

LIABILITY FOR DISSEMINATING IN THE DIGITAL AGE:
Copyright Law and Hyperlinking on the World Wide Web

Author: Sheik Issah Shehzaad-e-Ajmal Neerooa (1719881)

**Minor Dissertation as a prerequisite for completion of the LLM in
Intellectual Property Law**

Supervisor: Prof Caroline Ncube

Word Count: 24,890 (excluding Bibliography)

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in Intellectual Property Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM in Intellectual Property Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature: SISA. Neerooa

Date: 01/02/2021

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

ACKNOWLEDGEMENTS

I would like to firstly offer my heartfelt gratitude to my supervisor, Caroline Ncube of the University of Cape Town. Her door was always open for any queries or guidance that was needed. Caroline's invaluable insights, teachings and aid were essential in the completion of this thesis.

Secondly, I wish to extend my profound appreciation to my parents. Their continuous encouragement greatly motivated me when writing the dissertation. Their unfailing support were of utmost importance throughout my academic journey.

Table of Contents

<i>ACKNOWLEDGEMENTS</i>	<i>i</i>
<i>Table of Abbreviations</i>	<i>v</i>
<i>Chapter 1: Introduction</i>	<i>1</i>
1.1. Introductory remarks	1
1.2. Justification and Impact	2
1.3. Research Questions	2
1.4. Methodology and Scope	3
1.5. Thesis Structure	4
<i>Chapter 2: Setting the stage</i>	<i>5</i>
2.1. Purpose of copyright law	5
2.2. Copyright in the digital age	6
2.3. Communication to the Public in the EU	7
2.4. Constituent parts of the CTP right	8
2.5. Definition and types of hyperlinks	9
2.6. Why effective rules are necessary?	10
2.7. Conclusion	11
<i>Chapter 3: The initial approach</i>	<i>12</i>
3.1. The Two Step Test	12
3.2. Analysis of <i>Svensson</i>	13
3.2.1. Misinterpretation of the CTP right	13
3.2.2. Exhaustion of the CTP right	15
3.2.3. Neglecting the rights of copyright owners	16

3.3. Conclusion.....	17
Chapter 4: A Critique of <i>GS Media</i>	18
4.1. <i>GS Media</i> : The current approach.....	18
4.2. An improvement over <i>Svensson</i> and <i>Bestwater</i> ?.....	20
4.3. Uncertainties and Consequences of <i>GS Media</i>	21
4.3.1. The scope of profit-making activities.....	21
4.3.2. National interpretations of profit making activities	22
4.3.3. A duty of care	24
4.3.4. Rebutting a presumption	26
4.3.5. An overlap with secondary liability	27
4.3.6. Continued silence	28
4.4. An epilogue to <i>GS Media</i>	28
4.5. The value gap proposal.....	29
4.6. Conclusion.....	30
Chapter 5: An Alternative Approach.....	31
5.1. US's copyright law	31
5.2. The server rule	32
5.2.1. An equilibrium?	33
5.2.2. Shortcomings of the server rule	34
5.3. A change of tide	35
5.4. The right interpretation	36
5.5. Secondary Liability in the US.....	37
5.5.1. Finding direct infringement.....	38
5.5.2. Contributory Infringement.....	39
5.5.3. Knowledge element.....	40

5.5.4. Liability by inducement.....	42
5.6. Conclusion.....	43
Chapter 6: The way forward	44
6.1. Resolving hyperlinking in the EU.....	44
6.1.1. Uncertainties of <i>GS Media</i>	44
6.1.2. Categorising the different forms of hyperlinks	45
6.1.3. The duty of care.....	46
6.1.4. Defining profit	47
6.2. Hyperlinking in the US	48
6.2.1. The law in the US.....	48
6.2.2. Likelihood of direct infringement	49
6.2.3 Contributory infringement.....	49
6.2.4. Liability by inducement and vicarious infringement	50
6.3. Conclusion.....	51
Chapter 7: Hyperlinking and South Africa.....	53
7.1. Introduction to South Africa's Copyright Law	53
7.2. The Copyright Amendment Bill	54
7.3. Hyperlinking and copyright infringement in SA	55
7.4. The EU scenario.....	56
7.5. The US scenario	57
7.6. The ideal approach	58
7.7. Conclusion.....	59
Chapter 8: Conclusion	60
Bibliography.....	64

Table of Abbreviations

Acronyms	Full Name
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works 1886
CAB	Copyright Amendment Bill B13-2017
CDPA	Copyright, Designs and Patents Act 1988
CJEU	Court of Justice of the European Union
CTP	Communication to the public
EU	European Union
ECTA	Electronic Communications and Transaction Act 2002
Directive 2000/31/EC.	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 in certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)
Directive 2001/29	Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of Copyright and related rights in the information Society
DMCA	Digital Millennium Copyright Act 1998
MS	Member States

SA	South Africa
SACA	Copyright Act 98 of 1978 (South Africa)
UCA	Copyright Act of 1976 (United States of America)
UK	United Kingdom
US	United States of America
WCT	WIPO Copyright Treaty 1996
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms treaty 1996

Chapter 1: Introduction

1.1. Introductory remarks

The advent of technology and the digital age brought about the introduction of the World Wide Web.¹ The potential to disseminate and communicate information greatly expanded as a consequence.² One of the means to communicate information on the internet is with the use of hyperlinks. Hyperlinking is the main way internet users share information on the World Wide Web.³ If hyperlinking is restricted, access to information may be severely hindered.⁴ Unfortunately, hyperlinks may also be utilised to enable copyright infringement.⁵ Copyright protected works may be disseminated on the internet without the authorisation of the copyright owner using hyperlinks. Thus, it is essential to provide proper legal rules to regulate the practice of hyperlinking that achieves a balance between protecting the right of copyright owners and preserving the fluid communication of information on the internet. However, this task is easier said than done as demonstrated by the difficulties faced by the courts in the European Union (EU).⁶

This dissertation will firstly have the objective of providing a critical analysis of the EU's approach in dealing with hyperlinking to copyright protected works. It will be ascertained if the EU initially offered and if it continues to offer an efficient solution in regulating the practice of hyperlinking. As the provision of hyperlinks to copyright-protected work has recently been the subject of great debate in the EU, greater attention will be paid to this jurisdiction. Secondly, the dissertation will have the goal of exploring an alternative way of dealing with hyperlinking. Consequently, the legal treatment of hyperlinking in the United States of America (US) will be then be dealt with. It will then be proposed how the EU and the US should refine their respective laws to offer a balanced solution when dealing with hyperlinking. Finally, it will be shown how South Africa (SA) should address the hyperlinking issue as it is on the verge of overhauling its copyright law and has not yet had the opportunity to deal with the legal status of hyperlinking.

¹ Kanchana Kariyawasam, 'To Link or Not to Link: The Use of Hyperlinks and Copyright Infringement' (2019) 31 *I.P.J* 158.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid* at 159.

⁵ Cheng Lim Saw 'Linking on the internet and copyright liability: a clarion call for doctrinal clarity and legal certainty' (2018) 49(5) *IIC* at 537.

⁶ *Ibid* at 540.

1.2. Justification and Impact

One of the aims of the dissertation is to critically analyse the EU approach in dealing with hyperlinking. Accordingly, the strengths and weaknesses of the EU approach will be discussed. This will be done to ultimately show that that EU decisions in relation to hyperlinking have brought uncertainty to EU law and that the EU offers an unsatisfactory and unbalanced solution to the hyperlinking issue. Moreover, the status of hyperlinking in the US will also be explored as hyperlinking is addressed differently than in the EU. It is hoped that this dissertation will recommend effective legal rules for the EU, US and SA on how to deal with hyperlinking. To achieve the objectives set out for the dissertation, a list of research questions will now be outlined.

1.3. Research Questions

In order to achieve the aims of the dissertation, the following research questions will be tackled:

- (i) How was the practice of hyperlinking legally construed in the EU prior to the case of *GS Media BV v Sanoma Media Netherlands BV and Others*⁷?
- (ii) Do the legal rules enunciated in *GS Media* effectively regulate the practice of hyperlinking in the EU?
- (iii) How does the US addresses hyperlinking to copyright-protected material?
- (iv) How should the EU and the US refine their existing laws to provide an effective solution to the hyperlinking issue?
- (v) Should SA follow the EU or the US approach when dealing with hyperlinking?

⁷ *GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15) 2016 (9) WLUK 124.

1.4. Methodology and Scope

A doctrinal desk based approach will be mainly utilised for the purpose of writing this dissertation. Accordingly, written texts will be examined to conduct research. Primary sources of law such as case laws, statutes and other legal sources will be consulted and analysed for legal research in relation to the legal mechanisms governing the practice of hyperlinking. Secondary sources such as legal textbooks, legal journal articles will also be relied on.

It should be specified that service providers are generally shielded from incurring liability for copyright infringement and other acts that may arise in the course of their activities. Services providers may be defined as a ‘provider of online services or network access of the operator of a facility thereof.’⁷ These exemptions that may be relied by service providers are generally known as “safe harbours”. One such safe harbor relates to the act of hyperlinking. For example, s512(d) of the Digital Millennium Copyright Act 1998 (DMCA) in the US states that services providers may be exempted from liability for copyright infringement ‘by reason of the provider referring or linking users to an online location containing infringing material or infringing activity’.⁸ This dissertation will only deal with when the process of hyperlinking to copyright protected works should amount to copyright infringement. Defenses available to alleged infringers to escape liability will not be tackled. Thus, safe harbours as per Articles 12, 13 and 14 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 in certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) in the EU or s512 of the DMCA in the US will not be explored. This dissertation will also only restrict itself to the area of copyright law.

⁷ S 512(k) Digital Millennium Copyright Act 1998.

⁸ S 512(d) Digital Millennium Copyright Act 1998.

1.5. Thesis Structure

The structure of the remainder of this thesis is set out as follows:

Chapter 2 of the dissertation will introduce key concepts necessary for the proper understanding of the dissertation. The purpose of copyright law and the impact of the digital age on copyright law will be outlined. It will also be explained how the communication to the public (CTP) right connects with the issue of hyperlinking. Finally, the term hyperlinking will be defined and the importance of effective legal rules to regulate the practice of hyperlinking will be discussed.

Chapter 3 will discuss the first EU case concerning hyperlinking and the CTP right. The case of *Nils Svensson and Others v Retriever Sverige AB*⁹ and its repercussions will be assessed. It will be determined if the EU initially offered a satisfactory solution to the hyperlinking issue.

Chapter 4 will focus on the current state of affairs of hyperlinking in the EU. The facts of *GS Media* will be outlined to ascertain when the provision of hyperlinks to copyright protected works may currently amount to copyright infringement. Additionally, the *GS Media* case will be critically analysed to determine if the Court of Justice of the European Union (CJEU) has addressed the issues created by the case of *Svensson*. Ultimately, it will be explored if the EU effectively regulates the practice of hyperlinking.

In chapter 5, the US's approach to dealing with hyperlinking will be explored. Accordingly, the "server rule" and the recent case of *Goldman v Breitbart News Network*¹⁰ will be critically analysed followed by a discussion on the mechanisms of secondary liability.

In chapter 6, it will be proposed how the EU and the US should refine their existing laws to offer an effective solution to the hyperlinking issue.

Chapter 7 will provide recommendations for SA to rely on to effectively address hyperlinking to copyright protected works.

Chapter 8 will summarise the main findings of the dissertation

⁹ *Nils Svensson and Others v Retriever Sverige AB* (C-466/12) 2014 (3) CMLR 4.

¹⁰ *Goldman v Breitbart News Network, LLC et al.*, No.1:2017cv031444 (S.D.N.Y. 2018)

Chapter 2: Setting the stage

Before diving into the legal treatment of hyperlinking under copyright law, key concepts that are essential for the proper understanding of this dissertation need to be firstly explained. Thus, this chapter will have the aim of expounding the fundamental elements of copyright law and the impact of the digital age on copyright law. Thereafter, certain rights introduced to safeguard the interest of copyright owners in the digital environment will be briefly outlined. The implementation of the CTP right in the EU will then be discussed. The term hyperlink and the different types of hyperlinks will then be defined. Finally, it will be highlighted why effective legal rules are necessary to effectively regulate the practice of hyperlinking.

2.1. Purpose of copyright law

As defined by the World Intellectual Property Organization (WIPO), intellectual property refers to ‘creations of the mind such as, inventions; literary and artistic works; designs; and symbols, names and images used in commerce.’¹ Intellectual property may be protected by various forms of law such as copyright, trademark, patent and trademark amongst others.² Copyright law grants the owner of the copyright ‘exclusive statutory rights, limited in duration, in the rendering or performance of certain dealings or acts in relation to specified works.’³ It also grants the owner of the copyright the right to prevent others from performing these acts in relation to the protected works. For example, authors of literary or musical work have the exclusive right to reproduce, publish and/or perform the copyright protected work among others in South Africa.⁴ Performing any of these exclusive rights without the authorisation of the copyright owner will amount to copyright infringement.⁵ The purpose of copyright law is to allow the owner of the copyright to exploit and profit from his/her creation.⁶ Depending on the jurisdiction, copyright law also aims to strike a balance between rewarding not only innovators but also the public interest by eventually allowing the public to access and use the copyright protected works.⁷

¹ World Intellectual Property Organisation ‘What is Intellectual Property’ available at <https://www.wipo.int/about-ip/en/>, Accessed on 01 May 2020.

² *ibid.*

³ Owen Dean & Alison Dyer Dean & Dyer *Introduction to Intellectual Property Law* 4ed (2018) 3.

⁴ S6 Copyright Act 98 of 1978.

⁵ *Ibid.*

⁶ Dean & Dyer *op cit* note 3.

⁷ Article 1, Section 8, Clause 8 The Constitution of the United States 1787.

2.2. Copyright in the digital age

The advent of technology, particularly in the field of information and communication has drastically altered the manner copyright protected works are circulated and made accessible. Through the internet, information may now be communicated at instantaneous speed over wired or wireless networks and be accessed simultaneously by an unlimited amount of individuals.⁸ Moreover, high quality copies of copyright protected works may now be reproduced, modified, stored and be shared among people around the world regardless of borders.⁹ The digital revolution heralded both positive and negative in the way creative works may be produced and disseminated.¹⁰ Sharing of information became a key vital business asset.¹¹ However, the internet also increased people's ability to copy copyright protected works at a faster and easier rate.¹²

Thus, the digital age introduced a plethora of issues to the exclusive rights granted to authors of copyright protected works as they realistically could not control the dissemination of their work. As a consequence, WIPO Member States congregated in Geneva to create new rules to tackle the economic, social and cultural issues posed by the digital revolution.¹³ In response to the threats and implications posed by the digital era, the WIPO Copyright Treaty (1996) (WCT) and the WIPO Performances and Phonograms treaty (1996) (WPPT) were introduced to harmonise global copyright law and to supplement the Berne Convention for the Protection of Literary and Artistic Works (1886) (Berne Convention).¹⁴ The WCT and WPPT introduced norms and regulations that member treaties need to adhere to regulate the right of copyright owners on the internet. Some rights relevant to the digital age introduced by the aforementioned treaties will now be briefly outlined in the next paragraph.

⁸ Julie S. Sheinblatt 'The WIPO Copyright Treaty' (1998) 13 *Berkeley Tech. L.J.* 535.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Kanchana Kariyawasam, 'To Link or Not to Link: The Use of Hyperlinks and Copyright Infringement' (2019) 31 *I.P.J* 157.

¹² *Ibid.*

¹³ Iftikhar Hussian Bhat 'Right of Communication to the Public in Digital Environment' (2013) 2(4) *IJESI* 7.

¹⁴ Berne Convention for the Protection of Literary and Artistic Works 1886.

The agreed statement concerning Article 1(4) of the WCT states that the right to authorise reproduction of relevant work found under Article 9 of the Berne Convention now fully applies to the digital age.¹⁵ Article 11 of the WCT obliges contracting parties to provide protection against the circumvention of technological protection measures used by authors in connection with the exercise of their rights.¹⁶ The WCT also states that computer programs¹⁷ and databases¹⁸ may be protected by copyright. As will be shown below, the relevant provision pertaining to hyperlinking is the CTP right. Article 8 of the WCT states that “authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication of 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 these works from a place and at a time individually chosen by them”.¹⁹ The making available right is also applicable to performers in relation to their fixed performances under Article 10 of the WPPT.²⁰

2.3. Communication to the Public in the EU

In the EU, several directives were introduced to harmonise the rights of copyright owners among EU Member States.²¹ Member States are required to implement these directives. The EU incorporated the CTP right in Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of Copyright and related rights in the information Society (Directive 2001/29). Directive 2001/29 was created to enhance intellectual property protection due to development brought by the internet, to reduce disparities between national legal systems and to provide just remuneration to authors of copyright protected works among others.²² Article 3(1) states that “Member States shall provide authors with the exclusive right to authorise or prohibit any communication of 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.”²³

¹⁵ Article 1(4) World Intellectual Property Organisation Copyright Treaty 1996.

¹⁶ Article 11 supra note 15.

¹⁷ Article 4 supra note 15.

¹⁸ Article 5 supra note 15.

¹⁹ Article 8 supra note 15.

²⁰ Article 10 World Intellectual Property Organisation Performances and Phonograms Treaty 1996.

²¹ Catherine Barnard & Steve Peers *European Union Law* 2 ed (2017) 15.

²² Mark Hyland & Vu Van Anh Le, ‘Right of “communication to the public”’: *Stichting Brein v Ziggo BV and XS4All Internet BV* 22(4) *Comms. L.* at 132.

²³ Article 3(1) Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of Copyright and related rights in the information Society (Directive 2001/29).

2.4. Constituent parts of the CTP right

The CTP right was addressed in the landmark case of *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*.²⁴ The CJEU had the task to ascertain whether the broadcast of television signals by a hotel chain to its hotel rooms amounted as an act of communication within Article 3(1) of Directive 2001/29.²⁵ The court emphasized that no definition as to what amounts as an act of communication is present in Directive 2001/29. The CJEU stated that the communication right should be applied broadly so as to be in line with the objective of the directive, which is to offer a high level of protection to right holders.²⁶ The courts firstly defined the term public.

A public was defined as an ‘indeterminate number of potential viewers.’²⁷ This element was satisfied due to the high number of successive guests of the hotel.²⁸ Additionally, the courts stated that the relevant copyright protected work should be directed to a ‘public different from the public at which the original act of communication was directed’ to be in line with the Berne Convention.²⁹ In other words, to a new public. The courts stated that when the ‘author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme.’³⁰ As the clientele of the hotel did not fit in the aforementioned description, they were deemed to be ‘new public.’³¹

The scope of the CTP right was also explored in the case of *SGAE*. Directive 2001/29 states that transmission is a sine qua non of the CTP right.³² Relying on Recital 23 of Directive 2001/29, the court stated that the CTP right ‘should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.’³³ As the present case concerned the broadcasting of TV signals, this element was easily satisfied. Interestingly, this is where hyperlinking connects with the CTP right. On one side of the argument, scholars argue that hyperlinks do indeed make work available and should therefore be treated under the CTP right.³⁴ On the other hand, it is argued that hyperlinks only facilitates access to a work and do not consequently

²⁴ *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA (C-306/05) 2007 ECDR 2.*

²⁵ *ibid* at para 23.

²⁶ *ibid* at para 36.

²⁷ *ibid* at para 37.

²⁸ *ibid* at para 38.

²⁹ *ibid* at para 40.

³⁰ *ibid* at para 41.

³¹ *ibid* at para 42.

³² Recital 23 *supra* note 23.

³³ *ibid*.

³⁴ Cheng Lim Saw ‘Linking on the internet and copyright liability: a clarion call for doctrinal clarity and legal certainty’ (2018) 49(5) *IIC* at 536.

make a work available to the public.³⁵ It should also be noted that as per Recital 27 of the Directive 2001/29, the CTP right does not cover the mere provision of physical facilities.³⁶ An act of CTP will be found if the defendant provides a deliberate intervention.³⁷ A deliberate intervention will arise if without the act of the defendant, the relevant copyright protected work would have been difficult to be enjoyed.³⁸ The court found that the defendant provided a deliberate intervention as without the defendant's act, the clients of the hotel would not have been able to enjoy the broadcast of the copyright protected works.³⁹ As the defendant's action were directed to a new public and fell within the scope of the CTP right, the defendant were ultimately found to have infringed the applicant's CTP right within Article 3(1) of Directive 2001/29.⁴⁰

2.5. Definition and types of hyperlinks

A hyperlink may be defined as a Hyper Text Markup Language document that directs a user from a linking website to a target website or to a specific location in the target website.⁴¹ There are four types of hyperlinks. These are surface links, deep links, framing links and inline links.⁴² A surface link directs a user to the homepage of a website.⁴³ Deep linking arises when a link directs a user to a specific location within a website rather than the homepage.⁴⁴ Framing occurs when the content of a targeted website is displayed within a frame on the linking website.⁴⁵ The title and address of the page containing the framed content will be that of the linking website.⁴⁶ Thus, a user may be under the impression that the framed content originates from the linking website. Inline linking arises when digital content which is stored in the target website is displayed on the linking website.⁴⁷ Content may take the form of an image or video among others. Similar to framing, users may not realise that the linked object on the linking website originates from the target website.

³⁵ *ibid.*

³⁶ Recital 27 *supra* note 23.

³⁷ *SGAE supra* note 24 at para 42

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid* at para 45.

⁴¹ A. Strowel & V. Hanley et al *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* 1 ed (2009) 72.

⁴² Cheng Lim Saw *op cit* note 34 at 537-538.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ *ibid.*

2.6. Why effective rules are necessary?

Hyperlinks serve as essential tools for the internet to be enjoyed by users.⁴⁸ The internet may be defined as a large system of interconnected computers that allows for the sharing and communication of information with each other.⁴⁹ As stated by Arezzo, hyperlinks represent the wires linking the different computers or networks.⁵⁰ Hyperlinking is now a common practice in the online environment. Search engines such as Google provide users with hyperlinks, leading them to desired content within mere seconds. Acquaintances or friends may share information among each other by posting hyperlinks on social media websites such as Facebook. This author agrees with Lim Saw when he states that hyperlinks reflects the spirit of the interconnectedness of the internet as they facilitate widespread sharing of information.⁵¹ Recital 31 of Directive 2001/29 states that a balance between protecting the right and interest of the copyright holder and safeguarding freedom of expression and information of users should be achieved.⁵² Moreover freedom of expression of internet users is also protected under Article 11 of the Charter of Fundamental Rights of the European Union (2000). Hyperlinking is a vital tool for the dissemination of information online. Accordingly, interfering and restricting the use of hyperlinking to a great extent may constitute a barrier to an individual's freedom of expression and information.

Several intellectual property issues may arise pertaining to hyperlinks. The homepage of a website may contain advertising generating income for the website owners. Thus, circumventing the homepage through the use of deep linking, may cause economic harm to the website owners.⁵³ Moreover, through the use of inline linking and framing, an association may be created between the linking website and the linked object. Consequently, trademark infringement and/or unlawful competition may arise if internet users assume that there is an affiliation between the linking website and the linked object.⁵⁴ In terms of copyright law, linking to copyright protected works may infringe an author's exclusive right of CTP. Accordingly, hyperlinking should not be an unconditional practice and free from restrictions. If hyperlinking is not properly regulated, it may have the consequence of providing opportunities for copyright infringement. Any proposed reform should not only assure the fundamental rights of internet users but also protect the interest of right

⁴⁸ Emanuela Arezzo 'Hyperlinks and making available right in the European Union - what future for the Internet after Svensson?' (2014) 45(5) *IIC* 524-525.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ Cheng Lim Saw *op cit* note 34 at 537.

⁵² Recital 31 *supra* note 23.

⁵³ Arezzo *op cit* not 48 at 527.

⁵⁴ *ibid.*

holders. These legal mechanisms should be appropriately designed so as not to compromise the interconnectedness and functioning of the World Wide Web.

2.7. Conclusion

As outlined, copyright law grants to authors of work exclusive statutory rights. Copyright law had to be updated due to changes brought by the advent of technology. The WIPO treaties introduced rights to safeguard the interest of copyright owners particular in the online environment.⁵⁵ The right introduced relevant to this dissertation is the CTP right. The CTP right was introduced under Article 3(1) of Directive 2001/29.⁵⁶ As stated in the case of *SGAE*, the CTP right requires the transmission of the relevant copyright protected work.⁵⁷ This is where the issue of hyperlinking connects with the CTP right. Opinions differ about whether the provision of hyperlinks to a copyright protected work amounts as making that work available to the public⁵⁸ Finally, it was argued that hyperlinks are essential for the dissemination of information on the internet. Accordingly effective rules are necessary to regulate the practice of hyperlinking so as to strike a balance between not only to protect the right of copyright owners but also the freedom of expression and information of internet users.

⁵⁵ Sheinblatt op cit note 8.

⁵⁶ Article 3(1) supra note 23.

⁵⁷ *SGAE* supra note 24 at para 14.

⁵⁸ *Nils Svensson and Others v Retriever Sverige AB (C-466/12)* 2014 (3) CMLR 4.

Chapter 3: The initial approach

Having laid out the foundations that will be relied on during the course of this dissertation, chapter 3 will now have the aim of determining if the EU initially offered a satisfactory solution to the hyperlinking issue. In order to do so, the case of *Nils Svensson and Others v Retriever Sverige AB*¹ will be firstly outlined followed by an analysis of the case. The next paragraph will thus summarise the case of *Svensson*.

3.1. The Two Step Test

In *Svensson*, the applicants were journalists who wrote and published articles in the *Goteborgs-Posten* newspaper.² These articles were also made available with the authorisation of the copyright holders on the *Goteborgs-Posten* website.³ The defendant operated a news aggregation service.⁴ They provided clickable links to articles written and published by the applicants.⁵ They did so without the authorisation of the right holder of the articles.⁶ The CJEU had to primarily determine whether the provision of clickable links to a copyright protected work amounted as an act of CTP of that work within the meaning of Article 3(1) of Directive 2001/29.⁷

The court held that an act of CTP consists of two elements.⁸ Firstly, there should be an act of communication.⁹ Secondly, the work should be communicated to a new public.¹⁰ It was held that an act of communication to the public should be construed as widely as possible to ensure a high level of protection to right owners and to be in line with the objectives of the directive.¹¹ Accordingly, it was held that clickable links directing users to a work may amount to an act of communication.¹²

¹ *Nils Svensson and Others v Retriever Sverige AB* (C-466/12) 2014 (3) CMLR 4.

² *Ibid* at para 8.

³ *Ibid*.

⁴ *Ibid*.

⁵ *Ibid*.

⁶ *Ibid*

⁷ Article 3(1) Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of Copyright and related rights in the information Society.

⁸ *Svensson* supra note 1 at para 16.

⁹ *Ibid*.

¹⁰ *Ibid*.

¹¹ *Ibid* at para 17.

¹² *Ibid* at para 20.

The term “public” was defined as an indeterminate amount of persons.¹³ Potential users that could access the clickable links were considered large enough to constitute a public.¹⁴ Most importantly, the work should have been directed to a new public.¹⁵ In other words, a public that was not taken into account by the copyright owner when they authorised the initial CTP.¹⁶ In the present case, the articles on the website were unrestricted and freely accessible.¹⁷ Thus, the court contended that all internet users were intended to be taken into account by the applicant when they originally communicated the work.¹⁸ Accordingly, any internet user could already access the articles.¹⁹ Therefore, the work could not be directed to a new public.²⁰ Consequently, the court came to the conclusion that there was not an act of CTP and authorisation was not necessary.²¹

3.2. Analysis of *Svensson*

3.2.1. Misinterpretation of the CTP right

Several scholars have disagreed with the decision to equate hyperlinking as potential acts of CTP.²² Recital 23 of Directive 2001/29 states that the CTP right should be applied broadly to ensure a high level of protection to copyright holders.²³ The courts in *Svensson* only stated that the provision of clickable links should be capable of amounting to acts of communication to be in line with Directive 2001/29.²⁴ No further explanation or analysis was provided as to why this should be the case and the courts directly moved on to discuss the “new public” criterion. The courts relied on the case of *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* whereby it was stated that a work is communicated to the public when it is made available to the public “in such a way that the persons forming the public may access it, irrespective of whether they avail themselves of that opportunity”.²⁵ However, the case of *SGAE* concerned the retransmission of television signals. Recital 23 of Directive 2001/29 states that the CTP right ‘should cover any such

¹³ Ibid at para 21.

¹⁴ Ibid at para 22.

¹⁵ Ibid at para 24.

¹⁶ Ibid.

¹⁷ Ibid at para 26.

¹⁸ Ibid at para 27.

¹⁹ Ibid.

²⁰ Ibid at para 28.

²¹ Ibid.

²² Ansgar Ohly, ‘The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?’ (2018) 13(8) *JIPLP* at 664; Cheng Lim Saw ‘Linking on the internet and copyright liability: a clarion call for doctrinal clarity and legal certainty’ (2018) 49(5) *IIC* 537 para 1.

²³ Recital 23 supra note 7.

²⁴ *Nils Svensson* supra note 1 at para 20.

²⁵ *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA (C-306/05)* 2007 ECDR 2 at para 43

transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.²⁶ Moreover, the WIPO Guide to the Berne convention states that the transmission of a copyright-protected work should indeed be considered as an act of CTP.²⁷ Unfortunately, the courts in *Svensson* did not take into account the factual differences between the two cases. It did not analyse whether there was a difference in the provision of hyperlinks and the transmission of television signals.

It will be opined that the provision of normal and deep linking to copyright protected works should not be equated as acts of CTP. An act of transmission involves an act of intervention on the part of the defendant which makes the relevant copyright protected work available to the public.²⁸ Thus, the crucial question is whether the defendant makes a copyright protected work available when it provides a hyperlink leading to that work. This author believes that it is not the case for normal and deep linking. Firstly, normal and deep links lead to work that already exists on the internet. Accordingly, they do not make that relevant work available to the public. They are more akin to citations and location tools as they help locate content already available on the internet as stated by Tarkiainen.²⁹ Allowing hyperlinking to be potential act of direct infringement would be similar to being potentially liable for providing directions to the location of a particular copyright protected book in a library.

On the other hand, inline linking and framing does more than providing a location tool to internet users. It may also be argued that similar to normal and deep linking, inline linking and framing do not make a work available on the internet. However, they do not direct the user to another website. Instead, the content of the target website is displayed on the website the linking is done.³⁰ Thus, inline linking and framing pulls the copyrighted work from the target website to the website the link is placed.³¹ In other words, inline linking and framing make the copyrighted work available on a given website. The owner of that website has more control over whether to display the work or not on a given page. Therefore, framing and inline linking of copyright protected work should arguable be subject to authorisation and be considered as potential acts of CTP. Unfortunately, the CJEU did

²⁶ Recital 23 Supra note 7.

²⁷ World Intellectual Property Organisation ‘Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Acts, 1971)’ available at <https://www.wipo.int/publications/en/details.jsp?id=3172&plang=HU>, Accessed on 01 January 2020.

²⁸ *SGAE* supra note 25 at para 42.

²⁹ Roosa Tarkiainen, ‘Tipping the scale in *GS Media*: a proposal to restore the balance between rightholders and internet users’ (2017) 12(6) *JIPLP* at 508.

³⁰ *Ibid.*

³¹ *Ibid.*

not address the technological differences between the different types of hyperlinks.

3.2.2. Exhaustion of the CTP right

The decision in *Svensson* was also criticised for exhausting the CTP right. The principal of exhaustion entails that once a product has been placed on the market, the person holding the intellectual property rights in relation to that product will no more be able to restrict further sale of that product by invoking their intellectual property rights.³² Their IP right will be held to have been exhausted.

The new public criterion in relation to hyperlinking has been argued to exhaust the CTP right.³³ The new public element states that an act of communication should be directed to a public initially not taken into account by the copyright holders when the initial communication to the public was authorised.³⁴ If a work has initially been initially communication on a website free from any restrictive measures, the court will infer all internet users as the public targeted. Consequently, a new public will never be found as all internet users will already be taken into account. In other words, a right holder will be not be able to invoke his/her CTP right if he/she initially authorised the communication of the work to the public. Thus, it may be contended that the new public rule under *Svensson* does indeed exhaust the CTP right. This has the effect of curtailing the control copyright owners have over the dissemination of their work online. Moreover, Article 3(3) of Directive 2001/29 states the CTP right should never be exhausted pertaining to the communication of a work.³⁵ Authorisation to communicate or make available a work to the public should be subject to authorisation by the copyright owner. Accordingly, in addition to limiting the right of copyright owners, the new public criterion brought conflict with Article 3(3) of Directive 2001/29.

³² Owen Dean & Alison Dyer Dean & Dyer *Introduction to Intellectual Property Law* 4ed (2018) 279.

³³ Justin Koo 'Away we Ziggo: the latest chapter in the EU communication to the public story' (2018) 13(7) *JIPLP* at 546.

³⁴ *Svensson* supra note 1 at para 24.

³⁵ Article 3(3) supra note 7.

3.2.3. Neglecting the rights of copyright owners

The decision in *Svensson* also had the effect of neglecting the interest of copyright owners. To illustrate this argument, the case of *Bestwater International GmbH v Michael Mebes and Stefan Potsch*³⁶ will be briefly discussed. The applicant in that case owned copyright in a short video. The video was uploaded on YouTube without the consent of the applicant.³⁷ The defendant made the video available on their website by framing.³⁸ In other words, users had to click on a link to access the video.³⁹ By clicking on the link, the video would be retrieved from YouTube's servers and start playing.⁴⁰ The CJEU had to determine whether the act of the defendant amounted as an act of CTP. As in *Svensson*, it was held that as the work was already freely accessible to all internet users on YouTube, there could be no new public.⁴¹ The court held that in the given circumstances, the insertion of a copyright work in the defendant's website by framing did not amount to CTP.⁴²

The courts neglected one key difference between the facts of *Bestwater* and that of *Svensson*. In *Svensson*, the copyright holder originally authorised the making available of the copyright protected work.³² However, the copyright protected video was made available without the consent of the copyright holder in the case of *Bestwater*. The EU court overlooked this specific circumstance. The court only religiously applied the CTP test laid out in *Svensson*. Thus, it may have been concluded that whether a work was published online with or without the authorisation of the copyright owner was irrelevant. This oversight again tipped the scale in the favour of internet users and unfairly neglected the interest of copyright owners as linking to any freely available copyright protected work online may have been done regardless of its legitimacy. Ironically, the decision in *Svensson*, which was devised to protect sharing and freedom of information on the internet, may have had the converse effect.

³⁶ *BestWater International GmbH v Michael Mebes and Stefan Potsch*, (C-348/13) 2014 EUECJ C-348/13_CO.

³⁷ *Ibid* at para 4.

³⁸ *Ibid* at para 5.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ *Ibid* at para 16.

⁴² *Ibid*.

³² *Svensson* supra note 1 at para 8.

3.3. Conclusion

Liability pertaining to hyperlinking in the EU is addressed through the lens of CTP right. As stated in the case of *Svensson*, two elements needed to be satisfied for the provision of a clickable link to copyright protected work to amount as CTP of that work.³³ Firstly, there should have been an act of communication.³⁴ Secondly, the work should have been communicated to a new public.³⁵ It was argued that *Svensson* wrongly equated the provision of all types of hyperlinks as potential acts of CTP. Additionally, the decision in *Svensson* led to the exhaustion of the CTP right. Moreover, it did not take into account the interest of right holders as it was irrelevant as to whether or not the copyright owner initially authorised the communication of their work. It may thus be concluded that the decision tipped the scale in favor of internet users to the detriment of copyright owners. Ultimately, the EU initially offered an unsatisfactory solution to the hyperlinking issue.

³³ Ibid at para 16.

³⁴ Ibid.

³⁵ Ibid.

Chapter 4: A Critique of *GS Media*

The CJEU had the opportunity to address the issues created by the decision in *Nils Svensson and Others v Retriever Sverige AB*¹ in the landmark case of *GS Media BV v Sanoma Media Netherlands BV and Others*.² The goal of this chapter will be to provide an in depth analysis of the case of *GS Media* so as to determine if the CJEU did indeed fill the gaps created by *Svensson*. The new rules enunciated in *GS Media* to find an act of CTP under Article 3(1) of Directive 2001/29³ will be discussed to also ascertain if the EU currently regulates the practice of hyperlinking in an effective manner. The facts of the *GS Media* will next be outlined.

4.1. *GS Media*: The current approach.

The defendant owned a blog dealing with the publishing of news, scandalous revelations and journalism.⁴ The defendant received from an anonymous source, the photographs of Britt Decker that were going to be published on the December edition of the Playboy magazine.⁵ The applicant was the publisher of the magazine.⁶ They had exclusive rights to the use of the photographs.⁷ The defendant posted hyperlinks on their website directing users to the website *File Factory*, whereby the photographs could be downloaded.⁸

The applicant requested the defendant to remove the hyperlinks to the photos.⁹ Filefactory removed the photos but the defendant did not respond.¹⁰ A second article was published containing hyperlinks to the photos on the *Imageshack* website.¹¹ Another request was sent by the applicant to remove the hyperlinks.¹² Although *Imageshack* removed the picture, the defendant again did not comply with the removal request.¹³ A third article was again published containing hyperlinks to the

¹ *Nils Svensson and Others v Retriever Sverige AB* (C-466/12) 2014 (3) CMLR 4.

² *GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15) 2016 (9) WLUK 124.

³ Article 3(1) Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of Copyright and related rights in the information Society.

⁴ *GS Media* Supra note 2 para 7.

⁵ Ibid para 8.

⁶ Ibid para 6.

⁷ Ibid.

⁸ Ibid para 10.

⁹ Ibid para 11.

¹⁰ Ibid.

¹¹ Ibid para 14.

¹² Ibid.

¹³ Ibid.

photographs.¹⁴

The main issue was whether the posting of hyperlinks to copyright protected work which was already available on other websites online but without the consent of the copyright owner may amount to an act of CTP within Article 3(1) of Directive 2001/29/EC.¹⁵ Contrary to *Svensson*, the works to which the hyperlinks related, were posted without the consent of the copyright holder.¹⁶ Consequently, the CJEU held that the decisions in *Svensson* would not cover the present case.¹⁷ Relying on past case law, the court contended that CTP right consists of an act of communication and a public.¹⁸ Moreover, the court also stated that complementary independent criteria need to be taken into account.¹⁹ These include the profit-making nature of the act of communication;²⁰ the indispensable role of the defendant in giving access to a copyright protected work²¹ and/or the specific technical means through which the copyright protected work was communicated.²² According to the court, these criteria may be applied individually based on the circumstances of the case.²³

The court acknowledged the importance of the internet and the difficulty in ascertaining whether or not a work had been posted with consent. It was held that as a general rule, an individual posting a link on the internet does not or cannot reasonably know whether or not the work was published with the consent of the copyright owner.²⁴ However, if he/she knows or reasonably ought to have known that the hyperlink would lead to work illegally published online, such as when being notified by the author of the copyright protected work, it will be deemed that the person knew the consequences of posting links to illegally published works.²⁵ His/her act will then amount to an of CTP under Article 3(1) of Directive 2001/29.²⁶ Moreover, if the posting of the link was done for profit, the court will expect that the poster of the link has done all the necessary checks to confirm that the article was not illegally published.²⁷ Consequently, the court will infer that the person doing the act, intervened

¹⁴ Ibid at para 15.

¹⁵ Ibid at para 24.

¹⁶ Ibid.

¹⁷ Ibid at para 43.

¹⁸ Ibid para 32.

¹⁹ Ibid para 34.

²⁰ Ibid para 38.

²¹ Ibid at para 35.

²² Ibid para 37.

²³ Ibid para 34.

²⁴ Ibid para 47.

²⁵ Ibid para 49.

²⁶ Ibid at para 51.

²⁷ Ibid.

in full knowledge of the consequence of his/her action.²⁸ The act will then constitute unauthorised CTP unless the presumption of knowledge is rebutted.²⁹

It was undisputed that the hyperlinks posted to *Filefactory* was done for profit.³⁰ Moreover, the defendant was aware that the applicant had not authorised the publishing of the photos.³¹ They were constantly being notified of the illegal nature of their activities in posting hyperlinks to the pictures. Accordingly, it was presumed that the defendant knew that the posting of the hyperlinks led to works published online without the consent of the copyright holder. As the defendant could not rebut the presumption of knowledge,³² the act done by the defendant constituted an act of CTP. Having discussed the case of *GS Media*, it will now be ascertained if the rules enunciated in the case provide an effective solution in regulating the practice of hyperlinking and addresses the gaps left by *Svensson* and *Bestwater*.³³

4.2. An improvement over *Svensson* and *Bestwater*?

As was previously seen in *Svensson* and *Bestwater*, the court did not address whether the authorisation of the relevant copyright holder in relation to the publishing of the copyright protected work on the internet, was an essential element in finding CTP under Article 3(1) of Directive 2001/29. This was argued to lead to the exhaustion of the CTP right. The functioning of the internet could have been endangered if *Svensson* was applied to similar facts as in *GS Media*. Right holders would have no remedy or course of action against those who link their works even though they never consented to making the work available online.³⁴ Fortunately, the court stated that the rule in *Svensson* cannot apply to the present case since authorisation was not present.³⁵ *Svensson* applies only when the publication of the work was made with the consent of the copyright holder.³⁶ The new interpretation gives more protection to copyright holders on the internet whose works were being posted without consent.³⁷ Copyright owners may go against anyone who links their work and

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid at para 54.

³¹ Ibid.

³² Ibid at para 55.

³³ *BestWater International GmbH v Michael Mebes and Stefan Potsch*, (C-348/13) 2014 EUECJ C-348/13_CO.

³⁴ Ibid.

³⁵ *GS Media* supra note 2 para 43.

³⁶ Ibid.

³⁷ Joel Smith and Heather Newton, 'Hyperlinking to material on the internet: the CJEU expands on the circumstances when it may amount to copyright infringement' (2016) 38(12) *E.I.P.R* at 768.

had knowledge that the work was made available without consent.³⁸ If the hyperlinker is notified of the illegal nature of the work that was linked, such person will be presumed to have knowledge of the infringing nature of their intervention.³⁹ Consequently, if they do not remove the link, they may be found liable of infringing the CTP right under Article 3(1) of Directive 2001/29. Accordingly, the rule in *GS Media* closes a gap created in *Svensson* and *Bestwater* and provides certainty as to when the posting of hyperlinks without the consent of the copyright owner amounts to copyright infringement.⁴⁰ For the reasons stated above, this author supports Hanuz⁴¹ when she argues that the new rule in *GS Media* is an improvement over *Svensson*. Although the new rules in *GS Media* are a welcome improvement over previous case laws dealing with hyperlinks, they have unfortunately brought uncertainty in the law.⁴² These issues will now be discussed in more details.

4.3. Uncertainties and Consequences of *GS Media*

4.3.1. The scope of profit-making activities

If the posting of a link was done for profit, the court will expect that the poster of the link had done all the necessary checks to confirm that the copyright protected work was not illegally published.⁴³ Therefore, the court will infer that the person doing the act, intervened in full knowledge of the consequences of his/her action.⁴⁴ Consequently, the court may find that the right of CTP was infringed unless the presumption is successfully rebutted. Regrettably, profit was not defined in the judgment.⁴⁵ Several scholars argued that not defining what amounts to profit will lead to uncertainty when determining an act of CTP.⁴⁶ Profit may be acquired in a direct or indirect manner.⁴⁷ Profit may be generated when an individual clicks on hyperlink or it may be generated where the website on which the hyperlink was placed generates income from advertisement.⁴⁸ Thus, the spectrum of financial gain may be broad. If profit is interpreted broadly, several hyperlinking practices may become illegal as a consequence. For example, owners of blogs or websites who provide hyperlinks

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Bianca Hanuz, 'Linking to unauthorized content after the CJEU *GS Media* decision' (2016) 11(6) *JIPLP* at 879

⁴² Christina Angelopoulos, 'Hyperlinks and copyright infringement' (2017) 76(1) *CLJ* at 32.

⁴³ *GS Media* supra note 2 para 51.

⁴⁴ Ibid.

⁴⁵ Kanchana Kariyawasam, 'To Link or Not to Link: The Use of Hyperlinks and Copyright Infringement' (2019) 31 *I.P.J* at 167.

⁴⁶ Ibid.

⁴⁷ Joshua Colby, 'It's the end of the (online) world as we know it? The dangers of hyperlinking' (2017) 28(5) *Ent. L.R* at 161.

⁴⁸ Ibid.

to unauthorised sources may be potentially liable for infringing the CTP right if the website or blog generates revenue from advertisement. Linking may be irrelevant or incidental to obtaining financial gain for these websites. These individuals will now be referred as common or simple internet users. Adverts are essential to websites as they barely cover the cost of keeping the websites online. However, these individuals may nonetheless be liable even though the revenue obtained is negligible. As Savola contends, a broad interpretation of profit may have a chilling effect on these individuals or small businesses.⁴⁹ They may not continue with the posting of hyperlinks for fear of being liable. As argued in paragraph 2.6 of this dissertation, imposing a strict restriction on hyperlinking may impair the functioning of the internet and the freedom of expression of an individual.

4.3.2. National interpretations of profit making activities

It is still uncertain as to how the court will interpret the requirement of profit in future CJEU judgments pertaining to linking. If it is interpreted too broadly to cover websites wherein hyperlinking is not the main focus of obtaining financial gain, it may have some serious repercussions on the working of the internet as stated in the previous paragraphs. It will now be seen how Sweden, Germany and the Czech Republic interpreted the element of profit when determining an act of CTP. These three countries will be dealt with in particular, as they are the only ones to have addressed the element of profit at the time of writing of this dissertation.

In the Swedish case of *Rebecka Johnson v Les Editions de L'Avenir SA*, the defendant posted an embedded link to the claimant's video without consent.⁵⁰ The court had to determine whether the link was made with a pursuit to make profit and if knowledge was present.⁵¹ In coming to its conclusion, the court stated that it was 'obvious' that there was intention for profit as the links were published in a news website and thus the defendant possessed the requisite knowledge.⁵²

⁴⁹ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 *JIPITEC* at 139.

⁵⁰ *Rebecka jonsson v Les Edition de l'Avenir SA*, Attunda 2016 District Court FT 11952-15 at 3.

⁵¹ *Ibid.*

⁵² *Ibid* at 7.

In a German case, the defendant posted links to a website containing photographs without the consent of the copyright owner.⁵³ The issue was again whether the posting of the hyperlinks involved financial gain.⁵⁴ The court held that it was not necessary that the profit is generated from the link itself.⁵⁵ Profit may also be generated if the website was run with an intent to generate profit.⁵⁶

GS Media was applied in the case of Czech's case of *Spisova znacka*.⁵⁷ The applicant owned a website containing embedded links to episodes of television shows which were copyright protected and was made available without the authorisation of the copyright holders.⁵⁸ When deciding the issue of profit, the court held that there was no intention for profit as the website did not contain any advertising.⁵⁹

No reason as to why the act of the defendant was obvious as being for profit was explained in the Swedish case and offers little answer to how profit should be interpreted. It was sufficient that the website operated as a news website.⁶⁰ It may thus be interpreted strictly as in the Czech Republic. Both the German⁶¹ and Swedish⁶² courts took into account the website as a whole when determining profit. Profit may be present if the website on which the hyperlink is posted generate through advertising as stated in Germany and the Swedish case. These two jurisdictions adopted a broad approach when determining if a profit making intention was present. The interpretations by the different national courts reflect the current uncertainty in the EU for right holders and link providers, whether they are individuals or operating as a business.⁶³ As the CJEU failed to define clearly how profit should be interpreted, national courts were free to select between a broad and a strict interpretation of the term "profit making".⁶⁴ Individuals may refuse to partake in the posting of hyperlinks for fear of being litigated due to ambiguity as to what may amount as profit. As Colby claims, the broad approach of considering the website as a whole when evaluating the profit making

⁵³ *Landgericht Hamburg* 2016 310 O 402/16 at 10.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Spisova znacka*: 2016 33 T 54/2016.

⁵⁸ *Ibid* at 3.

⁵⁹ *Ibid* at 13.

⁶⁰ *Rebecka jonsson* supra note 50.

⁶¹ *Landgericht Hamburg* supra note 53.

⁶² *Spisova znacka* supra note 57.

⁶³ Roosa Tarkiainen, 'Tipping the scale in *GS Media*: a proposal to restore the balance between rightholders and internet users' (2017) 12(6) *JIPLP* at 502.

⁶⁴ *Ibid.*

nature of the act of hyperlinking may herald the end of hyperlinking as we know it.⁶⁵ Accordingly, this author argues that the profit making element should be redefined to provide clarity and certainty for EU member states.

4.3.3. A duty of care

As a general rule, *GS Media* held that an individual posting a link on the internet does not or cannot reasonably know whether or not the work was published with the consent of the copyright owner.⁶⁶ However, if he/she knows or reasonably ought to have known that the hyperlink would lead to illegally published content online, it will be deemed that the person knew the consequences of posting links to illegally published works.⁶⁷ The act will then amount to CTP under Article 3(1) Directive 2001/29. If the alleged infringing act was done for profit, the court will infer that the defendant has conducted necessary checks to determine the legality of the work and knowledge will be presumed.⁶⁸ As has been outlined in part 4.3.1 and 4.3.2, profit has been interpreted as profit generated from the website as a whole. Accordingly, the presumption of knowledge may also be applied to commercial activities in which the setting of the link is incidental or irrelevant to obtaining profit. As most website now run advertisement to generate income, the posting of hyperlinks to unauthorised content in these websites will undoubtedly amount as linking with profit-making and give rise to a presumption of knowledge. It may thus be contended that the rule in *GS Media* has created a de facto presumption of knowledge for any commercial website providing hyperlinks. These commercial parties are expected to carry out necessary checks to make sure that a work was not illegally published. This was argued to impose a duty of care for commercial linkers.⁶⁹ However, the court did not elaborate what amount to necessary checks. This leaves room for courts of member states to interpret necessary checks as they see fit.

Some scholars have opined that this approach adopted by the CJEU was fair and flexible.⁷⁰ The degree of necessary checks required may be adjusted, limited or increased according to the specifics

⁶⁵ Colby op cit note 47 at 161.

⁶⁶ *GS Media* supra note 2 para 47.

⁶⁷ Ibid para 49.

⁶⁸ Ibid para 51.

⁶⁹ Matthias Leistner, 'Closing the book on the hyperlinks: brief outline of the CJEU's case law and proposal for European legislative reform' (2017) 39(6) *E.I.P.R.* at 327.

⁷⁰ Ansgar Ohly, 'The broad concept of "communication to the public" in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?' (2018) 13(8) *JIPLP* at 664.

of the case in hand.⁷¹ Accordingly, a different duty of care may be adopted for individual posting links as compared to businesses depending on the gravity of the circumstances.⁷² Thus, a lower duty of care may be imposed on simple internet users, so that minimal and appropriate basic checks are sufficient to rebut the presumption of knowledge.⁷³ If the approach is applied as described, the rebuttable presumption stated in *GS Media* may indeed be considered a balanced approach to determine whether persons posting links for profit are liable of infringing the CTP right. Therefore, this author agrees with the argument that the new test pertaining to CTP may be deemed flexible.⁷⁴

However, it will be submitted that the flexibility argument underestimates how the new rule is going to be interpreted by member states. The success of the approach will depend on how it will be applied by member states. If it is proportionally adjusted and reasonably limited by taking into account all the relevant circumstances of the case in hand, then the approach may indeed be deemed suitable to determine CTP. On the contrary, if member states choose to interpret the approach strictly and not adapt the rebuttable presumption based on the specific facts of the case, then a compliance with minimal and basic duties will not suffice to avoid liability. If the standard of care is set too high for individuals posting link on blogs, the internet's free linking infrastructure may be seriously hampered as such persons may not have the capacity to rebut the presumption of knowledge.⁷⁵ Ultimately, the author endorses Leistner's⁷⁶ argument when he opines that what may be deemed a fair approach enunciated in *GS Media*, may pose problems for the freedom of the internet if it is not properly applied by national courts.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Leistner op cit note 69.

⁷⁶ Ibid.

4.3.4. Rebutting a presumption

The law is moreover uncertain as to how the presumption of knowledge may be successfully rebutted. As argued in paragraph 4.3.3 above, a commercial hyperlinker will presumably have to consistently monitor whether the linked content was published online with the consent of the copyright holder due to the de facto presumption of knowledge.⁷⁷ As put forward by Hanuz, it may not be realistic for individuals to verify if the copyright holder consented to the publishing of his work.⁷⁸ It may even be impossible to determine who the copyright owner of the work is as a webpage may be unnamed and the works located in the website may also be unnamed.⁷⁹ Moreover, as the legal status of a copyright protected work may change over time, the hyperlinker would need to check the legality of a work regularly and continuously to ensure that he/she had knowledge whether the publication of the work has been authorised by the relevant right holder and thus rebut the presumption of knowledge⁸⁰ The hyper linker would need to make daily checks of the work and keep a documentation of the historical record of the legality of the published work to prove that necessary checks were indeed performed.⁸¹ Only if these acts are undertaken may the court deem that the presumption of knowledge was successfully rebutted, if a strict duty of care is applied.⁸² Legal expertise would also be required such as in instances whereby the copyright owner of a publication may not be obvious. The copyright owner may not be the author of the work but the publisher. Individuals such as owners of small websites or blogs may not have the necessary knowledge or resources to determine the answer. These activities may be appropriate for big corporation. However, it may be unfair, onerous and unrealistic to expect these checks to be made by hyper linkers such as the example of the blogger whose linking activity is not the main focus of obtaining profit.⁸³

⁷⁷ Hanuz op cit note 41.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Savola op cit note 49.

⁸² Ibid.

⁸³ Roosa op cit note 63.

4.3.5. An overlap with secondary liability

Primary infringement arises when someone does one of the exclusive right of the copyright owner and without his/her consent.⁸⁴ No element of knowledge is required as the violation of these restricted acts is a strict liability tort.⁸⁵ On the other hand, secondary infringement arises in situation whereby someone aids, authorises, facilitates or induces primary infringement carried out by another.⁸⁶ Secondary liability may depend on whether the infringer had knowledge or reason to believe that he/she was dealing with infringing copies.⁸⁷ However, there are varying domestic approaches to the doctrine of secondary liability by EU member states as there is no harmonization of secondary liability under EU law. The addition of a knowledge requirement to the CTP right was criticised for creating disharmony in the tort law systems of EU member states.⁸⁸ Using the United Kingdom (UK) as an example, it will now be illustrated how the decisions in *GS Media* may have brought uncertainty for EU Member States. It has to be acknowledged that the UK is no more a member of the European Union.⁸⁹ However, the Copyright, Designs and Patents Act 1988 (CDPA) aligns with Directive 2001/29 having been amended when the UK was still part of the EU. Therefore, it remains worthwhile to use the UK as an example.

The violation of the CTP right is an infringement in the UK and is covered under s 20 of the CDPA.⁹⁰ Liability for direct or primary infringement is not dependent upon whether knowledge was present in the mind of the infringer as to whether they are in breach of s20 CDPA.⁹¹ Thus, by adding the element of knowledge to determine CTP, the EU may have blurred the distinction between act of primary and secondary infringement in the UK and in EU member states such as Germany under the German Copyright Act 1965. Colby argues that this overlap may open the gate for other acts of primary infringement to require knowledge.⁹² This may consequently lead to the destruction of the distinction of what may be considered acts of primary infringement and acts secondary infringement.⁹³

⁸⁴ Lionel Bently & Brad Sherman *Intellectual Property Law* 3ed (2008) 87.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Kariyawasam op cit note 45 at 157.

⁸⁹ European Commission 'Questions and Answers on the United Kingdom's withdrawal from the European Union on 31 January 2020' available at https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_104, Accessed on 06 August 2020.

⁹⁰ S20 Copyright, Designs and Patents Act 1988

⁹¹ *Ibid.*

⁹² Joshua Colby op cit note 47.

⁹³ *Ibid.*

4.3.6. Continued silence

It was opined in Chapter 3.2.1 that only inline linking and framing should be capable as amounting as potential acts of communication. Discussion about whether hyperlinks should be regarded as acts of communication was already discussed in Chapter 3.2.1 and will not be repeated. Unfortunately, the CJEU did not address the notion of whether hyperlinks should or should not be considered as transmission in *GS Media* as it was not the subject of referrals posed to the CJEU. Thus, the EU continues to misinterpret all forms of hyperlinking as potential acts of communication to the public and remains silent on the technological differences between the different forms of linking.

4.4. An epilogue to *GS Media*

Following *GS Media*, the CJEU has continued to interpret and provide clarification on the CTP right under Article 3(1) of Directive 2001/29. The cases of *Stichting Brein v Wullems (t/a Filmspeler)*⁹⁴ and *Stichting Brein v Ziggo BV and XS4All Internet BV*⁹⁵ confirm that the fault element introduced in *GS Media* should be applied when determining CTP. Particular emphasis is now placed on the deliberate role of the defendant. Accordingly, the court stated that the defendant should provide an intervention without which the user would find it difficult to benefit from the copyright protected work for there to be an act of communication.⁹⁶ However, the intervention need not be crucial and only make access to a copyright protected work less complex as stated in *Ziggo*.⁹⁷ Thus, the author agrees with Groom et al when they contend that the decisions in *Filmspeler* and *Ziggo* further decrease the standard for establishing an act of CTP and broadens the framework of liability.⁹⁸ To illustrate this point, a comparison between *GS Media* and *Ziggo* will be provided. On the one hand, the defendant were liable for infringing the CTP right when placing hyperlinks leading to unauthorised copyright protected work on their website in the case of *GS Media*. On the other hand, copyright protected works were placed by third parties but not the defendant in *Ziggo*.⁹⁹ The defendant in *Ziggo* was nonetheless liable as his intervention made access to those works less complex.¹⁰⁰ Ultimately, it may be concluded that the recent decisions have the consequence of

⁹⁴ *Stichting Brein v Wullems (t/a Filmspeler)* (C-527/15) 2017 (3) C.M.L.R 40.

⁹⁵ *Stichting Brein v Ziggo BV and XS4All Internet BV* (Case C-610/15) 2017 E.C.D.R 19.

⁹⁶ *Ibid* para 26.

⁹⁷ *Ibid*.

⁹⁸ John Groom, Iona Silverman & Birgit Clark 'Still lost in the labyrinth? : CJEU rules in *Filmspeler* that pre-loading a set-top box with links to a pirate site is a communication to the public' (2017) 39(9) *E.I.P.R* at 591.

⁹⁹ *Ziggo* supra note 95 para 9.

¹⁰⁰ *Ibid* para 36.

catching people further and further away from the person who originally put the infringing content online.

Holding the acts of *Ziggo* as acts of communication reflects that the CJEU continues to misinterpret the CTP right. The CJEU persists with equating acts that merely facilitate access to a work to acts that makes a work available or acts that transmit a work to the public. As was already argued in section 4.3.5 of this dissertation, the addition of the knowledge criteria to the CTP right may be problematic if applied in jurisdictions which recognise the doctrine of secondary liability such as the UK. Thus, the cases of *Filmspeler* and *Ziggo* continue to perpetuate the uncertainty as to how the legal rules pertaining to hyperlinking should be implemented by EU member states.

4.5. The value gap proposal

In 2015, the Digital Single Market Strategy was unveiled to modernize EU law particularly in the digital age.¹⁰¹ Consequently, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC was introduced. The directive has the aim to ensure a ‘well-functioning market for copyright.’¹⁰² Article 15 of the Directive states that member states shall grant the reproduction, communication and making available right to press publishers for the digital use of their press publication.¹⁰³ The initial version of Article 15, titled the link tax was met with severe opposition.¹⁰⁴ It entailed that online news providers such as google would have to pay licensing fees to publishers for providing hyperlinks to their articles, along with small fragments of the articles.¹⁰⁵ The proposal was argued to put great administrative burden on service providers to negotiate licenses and consent, before displaying any article.¹⁰⁶ Moreover, smaller outlets would have been unable to offer news due to not being able to afford the link.¹⁰⁷ Due to intense pressure, the final version of the directive now states that Article 15 does not apply to acts of hyperlinking, short

¹⁰¹ Koo, Justin ‘Away we Ziggo: the latest chapter in the EU communication to the public story’ (2018) 13(7) *JIPLP* at 542

¹⁰² *Ibid.*

¹⁰³ Article 15 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

¹⁰⁴ Matt Reynolds ‘What is Article 13? The EU’s divisive new copyright plan explained’ available at <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban> accessed on 10 December 2020

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

extract of press publications. The provision also does apply to private and non-commercial uses. Unfortunately, the directive provides no clarification on the CTP right, the definition of the term hyperlinking and if hyperlinking should amount to an act of CTP. Accordingly, Article 15 and the directive will not be further discussed.

4.6. Conclusion

Although the decision in *GS media* was argued to be an improvement over the new public test introduced in *Svensson*, the judgment was severely criticised for bringing uncertainty to the CTP right. A presumption of knowledge will arise if the defendant knew or ought to have known that the provision of the hyperlink led to works that were placed online without the authorisation of the copyright holder.¹⁰⁸ Similarly, a presumption will also arise if the posting of the hyperlink was done with the aim of acquiring financial gain.¹⁰⁹ If the defendant cannot rebut the presumption of knowledge, an act of CTP under Article 3(1) Directive 2001/29 will be found.¹¹⁰ Introducing a knowledge requirement to find an act CTP was claimed to have created an overlap with the law of secondary liability of EU member states.¹¹¹ The presumption of knowledge pertaining to profit making activities was deemed to be too strict.¹¹² Additionally, the profit making element was deemed not to be properly defined.¹¹³ The knowledge element was argued to be fair, flexible and adaptable only if properly interpreted by member states.¹¹⁴ However, if the rules are applied too broadly, the smooth functioning of the internet may be hindered as linking will be severely restricted. It will therefore be submitted that the EU approach does not provide an effective solution to address the practice of hyperlinking. The balance is now tipped in favor of copyright owners to the detriment of internet users. Unfortunately, recent development at EU level makes no attempt to solve these issues. It is hoped that the dissertation provided strong arguments as to why the current state of affairs is in need of a change. As was already stated when discussing the scope of the dissertation, protection afforded to service providers and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) will not be discussed. Thus, this chapter concludes hyperlinking under EU law.

¹⁰⁸ *GS Media* supra note 2 para 49.

¹⁰⁹ *Ibid* para 51.

¹¹⁰ *Ibid*.

¹¹¹ Angelopoulos op cit note 42.

¹¹² Tarkiainen op cit note 63.

¹¹³ *Ibid*.

¹¹⁴ Colby op cit note 47.

Chapter 5: An Alternative Approach

Having discussed how hyperlinking is legally construed under EU law, this chapter will now analyse how the United States of America (US) has addressed the issue of hyperlinking. The case of *Perfect 10, Inc. v Amazon.com Inc*¹ has long been the leading authority when dealing with hyperlinking. After giving a brief introduction pertaining to copyright law in the US, this chapter will introduce the concept of the “server rule” by outlining the facts of *Perfect 10*. The “server rule” will then be critically analysed to determine if it is the right approach when dealing with hyperlinks. The recent decision in *Goldman v Breitbart News Network, LLC*² has casted doubt over the applicability of the server rule in respect of inline linking. Thus, it will also be ascertained if the courts in *Goldman* correctly interprets the different forms of hyperlinking. It will then be determined if the US has other mechanisms in place to deal with the hyperlinking problem. Consequently, it will be assessed if the concept of secondary liability may be effectively relied on. As there is little academic literature on hyperlinking in the US, this chapter will be more application based. Hypothetical hyperlinking scenarios will be applied to the relevant rules of secondary liability to ascertain if they may indeed address the hyperlinking issue. As already mentioned, the protection afforded to online service providers and the Digital Millennium Copyright Act 1998 (DMCA) will not be discussed.

5.1. US’s copyright law

The US’s Copyright Act of 1976 (UCA) is the main statutory legislation governing copyright law in the US. Contrary to EU law, no communication to the public nor the making available right is afforded to copyright owners. However, s106 of the UCA grants to authors of works six exclusive rights.³ Examples include the right to reproduce the relevant work in copies or phonograms⁴ or the right to prepare a derivative work based upon the copyright protected⁵ work amongst others. The closest right afforded to copyright owners resembling the communication to the public or making available right under the UCA is the right to perform and/or display a work publicly.⁶ Section 101 of the Act defines to perform or display a work publicly as:

¹ *Perfect 10, Inc v Amazon.com Inc*. 508 F3.d 1146 (2007).

² *Goldman v Breitbart News Network, LLC* Civ No 1:17-cv-03144-KBF (2018)

³ 17 U.S. Code s106 Copyright Act 1976.

⁴ *Ibid* s106(1).

⁵ *Ibid* s106(2).

⁶ *Ibid* s106(4).

‘ to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.’⁷ To transmit and/or display a performance has also been defined under s101 as communicating that performance ‘by any device or process whereby images or sounds are received beyond the place from which they are sent.’⁸ Having described the statutory basis for direct infringement in the US, the case of *Perfect 10* and the server rule will now be outlined.

5.2. The server rule

It should be noted that prior to the case of *Perfect 10*, hyperlinking was also previously addressed by the US courts. In the case of *Ticketmaster Corp. v Tickets.com, Inc.*,⁹ it was stated that the provision of deep links do not violate the public display right.¹⁰ It was stated that hyperlinks only give direction to the user to locate copyrighted materials.¹¹ Accordingly, no copying which is necessary to find an act of direct infringement is involved regarding the act of hyperlinking.¹² The next landmark case pertaining to hyperlinking was the case of *Perfect 10*.

The server rule was first applied in the context of hyperlinking in the case of *Perfect 10*. The court had to decide whether Google was directly infringing Perfect 10’s right of display when framing in line linked copyright images.¹³ The court addressed the status of hyperlinking. The court adopted the server rule to determine the liability of Google.¹⁴ Under the server rule, a defendant does not display or distribute public information to a user if he/she does not store and/or serve that electronic information to that user on his/her server. Therefore, a defendant providing any type of hyperlink will only be liable for infringing the right to display or performance of a work publicly if he/she stored and/or served the copyright protected works that was linked.¹⁵ Consequently, it was decided that Google was not liable for direct infringement. Google did not host or store the infringing images on its servers.¹⁶ They only provided html instruction that directed a user’s web browser to

⁷ 17 U.S. Code s101 Copyright Act 1976.

⁸ *Ibid.*

⁹ *Ticketmaster Corp. v Tickets.com, Inc* No. CV99-7654-HLH WL 21406289 (2003)

¹⁰ *Ibid* at 6

¹¹ *Ibid* at 2

¹² *Ibid.*

¹³ *Perfect 10* supra note 1.

¹⁴ *Ibid* at 1159-1162.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

fetch copyright protected material that were hosted on third party websites¹⁷. A hyperlinker generally do not host or store the infringing material. His link will only direct the users to third party websites that are actually hosting the infringing copyright protected works. Accordingly, the server rule barred the provisions of all types of hyperlinks from being acts of direct infringement.

5.2.1. An equilibrium?

The server rule has been criticised for being in favour of internet users and website publishers to the detriment of copyright owners.¹⁸ The principle of universal free linking has been argued to be of paramount importance for the proper functioning of the internet.¹⁹ Restricting the use of hyperlinking and imposing liability on certain forms of hyperlinking were severely opposed before the case of *Perfect 10* as it could have had drastic consequences for the role of linking and freedom of information on the internet.²⁰ Imposing liability for linking was equated as being prohibited from recommending a book in a library without the authorisation of the copyright owner.²¹ Accordingly, the server rule was praised for protecting freedom of information on the internet.

However, the server rule has been denounced for over-applying the universal free linking principle.²² Under the server rule, hyperlinking cannot generally constitute acts of direct infringement. Thus, operators may without the authorisation of the relevant copyright owners publish copyright protected work on their websites without the risk of direct copyright liability.²³ Hyperlinks enables a person to locate an original work and no copying is involved. This has been heralded as a major victory for website operators and internet users as they need not to seek licenses from copyright owners when incorporating content of other websites in their own. Unfortunately, this is to the detriment of copyright owners as they lose control over how their work may be presented or disseminated on the internet.²⁴ Legal scholars have argued that the fear of losing control and revenue may force copyright owners to adopt technological restriction measures to

¹⁷ Ibid.

¹⁸ Mark Sableman, 'Link Law Revisited: Internet Linking Law at Five Years' (2001) 1273(16) *Berkeley Tech. L.J* at 1275-1276.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Jane Ginsburg & Luke Budiardjo, Liability for providing hyperlinks to copyright infringing content: International and Comparative Law Perspectives' (2018) 41(1) *Colum. J.L. & Arts* at 190.

²³ Ibid at 192.

²⁴ Ibid.

block access to their work when publishing them online.²⁵ Thus, the server rule ironically makes work on the internet less accessible as not all internet users may have the knowledge, time and/or resources to legally bypass these measures.²⁶ It will be submitted that the critics of the server rule overestimated the impact of the rule on copyright owners on the internet. As stated in *Perfect 10*, although linking to unauthorised sources may not give rise to primary infringement, it may however give rise to a tenable claim of secondary infringement.²⁷ Therefore, copyright owners may rely on the doctrine of secondary liability to protect the dissemination of their work on the internet. Secondary infringement will be discussed at a later stage.

5.2.2. Shortcomings of the server rule

The judgment in *Perfect 10* has been criticised for contradicting the UCA.²⁸ It was stated in *Perfect 10* that a work cannot be communicated or displayed to the public if the defendant is not in possession of a copy of the copyright protected work.²⁹ A hyper linker may not be held directly liable for publicly displaying a work as he/she will generally not have a tangible copy of the work in his/her possession.³⁰ However, display has been defined in the UCA as only showing a copy of a work directly or by means of ‘film, slide, television image, or any other device or process.’³¹ As stated by Burgunder and Floyd, a person may show a copy of a work even if it belonged to someone else.³² Thus, it may be argued that an act of public display or performance may also arise even without being in possession of a copy of the relevant copyright protected work.³³ This flaw has also been noted in cases such as *Leader’s Institute LLC v Robert Jackson et al*³⁴ and *Flava Works, Inc. v Gunter*³⁵ whereby the court disagreed with *Perfect 10* in relation to having possession of a copy of the relevant work as prerequisite for infringement of the public display right.

²⁵ Matthew C. Staples, ‘Kelly v Arriba Soft Corp.’ (2003) 18(69) *Berkeley Tech.L.J* at 82.

²⁶ *Ibid.*

²⁷ *Perfect 10* supra note 1 at 1161

²⁸ Ginsburg op cit note 23 at 183

²⁹ *Perfect 10* supra note 1 at 1160-1161.

³⁰ *Ibid.*

³¹ 17 U.S Code s101 Copyright Act 1976.

³² Lee Burgunder & Barry Floyd, ‘The future if Inline Web Designing After Perfect 10’ (2008) 17(1) *Tex. INTELL. PROP. L.J* at 17.

³³ *Ibid.*

³⁴ *The Leaders Institute LLC et al v Jackson et al* Civ No 3:14 CV 3572 B (2017) at 10.

³⁵ *Flava Works, Inc v Gunter* 689 F3.d 754 (2012) at 4.

It was stated in the case of *NFL v. Primetime 24* that when an actor takes active steps in a process to contribute content to the end user, an act of public display or performance may arise even in his/her action alone did not result in the delivery.³⁶ It was also opined in *American Broadcasting Companies Cos., v Aero, Inc.* that an act of public display and performance may arise if the defendant takes “steps which simply enhances” a user’s ability to receive a copyright protected work.³⁷ Thus, it may be argued that as hyperlinks facilitates access to works and enhances one’s ability to receive copyright protected work, they allow copyright protected work to find their way to the audience. Consequently, the defendant may commit an act of direct infringement even in cases of hyperlinking. These different authorities are in direct conflict with the serve rule introduced by *Perfect 10*. The shortcomings of *Perfect 10* and the server rule were addressed in the case of *Goldman*.

5.3. A change of tide

In the case of *Goldman*, the applicant owned copyright in a photograph of a famous celebrity.³⁸ The defendant made the photograph of the applicant visible by embedding the photograph from twitter onto the article.³⁹ Embedding is a form of inline linking and will therefore be referred as such. The applicant filed suit by claiming that the act of the defendant was infringing their right of display under s 106(5) of the UCA.⁴⁰

Judge Forest declined to apply the server rule as established in the case of *Perfect 10*. In *Perfect 10*, it was stated that a defendant who does not have a copy of a copyright protected work, cannot display the work.⁴¹ The court in *Goldman* held that nowhere the Copyright act makes mention that possessing a copy of an image is a prerequisite to its display.⁴² The Copyright act defines display as to transmit or communicate a work by means of a device or process.⁴³ Moreover to transmit a work has been defined as communicating the work by any device or process whereby images or sounds are received beyond the place from which they are sent.⁴⁴ The defendant pasted an HTML code in

³⁶ *NFL v Primetime 24* 211 F.3d 10 (2nd Cir. 2002) at 13.

³⁷ *American Broadcasting Cos, Inc. V Aero, Inc.* 573 U.S 431 (2014) at 2506.

³⁸ *Goldman* Supra note 2 at 2-5

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Perfect 10* supra note 1 at 1160-1161.

⁴² *Goldman* supra note 2 at 7.

⁴³ 17 U.S. Code s101 Copyright Act 1976.

⁴⁴ *Ibid.*

their article causing an image from a different website to appear on the defendant's website.⁴⁵ The court argued that these active steps were part of a process necessary to display the photograph.⁴⁶ Relying on the UCA, she concluded that the UCA calls for no more to find an act of direct infringement.⁴⁷ Consequently, the act of inline linking amounted to the infringement of the display right. The judge granted partial summary judgment to the applicant.⁴⁸ The defendant sought to appeal the district court's decision. However, the appeal was denied by the second circuit.

As was explained in section 5.2.1, there were fear that considering acts of hyperlinking as direct infringement would have a chilling effect on the practice of hyperlinking and impair the functioning of the internet. These consequences may now become a reality if the rule in *Goldman* continues to be applied to future cases concerning hyperlinking. Judge Forrest alleviated those fears by arguing that a number of defences namely the fair use defence and the defences under DMCA may protect innocent infringers and thus counter the much feared chilling effect.⁴⁹ As already stated these defences will not be discussed as this dissertation only relate to the circumstances when hyperlinking should infringe copyright law.

5.4. The right interpretation

As has already been argued in Chapter 3.2.1, not all types of hyperlinks share the same purpose. Normal and deep links act as reference point on the internet and should not be treated as acts of direct infringement.⁵⁰ However, inline linking and framing does more than direct a user to a copyright work on the internet.⁵¹ Inline links and framing gives to the user a more direct access to the copyrighted work. ⁵²It pulls the content from the target website to the website the link is placed on.⁵³ Moreover, the one who placed the link has control as to whether the content is available on the website or not.⁵⁴ Thus, inline linking should be capable of amounting as an act of communication to the public or an act of display as stated in the case of *Goldman*. Unlike the EU, the US courts correctly takes into account the technological differences between the different forms of linking.

⁴⁵ *Goldman* Supra note 2 at 17-20

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid* at 10.

⁵⁰ Roosa Tarkiainen, 'Tipping the scale in GS Media: a proposal to restore the balance between rightholders and internet users' (2017) 12(6) *JIPLP* at 508.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

It will be noted that the facts of *Goldman* dealt with inline linking and not all type of hyperlinks. Thus, for the purpose of this dissertation it will be presumed that only inline linking and the framing of copyright protected works may be a matter of direct infringement. On the contrary, normal and deep linking will continue to be considered under the server rule and not be treated as potential acts of direct infringement. As stated in *perfect 10*, the provision of hyperlinks may give rise to a tenable claim of secondary infringement.⁵⁵ The next part of the chapter will now determine if copyright owners may effectively rely on secondary liability to guard against the unlawful dissemination of their work through the process of normal and deep hyperlinking.

5.5. Secondary Liability in the US

Although the US's courts generally bar normal and deep hyperlinking from being considered as potential acts of direct infringement, these forms of linking may nonetheless be addressed through the lens of secondary liability. Notably, the US does not have the same issue of harmonising secondary liability as in the EU as secondary liability is a matter of federal law rather than a matter of the laws of the fifty states that constitutes the US.⁵⁶ There are three forms of secondary liability in the US.⁵⁷ These are contributory liability, vicarious liability and infringement by inducement.⁵⁸ Vicarious infringement may arise if the defendant supervises direct infringement of others, benefits from that activity and fails to exercise its right to stop the infringement.⁵⁹ As the linker seldom has control over the infringing activity pertaining to the work the hyperlink provides access to,⁶⁰ vicarious infringement is a poor fit in the context of hyperlinking and will thus not be further discussed. For any of these three types of secondary infringement to arise, there should firstly be an act of direct infringement.⁶¹

⁵⁵ *Perfect 10* supra note 1 at 1161.

⁵⁶ Ginsburg op cit note 23 at 192.

⁵⁷ Dawn Leung, 'What's all the hype about hyperlinking?: Connections in copyright' (2016) 7(1) *IP Brief* at 76.

⁵⁸ *Ibid*.

⁵⁹ *Arista Records Inc., et al. MP3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918 at 10.

⁶⁰ Ginsburg op cit note 23 at 194

⁶¹ *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171 (10th Cir. 2009) at 1181.

5.5.1. Finding direct infringement

For secondary infringement to arise, there should firstly be an act of direct infringement by a third party. Moreover, that act of direct infringement should be a result of the plaintiff's conduct.⁶² Merely supplying the means of infringement will not suffice.⁶³ Thus, it needs to be established whether the provision of hyperlinks resulted in an act of direct infringement by a third party. In the case of *Arista Records, Inc. v MP3Board, Inc.*, the plaintiff failed in their claim of contributory infringement as there was insufficient evidence of direct infringement due to the posting of hyperlinks to copyrighted music files.⁶⁴ Although copyright infringement was statistically highly to happen, secondary was nonetheless not found. Accordingly, the US courts require actual infringement to happen and merely an offer to cause infringement will suffice as in the EU. Surprisingly, in the case of *Intellectual Reserve, Inc. v Utah Lighthouse Ministry*, the court did not even require the plaintiff to show proof of actual download.⁶⁵ Ginsburg argues that despite this oversight, the ability to prove that the hyperlink resulted in directed infringement should not be overlooked by the plaintiff as US courts will be bound by precedence.⁶⁶

As stated in *Intellectual Reserve*, when a user browse a website involving infringing copyrighted work, a copy of that work is made by the computer's random access memory to permit the viewing of the material.⁶⁷ In making that copy, copyright is infringed. Therefore, in the context of hyperlinking the plaintiff may be required to provide evidence that a third party actually clicked on the hyperlink and that he/she was directed to the website containing infringing material as a consequence.⁶⁸ Direct infringement may then be successfully be proven if the activation of the URL resulted in the download of a copyright protected work or if copyright was infringed in another manner when on the website the hyperlink led to.⁶⁹ However, this tortuous process may prevent a plethora of copyright owners from succeeding in their claims as they may not have the capacity or knowledge to prove that copying of their copyright protected work occurred. Copyright owners may be required to show that visitors of the website containing the copyrighted material actually increased when the hyperlink was posted. The US courts have tackled neither of these issues in hyperlinking cases as direct infringement was obvious from cases dealing with hyperlink and

⁶² *Arista Records Inc., et al. MP3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918 at 1-12.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Intellectual Reserve, Inc. v Utah Lighthouse Ministry* 75 F Supp. 2d (1999) at 1292.

⁶⁶ Ginsburg op cit note 23 at 220.

⁶⁷ *Intellectual Reserve* supra note 66 at 1294.

⁶⁸ Ginsburg op cit note 23 at 220.

⁶⁹ *Ibid.*

secondary infringement.⁷⁰ If the plaintiff succeeds in proving an act of direct infringement, the courts may then consider if any of the three forms of secondary infringement was present. Contributory infringement will first be tackled.

5.5.2. Contributory Infringement

Hyperlinking has usually been an issue of contributory infringement. To be found liable for contributory infringement, two elements must be present.⁷¹ The defendant's conduct should firstly encourage and/or assist an act of direct infringement.⁷² Secondly, the defendant should have had actual or constructive knowledge of the specific direct infringement.⁷³ The first requirement will be satisfied if the hyperlink leads to infringing content and the linker materially contributed to an act of direct infringement. For example, in the case of *Pearson Education Inc v Ishayev*, the defendant sold illegal educational material online.⁷⁴ He provided hyperlinks to file sharing sites whereby the educational material could be downloaded. His conduct satisfied the assistance and conduct element.⁷⁵ Similarly, in the case of *Intellectual Reserve, Inc v Utah Lighthouse Ministry*, the defendant provided links to websites containing copyright protected material.⁷⁶ The defendant encouraged readers of its website to use the link and download the protected contents.⁷⁷ As in *Pearson*, the courts found the act of the defendant enough to be an act which encourages infringement.⁷⁸

Unfortunately, the above cases do not concern pure acts of hyperlinking that may be commonly found on the internet. In other words, the mere provision of hyperlinks without any encouraging factor. Accordingly, a defendant who merely provides hyperlinks to infringing content may argue that his/her act does not amount to a material contribution and should therefore not be found liable of contributory infringement. The US courts have yet to decide on cases involving mere hyperlinking practice as most cases pertaining to hyperlinks involved some sort of encouraging

⁷⁰ Ibid.

⁷¹ *Gershwin Oubl'g Corp. v. Columbia Artist Mgmt., Inc.*, 443 F.2d (1971) at 1150,1162

⁷² Ibid.

⁷³ *Perfect 10* supra note 1 at 1172

⁷⁴ *Pearson Educ., Inc. v Ishayev* 9F. Supp. 3d 328, 339 (2014) at 339.

⁷⁵ Ibid.

⁷⁶ *Intellectual Reserve, Inc. v Utah Lighthouse Ministry* 75 F Supp. 2d (1999) at 1294-1295.

⁷⁷ Ibid.

⁷⁸ Ibid.

activity. However, guidance may be found in US decisions such as *Perfect 10 v Amazon*⁷⁹ which suggest that acts which “facilitates access to website throughout the world can significantly magnify the effects of otherwise immaterial infringing activities”. As was argued in paragraph 3.2.1 this dissertation, normal and deep hyperlinks acts as location tools on the internet. They allow users to find content on the internet. Consequently, hyperlinks to illegal material arguably facilitates and expand access to that copyright protected material. It may thus be contended that facilitating access through normal and deep hyperlinking may amount to material contribution to an infringing activity. As a result, the mere provision of hyperlinks may indeed satisfy the material contribution element as also submitted by Ginsburg.⁸⁰

5.5.3. Knowledge element

The second requirement for contributory infringement is in relation to the knowledge of the defendant.⁸¹ He/she should have actual or constructive knowledge of direct infringement.⁸² It should be asked whether the defendant knew or had reason to know of the direct infringement based on the circumstances of the case.⁸³ The test is an objective one and thus should be asked from a reasonable internet user perspective.⁸⁴ This element will be satisfied if the defendant had specific knowledge pertaining to the specific copyright protected work it facilitated access to and that his/her facilitation acts were acts of direct infringement.⁸⁵

In the case of *A&M Records, Inc v Napster Inc*, the defendant created a centralised index of all the contents that were being shared on their platform.⁸⁶ The issue was whether defendant had ‘specific information which identified infringing activity.’⁸⁷ The court concluded that defendant knew or should have known of the instances of direct infringement occurring on their platform and nonetheless refrained from stopping the illicit acts.⁸⁸ In the context of hyperlinking therefore, it should be asked whether the defendant knows or should have known of the particular copyright protected works which the hyperlink facilitated access to. The US courts only had the opportunity to

⁷⁹ *Perfect 10* supra note 1 at 1172.

⁸⁰ Ginsburg op cit note 23 at 196

⁸¹ *Arista Records LLC v. Lime Group LLC*, 715 F.Supp. 2d (2010) at 110-118

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Perfect 10* supra note 1 at 1172.

⁸⁶ *A&M Records, Inc. v Napster Inc*. 239 F.3d (9th Cir. 2001) at 1004-1021.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

address cases whereby it was unambiguous and clear that the linker had knowledge that the linked contents were infringing as in the case of *Pearson* and *Intellectual Reserve*. However, this element may arguably be easily satisfied in cases relating to deep links and they usually relate to one particular work or source. Deep links transfer the user directly to a specific point on a website rather than to its homepage. Thus, the linker will necessarily know to what copyright protected work the link is specifically providing or facilitating access to.

In the case of *EMI Christian Music Grp., Inc. v MP3tunes*, the judge allowed the jury to conclude that the defendant had knowledge pertaining to infringement as it was common knowledge in the music industry that major labels do not authorize their music to be distributed widely.⁸⁹ Similarly, in the context of hyperlinks, knowledge may be presumed based on the characteristics or nature of the linked websites. For example, a presumption of knowledge may arise for websites containing recently released movies for free. As it is common knowledge that these movies are rarely available for free, the defendant linking to these types of websites will generally have knowledge of the infringing nature of his act. Moreover, a presumption may also arise if the defendant was notified by the copyright holder of the infringing nature of the link. In *Flava Works, Inc v Gunter*, it was concluded that the defendant knew of the infringing nature of the works it was facilitating access to as several notices and emails were sent to the defendant pertaining to the infringing nature of the link.⁹⁰

Interestingly, the knowledge element may not be satisfied pertaining to site aggregators containing infringing content. Site aggregators contain a plethora of music, videos or other copyright protected works. Thus, the linker may argue that he/she had only a generalised knowledge of infringing activities but not what specific copyright protected work the link was specifically facilitating access to. Accordingly, his generalised knowledge may not suffice to meet the knowledge threshold. However, the linker may still be found liable for liability by inducement.

⁸⁹ *EMI Christian Music Grp., Inc. v MP3tunes, LLC* 844 F.3d (2nd Cir. 2016) at 79-92.

⁹⁰ *Flava Works, Inc v Gunter* 689 F.3d 754 (2012) at 7.

5.5.4. Liability by inducement

To be liable for inducement, three elements need to be satisfied. Firstly, the defendant should have taken active steps to encourage direct infringement.⁹¹ Secondly, he/she should have refrained from curtailing the infringing activity.⁹² Finally, he/she should have created a business model structured around the infringing use.⁹³ The difference between contributory infringement and infringement through inducement, is the amount of knowledge required. As was already discussed, contributory infringement requires the defendant to have specific knowledge in relation to the work which he/she facilitated access to.⁹⁴ However, in terms of inducement, only an intention to promote infringement will suffice without ‘requiring that the defendant knew precisely which works would be infringed.’⁹⁵ As was analysed, linkers to website aggregators may have a solid defence against contributory infringement as they may argue that they had only a generalised knowledge of infringement and not specifically about infringement of a particular work. However, inducement liability may be found. A defendant linking to site aggregators may be found liable through inducement if he/she ‘actively encourages’ internet users to use the relevant links to download copyright protected works found in those websites and made no effort to remove the infringing link. Finally, the defendant need to have benefitted from providing the link. The final requirement will depend on the facts of the case. It will be proposed how financial benefit should be interpreted in the context of hyperlinking when crafting an effective approach to hyperlinking in chapter 6. Interestingly, internet users such as those who use the internet for non-commercial purposes will likely be shielded from liability as they generally merely provide links without incurring any economic benefit.

Ultimately, it may be argued that the doctrine of secondary liability and reference from existing authorities in the US may effectively deal with future hyperlinking issues. The US rarely had the opportunity to deal with the provisions of mere hyperlinks to illegal content. However, the provision of hyperlinks to protected content may amount to contributory infringement if the defendant had specific knowledge pertaining to the specific copyright protected work it facilitated access to and if his/her act materially contributed to an act of direct infringement. Thus, it will be submitted that the secondary liability mechanisms in the US may address numerous scenarios of

⁹¹ *MGM Studios, Inc. v Grokster, Ltd.*, 545 U.S (2005) at 913.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Perfect 10* supra note 1 at 1172.

⁹⁵ Ginsburg op cit note 23 at 199.

illegal hyperlinking and fill the gap left by the exclusion of normal and deep hyperlinking from direct liability under the server rule.

5.6. Conclusion

Since 2017, the server rule generally barred all forms of hyperlinking to copyright protected works from being acts of direct infringement.⁹⁶ Inline linking and framing of copyright protected work without the consent of the relevant copyright owner may now be considered as infringing the public display right as per *Goldman*.⁹⁷ As was already argued, US courts should continue to follow this approach as inline inking and framing do more than act as reference guide on the internet and due to the inconsistencies of the server rule. Normal and deep linking should however continue as not being capable of amounting as acts of direct infringement. They should be dealt under the doctrine of secondary liability. As was discussed, the rules to find contributory and infringement by inducement arguably covers several illegal and dishonest acts of hyperlinking; thus protection the rights of copyright owners. The only difficulty for copyright owners to protect their right will be to prove that an act of direct infringement occurred due to the posting of the hyperlinks. If this can be proven it is the opinion of this author that relying on secondary liability and the rule in *Goldman* arguably provides a balance between protecting the right of copyright owners and freedom of information on the internet, provided some adjustments are made. These adjustments will now be proposed in the next chapter of the dissertation.

⁹⁶ *Perfect 10* supra note 1.

⁹⁷ *Goldman* supra note 2.

Chapter 6: The way forward

After having dealt with how the EU and the US courts have addressed hyperlinking in the context of copyright law, this chapter will now ascertain how the different jurisdictions should refine their existing laws to provide a better solution to the hyperlinking issue. The EU will firstly be dealt with. A summary of the law governing hyperlinking in the EU and the issues it has created will be outlined. It will then be proposed how the law should be refined. The same steps will be then repeated for the US.

6.1. Resolving hyperlinking in the EU

6.1.1. Uncertainties of *GS Media*

As outlined in the case of *GS Media BV v Sanoma Media Netherlands BV and Others*, the provision of hyperlinks to copyrighted protected works may amount as copyright infringement.¹ The CTP right will be infringed if the defendant knew or ought to know that the hyperlink provided access to a copyright protected work that was made available online without the consent of the copyright owner.² Moreover, a presumption of knowledge will arise if the posting of the link was done in a view of incurring profit.³ If the presumption cannot be rebutted the posting of the link will amount as copyright infringement.⁴

The treatment of all types of hyperlinks under the CTP right was subject to criticism as it was submitted that normal and deep hyperlinks only facilitate access to a work.⁵ It was explained that they should therefore not be potential acts of CTP. Failure to properly define the amount of knowledge necessary to find infringement was argued to have potentially created a too strict duty of care for individuals posting hyperlinks.⁶ Not defining the term profit was also criticised for creating uncertainty and potentially a chilling effect for internet users in EU member states.⁷ The state of mind of the defendant is now taken into account to find if an act of CTP was present. However, this

¹ *GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15) 2016 (9) WLUK 124.

² *Ibid* at 49.

³ *Ibid* at 51.

⁴ *Ibid*.

⁵ Joshua Colby, 'It's the end of the (online) world as we know it? The dangers of hyperlinking' (2017) 28(5) *Ent. L.R* at 163

⁶ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 *JIPITEC* at 147.

⁷ Christina Angelopoulos, 'Hyperlinks And Copyright Infringement' (2017) 76(1) *CLJ* at 32.

element is generally only required when dealing with secondary infringement.⁸ Conflating the CTP right with secondary liability rules was argued to have created disharmony in jurisdictions recognising the concept of secondary liability.⁹ It will now be seen how the requirements to find infringement should be refined to achieve a balanced approach.

6.1.2. Categorising the different forms of hyperlinks

The EU courts do not make a distinction between the different forms of linking. Normal and deep linking are treated under the CTP right as are inline links and framing. This interpretation has been criticised for not taking into account the factual and legal diversity of the different types of linking.¹⁰ As was already stated in Chapter 3.2.1 and throughout the dissertation, a distinction should be made between the different types of hyperlinking. Normal and deep linking should be treated outside the ambit of the CTP right as they only act as reference guide on the internet. Inline linking and framing however, do more than act as reference guide. The owner of the website whereby inline linking or framing is being made has control over whether to display a work or not on that particular website. The content of the target website is displayed on the website the inline linking or framing is done. Inline linking and framing pulls the copyrighted work from the target website to the website the link is placed.¹¹ In other words, framing or inline linking makes the copyrighted work available on a given website. Thus, inline linking and framing of copyright protected work should be subject to authorisation and be considered as potential acts of CTP.

Unfortunately, this distinction is not on the horizon for the EU courts. Recent development such as the case of *Stichting Brein v Ziggo BV and XS4All Internet BV* did not tackle the differences between the different forms of linking.¹² Therefore, all forms of linking will arguably continue to be treated under the CTP right. Interestingly, creating the distinction would have also posed a problem for the EU courts as there is a lack of harmonisation of secondary liability rules across the EU. Due to this lack of harmonisation, the EU is forced to incorporate secondary liability rules to an issue of direct infringement and treat all forms of hyperlinking under the CTP right. Accordingly, this

⁸ Kanchana Kariyawasam, 'To Link or Not to Link: The Use of Hyperlinks and Copyright Infringement' (2019) 31 *I.P.J* at 170-172

⁹ *ibid.*

¹⁰ Ansgar Ohly, 'The broad concept of "communication to the public" in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?' (2018) 13(8) *JIPLP* at 664;

¹¹ Roosa Tarkiainen, 'Tipping the scale in GS Media: a proposal to restore the balance between rightholders and internet users' (2017) 12(6) *JIPLP* at 508.

¹² *Stichting Brein v Ziggo BV and XS4All Internet BV* (Case C-610/15) 2017 E.C.D.R 19.

criticism is likely to persist. As the EU is likely to continue to interpret all forms of linking as potential acts of direct infringement, the proposal will focus on how the existing rules should be refined. It will now be recommended how the profit and knowledge should be interpreted to achieve a balanced approach.

6.1.3. The duty of care

In the EU, the courts require the defendant to know or to have had reason to believe that a hyperlink would lead to copyright protected works made available without the consent of the copyright owner.¹³ The knowledge necessary and duty of care may be adapted based on the circumstances of the case and the nature of the defendant. If this rule is to be applied too strictly, an individual would be required to perform regular check to check the legality of a given work as it may vary over time.¹⁴ Difficulty may also arise if the work located on the webpage makes no mention of the copyright owner.¹⁵ The user may have no way of finding out if was authorised or not.¹⁶ It may thus be unrealistic for the common internet users to perform those checks.¹⁷ They may be required to keep documentation about the historical record of the legality of the work.¹⁸ Consequently, imposing a high duty of care may have a chilling effect and deter individuals from posting hyperlinks.

To avoid a too strict monitoring duty of care, it will be proposed that knowledge of the linker should be limited to knowledge pertaining to the nature of the published copyright protected work at the time the link was posted. As recommended by Tarkiainen, the link provider should only be liable if he/she knew or ought to have known that the hyperlink he/she provided led to copyright protected works made available without the consent of the right holder at the time he/she posted the hyperlink.¹⁹ A copyright owner may initially publish a copyright protected work online and allow all internet users to use and share that particular work. He may then have a change of mind and require consent before using or communicate his work to the public. Under the new rule, a hyperlinker posting a link to that work will not be infringing the CTP right if he/she posted the link to the copyright protected work when the work was freely accessible. Agreeing with Tarkiainen, the

¹³ *GS Media* supra note 1 para 49.

¹⁴ Ohly op cit note 10 at 664.

¹⁵ Matthias Leistner, 'Closing the book on the hyperlinks: brief outline of the CJEU's case law and proposal for European legislative reform' (2017) 39(6) *E.I.P.R* at 327.

¹⁶ *Ibid.*

¹⁷ Bianca Hanuz, 'Linking to unauthorized content after the CJEU *GS Media* decision' (2016) 11(6) *JIPLP* at 879.

¹⁸ Ohly op cit note 10

¹⁹ Tarkiainen op cit note 11 at 508.

constant monitoring of the status of a work may be unrealistic and unfair for common users on the internet.²⁰ The proposed amendment will therefore bypass the practical implications of *GS Media* as detailed above.

6.1.4. Defining profit

As was earlier stated, an act of CTP may arise if the defendant had knowledge that the provision of hyperlinks would lead to illegally available material.²¹ A presumption of knowledge will arise if the defendant's act of linking was done for profit.²² As was explained, profit may be gained directly from the linking activity.²³ Profit may be generated due to the posting of the link of when someone clicks on the link leading to copyright protected works. It may also be acquired in an indirect manner such as when generated on the website the link was posted through advertising revenue.²⁴ It will be submitted that the interpretation should exclude the latter one. EU member states such as Germany have decided to interpret profit broadly so as to encompass financial benefit gained from the website the link is posted.²⁵

As previously argued, most businesses or website on the internet now operates for profit as they may gain revenue from advertising. Therefore, a broad interpretation of the term "profit" creates a de facto presumption of knowledge on these types of websites. The internet is also made of individuals such as blog owners that generate income through advertising.²⁶ Linking may be incidental or even irrelevant to obtaining profit for these individuals. Income may be gained from advert that barely covers the cost to keep the blog or website online. If the profit element is interpreted broadly, a presumption of knowledge will apply even to these individuals if they post hyperlinks leading to unauthorised content on their website or blog. However, they may not have the capacity, means or knowledge to conduct necessary checks and discard the presumption of knowledge.²⁷ Consequently, a broad interpretation may deter linking activities for fear of infringing copyright.

²⁰ Ibid.

²¹ *GS Media* supra note 1 para 49.

²² Ibid at para 51.

²³ Colby op cit note 5 at 161

²⁴ Ibid.

²⁵ *Landgericht Hamburg* 2016 310 O 402/16 at 10.

²⁶ Tarkiainen op cit note 11 at 502.

²⁷ Ibid.

It will be submitted that profit making intention should only relate to profit gained directly attributable to the infringing activity. In other words, the presumption should arise if the defendant provided hyperlinks with a view to gain financial advantage due to the posting of the link or if income is generated when someone clicks on the hyperlink. If this approach is followed, common and honest commercial parties such as bloggers and websites generating small income from advert which are essential for the websites to survive will not be liable for infringement. This narrow approach will ensure the smooth functioning of the internet as simple individuals such as blog owners will not be subject to the presumption of knowledge if no direct profit is acquired. To interpret profit otherwise may arguably create a chilling effect on these individuals. A summary of the above recommendations will later be provided in chapter 7. It will now be discussed how the US should tackle the issue of hyperlinking

6.2. Hyperlinking in the US

6.2.1. The law in the US

All acts of hyperlinking to copyright protected works have generally been barred from being considered as acts of primary infringement under the server rule. They have been addressed under the doctrine of secondary liability in the US. The decision in *Goldman v Breitbart News Network LLC* has considered the embedding of a copyright protected work without consent as direct infringement.²⁸ As has been already stated, it remains to be seen if the server will be completely overturned and if the rule in *Goldman* will only be applied to inline linking and framing. It will be submitted that normal and deep linking should be a matter of secondary infringement while inline linking and framing a matter of primary infringement. Thus, the US courts currently provides a correct interpretation on the different types of hyperlinking and no drastic change is necessary under US law. It will be argued that the server rule should indeed be overturned in relation to inline linking and framing. It will now be seen how the rules to find secondary infringement should be interpreted to find if the provision of normal and deep linking to copyright protected work should amount as secondary infringement.

²⁸ *Justin Goldman v Breitbart News Network, LLC* Civ No 1:17-cv-03144-KBF (2018).

6.2.2. Likelihood of direct infringement

To be considered for secondary liability, an act of direct infringement should firstly be found.²⁹ The provision of the normal or deep link should have caused an act of direct infringement.³⁰ Under EU law, an act that merely offers access to a copyright protected work will suffice to amount as an act of communication.³¹ Conversely, US courts may require the plaintiff to prove that direct infringement actually occurred due to the posting of the hyperlink.³² Thus, in hyperlinking cases the plaintiff may need to provide proof that a third party actually clicked on the hyperlink, the hyperlink then directed the user to the website containing the copyright protected work and that direct infringement occurred as a consequence. This is whereby most copyright owners may fail in their claim as they may not have the capacity or technical knowledge to prove such a scenario. US courts may also be bound by past precedence to find an act of direct infringement. It will be submitted that regarding hyperlinking cases, only a likelihood that infringement occurred or providing an opportunity for a copyright protected work to be accessed should suffice as in *Intellectual Reserve, Inc. v Utah Lighthouse Ministry*³³ and as in the EU. Accordingly, providing evidence that traffic to the website on which the copyright protected material was present increased when the hyperlink leading to that website was posted, may suffice to satisfy the likelihood of infringement element. It will now be proposed how the element to find contributory infringement should be interpreted when dealing with hyperlinking.

6.2.3 Contributory infringement

Contributory infringement may be found if the defendant materially contributed to an act of direct infringement and had reason or should have had reason to know of the direct infringement.³⁴ As was seen in Chapter 5.5.2, the provision of hyperlinks will likely satisfy the inducement element.

In the US, someone may be found liable for contributory infringement if he/she knew or had reason to know of the specific work that he/she facilitated access to.³⁵ In the EU, the courts only require the defendant to know or had reason to believe that the hyperlink would lead to copyright protected

²⁹ *Arista Records Inc., et al. MP3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918 at 1-12.

³⁰ *Ibid.*

³¹ *Nils Svensson and Others v Retriever Sverige AB (C-466/12)* 2014 (3) CMLR 4 at para 19.

³² Jane Ginsburg & Luke Budiardjo, Liability for providing hyperlinks to copyright infringing content: International and Comparative Law Perspectives' (2018) 41(1) *Colum. J.L. & Arts* at 220.

³³ *Intellectual Reserve, Inc. v Utah Lighthouse Ministry* 75 F Supp. 2d (1999) at 1292.

³⁴ *Gershwin Oubl'g Corp. v. Columbia Artist Mgmt., Inc.*, 443 F.2d (1971) at 1150,1162

³⁵ *Perfect 10, Inc v Amazon.com Inc.* 508 F3.d 1146 (2007) at 1172.

works made available without the consent of the copyright owner.³⁶ It will be proposed that in order to satisfy the mental element to be found liable, the defendant should only know or have reason to know that his/her act facilitated access to works made available online without the authorisation of the copyright holder as in the EU. This simpler approach is a catch all provision that will ensure that an individual having knowledge about the specific works that he facilitated access to and also those who encourages users to access infringing works even without having specific knowledge about specific works the link facilitated access to may face liability.

Interestingly, an applicant may argue that knowledge may be presumed based on nature and characteristics of the website based on the case of *EMI Christian Muic Grp., Inc. v MP3tunes* in the US.³⁷ It will be submitted that knowledge may also be presumed if the links leads to site aggregating websites or websites whereby copyright protected works are freely available. As it is common knowledge that recently released movies, books or music are rarely made available for free, a presumption of knowledge may be fairly presumed as the defendant will be generally aware that the link is leading to infringing works. The US should only limit knowledge to find infringement to knowledge of the defendant at the time the link was posted as proposed for the EU. Similarly, if the US courts decide to presume knowledge based on the profit intention of the defendant, it should only relate to profit acquired due to the posting of the hyperlink for the reasons stated in section 6.1.4 of this chapter.

6.2.4. Liability by inducement and vicarious infringement

The doctrine of vicarious and inducement may also be relied on under specific conditions. Liability by inducement may be found if the defendant takes active steps to encourage direct infringement, builds a business model based on benefiting from the infringing activity and takes no step to diminish the infringing activity.³⁸ There is no need to prove specific knowledge as in contributory cases.³⁹ In the case of vicarious infringement, liability will arise if the defendant supervises infringing conduct of another, profits from those activities and fails to exercise the right to stop the activity.⁴⁰ As already argued vicarious is likely to be poor fit in the context of hyperlinking as a

³⁶ *GS Media* supra note 1 para 49.

³⁷ *EMI Christian Muic Grp., Inc. v MP3tunes, LLC* 844 F.3d 79 (2nd Cir. 2016) at 91-92.

³⁸ *MGM Studios, Inc. v Grokster, Ltd.*, 545 U.S (2005) at 913.

³⁹ Ginsburg op cit note 32 at 199.

⁴⁰ *Arista Records Inc., et al. MP3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918 at 10.

linker rarely has control over the infringing work the links direct.⁴¹ However, if a hyperlinker satisfies those element vicarious liability may arise. Profiting and benefitting from infringing activities under both inducement and vicarious should be interpreted as acquiring profit due to the posting of the link for the reasons stated in section 6.2.4.

6.3. Conclusion

Due to the lack of harmonisation of secondary liability in the EU, the EU court are bound to treat all forms of hyperlinking under the CTP right. An act of CTP will arise if the defendant knew or should have known that the hyperlink led to copyright protected works made available without the authorisation of the copyright owner.⁴² A presumption of knowledge will arise if the link was posted in view of acquiring profit.⁴³ It was submitted that the knowledge of the defendant should be limited to knowledge at the time the hyperlink was posted. Moreover, profit should be interpreted as profit gained due to the posting of the link. Accordingly, a balance may be struck between protecting the freedom of information of internet users and the rights of copyright owners. Internet users will not be subject to a too stringent monitoring obligations. They may partake in common internet activities such as blogging without being liable for copyright infringement. In the US, inline linking and framing of copyright protected without the consent of the right owner should continue to be treated as an act of primary infringing. Normal and deep linking should be a matter of secondary liability. It was proposed that pertaining to hyperlinking only a likelihood that direct infringement occurred should be sufficient to be considered for secondary liability. Contributory infringement will arise if the defendant materially induces the infringing conduct of another.⁴⁴ In terms of contributory infringement, the positing of hyperlinks should satisfy the material inducement element. Secondly, the defendant should have had actual or constructive knowledge of the specific direct infringement.⁴⁵ However, it was put forward that the defendant should only know or have reason to know that the hyperlink facilitated access to copyright protected works to satisfy the mental element. Similar to the EU knowledge, should be limited to knowledge at the time the link was posted. If the US courts decides to presume knowledge based on the profit making activity of the defendant, then profit should be interpreted as profit gained due to the posting of the hyperlink as in the EU. A similar interpretation of benefit should be applied when dealing with liability by

⁴¹ Ginsburg op cit note 32 at 194.

⁴² *GS Media* supra note 1 at 49.

⁴³ *ibid* at 51.

⁴⁴ *Gershwin* supra note 34.

⁴⁵ *Perfect 10* supra note 35.

inducement or vicarious liability. It is hoped that these adjustment will achieve a balance in protecting the right of copyright owners while also maintaining the free flow of information on the internet for the reasons stated in this chapter.

Chapter 7: Hyperlinking and South Africa

As South Africa (SA) is on the verge of overhauling its copyright law with the introduction of the Copyright Amendment Bill (CAB),¹ this author will use this opportunity to demonstrate how SA should tackle the legal treatment of hyperlinking within copyright law. An introduction to SA's copyright law will be firstly provided and the main provision of the CAB relevant to this dissertation will be discussed. The provision dealing with copyright infringement in SA will then be outlined. It will then be shown how SA should tackle the issue of hyperlinking if it decides to follow either the EU or US approach. Finally, it will be submitted which approach SA should favour to regulate hyperlinking to copyright protected works. It should be noted that the CTP right is currently not afforded to all types of work under the South African's Copyright Act 98 of 1978. Consequently, the provision of hyperlinking to copyright protected work cannot currently amount to direct infringement for certain types of works. The CAB proposed the introduction of the CTP right to most types of work. Thus the recommendations in this chapter will focus on how SA should deal with hyperlinking if the CTP right is indeed introduced to most types of work in the near future. A temporary solution will also be provided while awaiting the introduction of the CTP right to most type of works.

7.1. Introduction to South Africa's Copyright Law

Liability for copyright infringement is governed by the South African's Copyright Act 98 of 1978 (SACA). The SACA grants to authors of copyright protected works exclusive rights. For example the right to reproduce, perform or broadcast a work are granted in relation to authors of literary and musical works.² Unfortunately, the CTP right is only afforded to authors of sound recordings under s9(e) of the SACA.³ Thus, authors of literary works, artistic works and cinematograph films have currently no course of action if their work are communicated or made available to the public without their authorisation. Interestingly, it appears that even the CTP right afforded to authors of sound recording may not extend to the digital environment due to the absence of the wording 'in any manner or form.' Accordingly, s9(e) may also be regarded as irrelevant in terms of protecting the right of authors of sound recording on the internet and relating to the issue of hyperlinking. The

¹ Copyright Amendment Bill B13-2017

² S6 Copyright Act 98 of 1978.

³ S9(e) Copyright Act 98 of 1978.

above omissions reflect the shortcoming of the SACA with regards to information technology and the internet. However, these omissions may be rectified with the introduction of the CAB.

7.2. The Copyright Amendment Bill

The CAB has been created to modernise copyright law in SA and to take into account the changes brought about by the advent of technology.⁴ The bill was passed by the National assembly and was referred for signature into law by the president of SA. Unfortunately, the bill has recently been returned to parliament for further considerations due to oppositions regarding the constitutionality of the parliamentary process leading to its passage as well as concerning the constitutionality of some of its provisions.⁵ It remains to be seen if an amended version of the bill will soon see the light of day. For the purpose of this dissertation, the latest version of the bill as of time of writing will be analysed. The amendment to the current SACA that is of relevance for this dissertation is the introduction of the CTP right. The CAB enunciated that the CTP right will be afforded to authors of literary work under s6(eA), artistic works under s7(eA) and authors of cinematograph films under s8(eA). Moreover, the CAB also stated that the CTP right will be fully applicable in the digital age as the aforementioned provisions will guard against the communication of the public of the work ‘by wire or wireless means.’⁶

⁴ Marcus Riby-Smith ‘South African Copyright Law- the good, the bad and the Copyright Amendment Bill’ (2017) 12(3) *JIPLP* at 216-225.

⁵ Parliamentary Monitoring Group, ‘Copyright Amendment Bill (B13-2017)’ available at <https://pmg.org.za/bill/705/> accessed on 18 August 2020.

⁶ s6 supra note 1

7.3. Hyperlinking and copyright infringement in SA

As stated by s23(1) of the SACA,

‘Copyright shall be infringed by any person, not being the owner of the copyright, who, without the license such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or authorize.’⁷

The above provision may be broken down into two parts. Firstly, copyright shall be infringed if a person does an act relating to one of the exclusive right of the copyright owner.⁸ Secondly, copyright will also be infringed under s23(1) if a person causes any other person to do one of the exclusive right of the copyright owner.⁹

It should be noted that copyright may also be infringed under s23(2) of the CA.¹⁰ However, these provisions are not relevant to the hyperlinking issue and will not be further discussed. As noted SA has not yet introduced the CTP right to all types of works. Thus, the provision of hyperlinks cannot currently amount to an act of direct infringement in SA for most if not all types of work. It will therefore be proposed how SA should deal with hyperlinking when and if the CTP right is indeed introduced to most types of work under a revised version of the CAB. A solution will also be provided as to how SA should deal with hyperlinking while awaiting the introduction of the right. It will now be ascertained how SA should deal with hyperlinking if it decides to adopt the EU approach. These proposals will be a summary of the refined ruled enunciated in Chapter 6.

⁷ s23(1) supra note 2.

⁸ Ibid.

⁹ Ibid.

¹⁰ s23(2) supra note 2.

7.4. The EU scenario

If SA decides to interpret all acts of hyperlinking under the CTP as in the EU, the below principles should be followed:

- (a) Linking to copyright protected work on the internet shall amount to an act of communication to the public if the copyright work was made available without the consent of the copyright owner and;
- (b) The defendant knew or had reason to believe that his/her act facilitated access to a work made available without the consent of the copyright owner. Knowledge of the linker should be limited to knowledge pertaining to the nature of the copyright protected work and at the time the link was posted.
- (c) Knowledge may be presumed if the hyperlink was posted with a profit making intention and/or based on the nature of the website the link provided access to. The profit making intention should only relate to profit directly attributable to the linking activity.

As noted, the above principles also act as a summary of the refined rules proposed for the EU. As was previously submitted, the profit making intention should only relate to profit directly attributable to the linking activity. As a consequence, websites generating income from advert in which the hyperlink is posted will not be liable for infringement. This narrow approach will ensure the smooth functioning of the internet as simple individuals such as blog owners will not be subject to the presumption of knowledge if no direct profit is acquired. Moreover, to avoid a too strict monitoring duty of care, it will be proposed that knowledge of the linker should be limited to knowledge pertaining to the nature of the published copyright protected work and at the time the link was posted. Accordingly, this will avoid the constant monitoring of the status of a work which may be unrealistic and unfair for simple users on the internet.

7.5. The US scenario

Copyright infringement in SA may also be found if a person causes any other person to do one of the exclusive right of the copyright owner under the second limb of s23(1) of the Copyright Act.¹¹ Interestingly, this element mirrors the doctrine of contributory liability in the US. The SA courts have not yet had the opportunity to define the term causes to do. Thus, it will now be proposed how SA should interpret the term if it decides to follow the US approach. If the US approach is favoured the provision of inline linking and framing of copyright protected works made without the consent of the copyright owner should amount as direct infringement when the CTP right is introduced. Normal and deep linking may be addressed under the second limb of s23(1). The following principles should be applied if the US approach is to be followed:

- (a) The act of inline linking and framing of copyright protected works without the consent should be capable of amounting as an act of communication to the public.
- (b) Normal and deep linking should be treated under the second limb of s23(1).
- (c) The provision of normal or deep links to copyright protected work should have likely resulted in an act of direct infringement or provided access to a copyright protected work published online without the consent of the copyright owner.
- (d) To satisfy the second limb of s23(1), the defendant's actions should have materially contributed to an act of direct infringement. The act of normal and deep linking to copyright protected works made available without the consent of the copyright owner should amount as acts which materially contributes to an act of direct infringement.
- (e) The defendant should know or have reason to know that his/her act facilitated access to works made available online without the authorisation of the copyright holder.

The above principles also act as a summary of the proposal to refine the US approach to dealing with hyperlinking. Moreover, the element to find infringement under the second limb of s23(1) mirrors the element to find contributory infringement in the US. Knowledge of the defendant may also be presumed based on the nature and characteristics of the link the website leads to. Knowledge to find infringement should be limited to knowledge of the defendant at the time the link was posted. Moreover, if the US or SA courts decide to presume knowledge based on the profit intention of the defendant, it should only relate to profit acquired due to the posting of the

¹¹ s23 supra note 2

hyperlink.

7.6. The ideal approach

If SA had to choose one approach, the author proposes that the US approach should be followed. The US correctly interprets inline linking and framing as potential acts of direct infringement and normal and deep linking is addressed under secondary liability. The EU courts wrongly interprets all forms of hyperlinking under the CTP right. Moreover, secondary liability rules are taken into account when determining if an act of CTP is present.¹² As was argued this has the consequence of creating an overlap between acts of direct and indirect infringement under EU law. If the US approach is adopted there will be no overlap between primary and secondary liability rules. Interestingly, secondary liability rules to find secondary infringement and the rule in *GS Media* are mostly similar.

The South African court has discussed the term hyperlinking in the case of *Moneyweb (pty) Limited v Media 24 Limited and Another*.⁹⁸¹³ Although the case of *Moneyweb* does not relate to whether the act of providing a hyperlink amounts to copyright infringement, an interpretation of the term hyperlink was nonetheless provided. Berger AJ held that hyperlinks informs the user that further information may be accessed at the click of a mouse.¹⁴ As already put forward only deep and normal linking should fit this definition and be treated outside the ambit of direct liability.

As has been noted, the CAB has recently been returned to parliament.¹⁵ Thus, it is currently uncertain as to when the CTP right is going to be introduced in the SACA. Accordingly, inline linking and framing cannot currently amount to an act of direct infringement in SA. Therefore, it will be proposed that SA should deal with all types of hyperlinking under the second limb of s23(1) until the CTP is introduced. The same rules enunciated in the previous section should be followed to satisfy the second part of s23(1). Unfortunately, this is the arguably the only alternative to protect the rights of copyright owners against the dissemination of their work until the CTP right is introduced.

¹² *GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15) 2016 (9) WLUK 124 at para 49.

¹³ *Moneyweb (pty) Limited v Media 24 Limited and Another* 2016 (4) SA 591 (GJ) para 124.

¹⁴ *Ibid.*

¹⁵ Chijioke Okorie 'Long walk to copyright reform: South Africa's Copyright Amendment Bill is back to the National Assembly' available at <https://ipkitten.blogspot.com/2020/06/long-walk-to-copyright-reform-south.html>, accessed on 15 December 2020.

7.7. Conclusion.

The CAB proposed the introduction of the CTP right to most types of work in SA. When and if the CTP right is indeed introduced, SA can regulate the practice of hyperlinking as in the EU or similar to as in the US. It was submitted when copyright infringement should arise if either approach is chosen. It was then stated that if one approach is to be utilised, SA should favor the US approach. The US correctly makes a distinction between the different types of hyperlinking. Inline linking and framing should be a matter of primary infringement while normal and deep linking should be treated under the doctrine of secondary liability. Moreover, SA will not have the issue of implementing secondary liability rules to find acts of direct infringement if the US approach is chosen. Finally, it was argued that while awaiting the introduction of the CTP right to other types of work, SA should address all forms of hyperlinking under the second limb of s23(1). Finding infringement under the second limb of s23(1) should mirror the requirement to find contributory infringement as in the US along with the refinements proposed.

Chapter 8: Conclusion

The final chapter will summarise the main findings of the dissertation. The first case to deal with hyperlinking and the CTP right in the EU was the case of *Nils Svensson and Others v Retriever Sverige AB*.⁹⁹ It was held that for there to be an act of CTP, two elements must be present.¹⁰⁰ Firstly, there should have been an act of communication.¹⁰¹ Secondly, it should have been communicated to a new public.¹⁰² A new public was defined as a public not taken into account when the initial act of communication took place.¹⁰³ The decision in *Svensson* was highly criticised for neglecting the rights of copyright owners as it did not matter whether the copyright protected work was made available online with the consent of the copyright holder.¹⁰⁴ The CTP right was argued to be exhausted as a consequence.¹⁰⁵ The decision was thus in direct conflict with Article 3(3) of 2001/29.¹⁰⁶ The decision to equate the provision of all types of hyperlinks as acts of communication was also met with pessimism as it was described that normal and deep hyperlinks merely provides information about the location of a particular copyright protected work.¹⁰⁷ It was then submitted that normal and deep linking should be dealt outside the ambit of the CTP right. It was explained that only inline linking and framing should have been capable of amounting as acts of CTP as they do more than act as reference guide on the internet.¹⁰⁸

Following *Svensson*, the landmark case of *GS Media BV v Sanoma Media Netherlands BV and Others*¹⁰⁹ introduced new legal rules to ascertain whether the CTP right may be infringed by the provision of hyperlinks. It was held that for there to be an act of CTP, the defendant should know or should have known that the provision of the hyperlinks would lead to copyright protected works

⁹⁹ *Nils Svensson and Others v Retriever Sverige AB* (C-466/12) 2014 (3) CMLR 4.

¹⁰⁰ *Ibid* para 16.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*.

¹⁰³ *Ibid* at para 24.

¹⁰⁴ Bianca Hanuz 'Linking to unauthorized content after the CJEU *GS Media* decision' (2016) 11(6) *JIPLP* at 879.

¹⁰⁵ Justin Koo 'Away we Ziggo: the latest chapter in the EU communication to the public story' (2018) 13(7) *JIPLP* at 546.

¹⁰⁶ Article 3(3) Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of Copyright and related rights in the information Society.

¹⁰⁷ Roosa Tarkiainen, 'Tipping the scale in *GS Media*: a proposal to restore the balance between rightholders and internet users' (2017) 12(6) *JIPLP* at 508

¹⁰⁸ *Ibid*.

¹⁰⁹ *GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15) 2016 (9) WLUK 124.

that were published online without the consent of the copyright owner.¹¹⁰ A presumption of knowledge will arise if the linking was done for profit.¹¹¹ *GS Media* is still the leading authority to decide whether the provision of clickable links to copyright protected work may amount to copyright infringement in the EU.

As was explained, the rights of copyright owners were neglected in the decision of *Svensson* as it did not matter whether a work was made available without the consent of the copyright owner. *GS Media* fills the gap created by *Svensson* as copyright owners whose work were made without consent are now taken into account. However, *GS Media* introduced a myriad of issues pertaining to the CTP right at EU level. It was argued that the addition of a knowledge element to find an act of CTP created uncertainty among EU Member States.¹¹² A presumption of knowledge may arise if the linking was done for profit.¹¹³ However, profit was not defined in the case of *GS Media*. Unfortunately, this omission may have the effect of introducing a chilling effect by potentially restraining internet users from posting hyperlinks.¹¹⁴

The CJEU stated that there will be infringement if the defendant knew or should have known that the link would lead to works illegally published online.¹¹⁵ It was analysed that this approach may be deemed fair and flexible due to its fact specific nature.¹¹⁶ All circumstances of the case may be taken into account.¹¹⁷ The duty of care may be adjusted based on the nature of the defendant.¹¹⁸ However, if the rule is applied strictly, internet users may not have the capacity to rebut the presumption of knowledge.¹¹⁹ There has also been no guidance as to how to rebut the presumption of knowledge. The linker may be required to consistently monitor the legal status of the copyright protected work.¹²⁰ However, this may prove unrealistic as the copyright owner of a work may not be easily identified or the status of the work may change over time.¹²¹ These strict obligations may prove unrealistic, time consuming and expensive for the common internet user.¹²² As was already argued,

¹¹⁰ *Ibid* at 49.

¹¹¹ *Ibid* at 51.

¹¹² Kanchana Kariyawasam, 'To Link or Not to Link: The Use of Hyperlinks and Copyright Infringement' (2019) 31 *I.P.J* at 167.

¹¹³ *GS Media* supra note 11 at 51.

¹¹⁴ Joshua Colby, 'It's the end of the (online) world as we know it? The dangers of hyperlinking' (2017) 28(5) *Ent. L.R* at 161.

¹¹⁵ *GS Media* supra note 11 para 49.

¹¹⁶ Matthias Leistner, 'Closing the book on the hyperlinks: brief outline of the CJEU's case law and proposal for European legislative reform' (2017) 39(6) *E.I.P.R* at 327.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

¹²⁰ Ansgar Ohly, 'The broad concept of "communication to the public" in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?' (2018) 13(8) *JIPLP* at 664.

¹²¹ *Ibid*.

¹²² *Ibid*.

the courts continues to misinterpret the provision of all types of hyperlinks as acts of CTP.¹²³ Thus, for the reasons stated above, it was submitted that the provision of hyperlinks to copyright protected work is currently not appropriately regulated at EU level. The CTP public right was next scrutinised in the cases of *Stichting Brein v Wullems (t/a Filmspelers)*¹²⁴ and *Stichting Brein v Ziggo BV and XS4All Internet BV*.¹²⁵ Unfortunately, these two cases did not address the issues introduced in *GS Media* but further perpetuated them. It was then proposed in Chapter 6 that knowledge should be restricted to knowledge of the defendant at the time the linking was first done and that profit should only relate to profit gained due to the posting of the link. These changes will result in internet users not be subject to a too stringent monitoring obligation. Common online activities which generates crucial profit through advertising may also be safeguarded. These refinements will arguable achieve a better balance between protecting the rights of copyright owners and also safeguarding freedom of dissemination of information on the internet.

In the US, the server rule as per the case of *Perfect 10, Inc v Amazon.com Inc* previously barred the provision all types of hyperlinks as being acts of direct infringement.¹²⁶ The provision of inline links to copyright protected works can now amount to primary infringement as per the recent case of *Goldman v Breitbart News Network, LLC*.¹²⁷ It was put forward that this interpretation should stand for future cases concerning inline linking and framing due to the inconsistencies of the server rule. Moreover, it was argued that inline linking and framing does more than provide reference point on the internet and should therefore be indeed considered as potentially acts of direct infringement. Normal and deep linking on the other hand should continue to be barred from direct infringement and be dealt with under the doctrine of secondary infringement. As was discussed, contributory liability and liability through inducement arguably covers several infringing acts of hyperlinking; thus protection the rights of copyright owners. The only difficulty for copyright owners will be to prove that the provision of hyperlink actually resulted in an act of direct infringement by third parties. Accordingly, it was proposed in Chapter 6 that only a likelihood to cause direct infringement should suffice. Similar to the EU, it was proposed that the knowledge element to find contributory infringement should be limited to knowledge at the time hyperlinking was posting. Moreover, the financial element to find liability by inducement should be related to profit gained due to the posting of the hyperlink.

¹²³ Ibid.

¹²⁴ *Stichting Brein v Wullems (t/a Filmspelers)* (C-527/15) 2017 (3) C.M.L.R 40.

¹²⁵ *Stichting Brein v Ziggo BV and XS4All Internet BV* (Case C-610/15) 2017 E.C.D.R 19.

¹²⁶ *Perfect 10, Inc v Amazon.com Inc*. 508 F.3d 1146 (2007).

¹²⁷ *Goldman v Breitbart News Network, LLC et al.*, No.1:2017cv031444 (S.D.N.Y. 2018)

It was then addressed which approach SA should favor when the CTP will be introduced to most types of work. It was proposed that SA should treat the legal treatment of hyperlinking similar to as the US approach in addition with the refinement proposed. The US correctly makes a distinction between the different forms of hyperlinking. Normal and deep linking only acts as bookmarks on the internet and does not actually make a work available. Thus, this author believes that treating them outside the ambit of the CTP right is the correct approach. Moreover, inline linking and framing should indeed be potentially acts of CTP public as they do more than act as reference guide and bring the copyright protected works to the user. The provision of normal and deep link should be a matter of secondary infringement as in the US and be treated under the second limb of s23(1) of the South African's Copyright Act 98 of 1978. SA will not have the issue of merging secondary liability rules to find act of direct infringement as in the EU. As noted SA has not yet introduced the CTP right to all types of work. Therefore, copyright owners may not rely on direct liability rules to find direct infringement for inline linking and framing of copyright protected works. It was then argued that in the meantime, SA should address hyperlinking cases under the second limb of s23(1) of the South African's Copyright Act 98 of 1978.

Hyperlinks serve as essential tools to communicate and disseminate information on the World Wide Web. As one commentator stated, 'without hyperlinks, the web would be like a library without a catalogue: full of information, but with no sure means of finding it'.³⁰ Thus, limiting the act of hyperlinking may herald a great danger for communication and future innovation. Accordingly, legal rules regulating the practice of hyperlinking should achieve a balance between protecting the rights of copyright owners and the public interest. One of the purposes of this dissertation was to provide an in-depth analysis of copyright law in relation to hyperlinks, particularly at EU level. The dissertation highlighted why the law is in great need of a change. Recent EU decisions have brought great uncertainty and complications to the CTP right. The current state of law regarding hyperlinking greatly favours copyright owners to the detriment of internet users. The other relevance of the dissertation was to provide an effective solution in regulating the practice of hyperlinking for the EU, US and SA. It is this author's optimistic view that the proposal made for each jurisdiction will appropriately strike a better balance between protecting the dissemination of copyright protected works and safeguarding the practice of sharing on the World Wide Web.

³⁰ Matthew Collins *The Law of Defamation on the Internet* 3ed (2010) 98.

Bibliography

Primary Sources

Legislation and Treaties:

South African

1. Copyright Amendment Bill B13-2017.
2. Electronic Communications and Transactions Act 2002.
3. The Copyright Act 98 of 1978.

Foreign:

1. Act on Copyright and Related rights 1965. (Germany)
2. Berne Convention for the Protection of Literary and Artistic Works of the World Intellectual Property Organisation (WIPO) as modified in Paris in 1976.
3. Charter of Fundamental Rights of the European Union 2000. (European Union)
4. Copyright Act of 1976. (United States of America)
5. Digital Millennium Copyright Act 1998. (United States of America)
6. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 in certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. (Directive on electronic commerce) (European Union)
7. Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of Copyright and related rights in the information Society. (European Union)
8. Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. (European Union)
9. The Constitution of the United States of America 1787.
10. The Copyright, Designs and Patents Act 1988. (United Kingdom)
11. World Intellectual Property Organisation Copyright Treaty 1996.
12. World Intellectual Property Organisation Performances and Phonograms treaty 199.

CASES

South African:

1. *Moneyweb (pty) Limited v Media 24 Limited and Another* 2016 (4) SA 591 (GJ).

Foreign:

1. *A&M Records, Inc. v Napster Inc.* 239 F.3d 1004, 1021 (9th Cir. 2001). (United States of America)
2. *American Broadcasting Cos, Inc. V Aero, Inc.* 573 U.S 431 (2014). (United States of America)
3. *Arista Records Inc., et al. MP3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918. (United States of America)
4. *Arista Records LLC v. Lime Group LLC*, 715 F.Supp. 2d (2010). (United States of America)
5. *BestWater International GmbH v Michael Mebes and Stefan Potsch*, (C-348/13) 2014 EUECJ C-348/13_CO. (European Union)
6. *Capitol Records LLC v. Vimeo, LLC* 826 F.3d 78 (2nd Cir. 2016). (United States of America)
7. *EMI Christian Music Grp., Inc. v MP3tunes, LLC* 844 F.3d 79, 92 (2nd Cir. 2016). (United States of America)
8. *EMI Records Ltd and others v British Sky Broadcasting Ltd and Others* 2013 EWCH 379. (United Kingdom)
9. *Flava Works, Inc v Gunter* 689 F.3d 754 (2012). (United States of America)
10. *Football Association Premier League Ltd v British Communications Plc* 2017 EWCH 1082. (United Kingdom)
11. *Gershwin Oubl'g Corp. v. Columbia Artist Mgmt., Inc.*, 443 F.2d (1971). (United States of America)
12. *Goldman v Breitbart News Network, LLC et al.*, No.1:2017cv031444 (S.D.N.Y. 2018).
13. *GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15) 2016 (9) WLUK 124 (European Union)
14. *Intellectual Reserve, Inc. v Utah Lighthouse Ministry* 75 F Supp. 2d 1290, 1249 (1999). (United States of America)
15. *ITV Broadcasting Ltd and Others v TVCatchUp Ltd* 2011 EWHC 2977. (European Union)

16. *MGM Studios, Inc. v Grokster, Ltd* 243 F Supp 2d 1073 (CD Cal 2003). (United States of America)
17. *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171 (10th Cir. 2009). (United States of America)*Landgericht Hamburg* (2016) 310 O 402/16. (Germany)
18. *Mediakabel BV v Commissariaat Voor de Media* (C-89/04) 2005 E.C.R. I-4891. (European Union)
19. *N.F.L v Primetime 24 Joint Venture* 211 F3.d 10 (2nd Cir 2002). (United States of America)
20. *Nils Svensson and Others v Retriever Sverige AB* (C-466/12) 2014 (3) CMLR 4. (European Union)
21. *N.Y. Times Co. v Tasini* 533 U.S 483 (2001). (United States of America)
22. *Pearson Educ., Inc. v Ishayev* 9F. Supp. 3d 328, 339 (2014). (United States of America)
23. *Perfect 10, Inc v Amazon.com Inc.* 508 F3.d 1146 (2007). (United States of America)
24. *Perfect 10, Inc. V Google Inc.* 508 F3.d 1147 (9th Cir. 2007). (United States of America)
25. *Rebecka jonsson v Les Edition de l'Avenir SA* (2016) Attunda District Court FT 11952-15. (Sweden)
26. *Re Aimster Copyright litigation* 334 F.3d 643 (7th Cir 2003). (United States of America)
27. *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (C-306/05) 2007 ECDR 2. (European Union)
28. *Spisova znacka* 33 T 54/2016. (Czech Republic)
29. *Stichting Brein v Wullems (t/a Filmspeler)* (C-527/15) 2017 (3) C.M.L.R 40. (European Union)
30. *Stichting Brein v Ziggo BV and XS4All Internet BV* (C-610/15) 2017 E.C.D.R 19. (European Union)
31. *The Leaders Institute LLC et al v Jackson et al* Civ No 3:14 CV 3572 B (N.D. Tex. 2017). (United States of America)
32. *Ticketmaster Corp. v Tickets.com, Inc.* US Dist Lexis 6483 (CD CA 2003). (United States of America)
33. *Viacom Intern., Inc v Youtube Inc.*, 676 F.3d 19 (2nd Cir. 2012). (United States of America)

Secondary Sources

Books and Journal Articles:

1. A. Leaffer, *Marshall Understanding Copyright Law* 7ed (2019).
2. Angelopoulos, Christina ‘Communication to the public and accessory copyright infringement’ (2017) 76(3) *C.L.J* at 496-499.
3. Angelopoulos, Christina ‘HYPERLINKS AND COPYRIGHT INFRINGEMENT’ (2017) 76(1) *CLJ* at 32-35.
4. Aplin, Tanya *Research Handbook on Intellectual Property and Digital Technologies (Research Handbooks in Intellectual Property)* 1ed (2020).
5. Arezzo, Emanuela ‘Hyperlinks and making available right in the European Union - what future for the Internet after Svensson?’ (2014) 45(5) *IIC* 524-525.
6. Barnard, Catherine & Peers, Steve *European Union Law* 2 ed (2017) 15.
7. Bently, Lionel & Brad, Sherman *Intellectual Property Law* 3ed (2008).
8. Bhat, Ifthikar Hussian ‘Right of Communication to the Public in Digital Environment’ (2013) 2(4) *IJESI* 7.
9. Burgunder, Lee & Barry Floyd ‘The future if Inline Web Designing After Perfect 10’ (2008) 17(1) *Tex. INTELL. PROP. L.J.*
10. C. Staples, Matthew ‘Kelly v Arriba Soft Corp.’ (2003) 18(69) *BERKELEY TECH.L.J* 69-91.
11. Colby, Joshua ‘It's the end of the (online) world as we know it? The dangers of hyperlinking’ (2017) 28(5) *Ent. L.R* 161-166.
12. Collins, Matthew *The Law of Defamation on the Internet* 3ed (2010).
13. Cordell, Neville & Beverley Potts ‘Communication to the public or accessory liability? Is the CJEU using communication to the public to harmonise accessory liability across the EU?’ (2018) 40(5) *E.I.P.R* 289-294.
14. Dean, Owen & Alison Dyer *Dean & Dyer Introduction to Intellectual Property Law* 4ed (2018).
15. Dr. Clark, Birgit & Julia Dickenson ‘Theseus and the Labyrinth? : overview of the "communication to the public" under EU copyright law: after Reha Training and GS Media where are now and where go from here ?’ (2017) 39(5) *E.I.P.R* 265-278.
16. Deveci, Hasan ‘Hyperlinks Citations, Reproducing Original Works’ (2011) 27 *CLSR* 465.
17. Eleni Synodinou, Tatiana ‘Decoding the Kodi box: to link or not to link?’ (2017) 39(12)

E.I.P.R 733-736.

18. Ginsburg, Jane & Luke Budiardjo 'Liability for providing hyperlinks to copyright infringing content: International and Comparative Law Perspectives' (2018) 41(1) *Colum. J.L. & Arts* 153-225.
19. Groom, John & Silverman, Iona Silverman et al 'Still lost in the labyrinth? : CJEU rules in Filmspelers that pre-loading a set-top box with links to a pirate site is a communication to the public' (2017) 39(9) *E.I.P.R* 591-594.
20. Hanuz, Bianca 'Linking to unauthorized content after the CJEU GS Media decision' (2016) 11(6) *JIPLP* 879-881.
21. Hyland, Mark & Anh Le Vu Van, 'Right of "communication to the public": Stichting Brein v Ziggo BV and XS4All Internet BV' 22(4) *Comms. L.*133-135.
22. Kariyawasam, Kanchana 'To Link or Not to Link: The Use of Hyperlinks and Copyright Infringement' (2019) 31 *I.P.J* 157.
23. Koo, Justin 'Away we Ziggo: the latest chapter in the EU communication to the public story' (2018) 13(7) *JIPLP* 542-551.
24. Leistner, Matthias 'Closing the book on the hyperlinks: brief outline of the CJEU's case law and proposal for European legislative reform' (2017) 39(6) *E.I.P.R* 327-333.
25. Leung, Dawn 'What's all the hype about hyperlinking?: Connections in copyright' (2016) 7(1) *IP Brief*.
26. Lim Saw, Cheng 'Linking on the internet and copyright liability: a clarion call for doctrinal clarity and legal certainty' (2018) 49(5) *IIC* 536-564.
27. Ohly Ansgar 'The broad concept of "communication to the public" in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?' (2018) 13(8) *JIPLP* 664-675.
28. P. Hugenholtz, Bernt & Sam C. Van Velze 'Communication to a new public? Three reasons why EU copyright law can do without a "new public"'(2016) 47(7) *IIC* at 797-816.
29. Riby-Smith, Marcus 'South African Copyright Law- the good, the bad and the Copyright Amendment Bill' (2017) 12(3) *JIPLP* at 216-225.
30. Rosati, Eleonora 'The CJEU Pirate Bay Judgement and its impact on the liability of online platforms' (2017) 39(12) *E.I.P.R* 737-748.
31. Sableman, Mark 'Link Law Revisited: Internet Linking Law at Five Years' (2001) 1273(16) *Berkeley Tech. L.J* 1273-1343.
32. Savola Pekka 'EU Copyright Liability for Internet Linking' (2017) 8 *JIPITEC* 139-150.
33. Schellekens, Maurice 'Reframing hyperlinks in copyright' (2016) 38(7) *E.I.P.R* 401-408.
34. Sheinblatt, Julie S. 'The WIPO Copyright Treaty' (1998) 13 *Berkeley Tech. L.J.* 535.

35. Smith, Joel & Heather Newton 'Hyperlinking to material on the internet: the CJEU expands on the circumstances when it may amount to copyright infringement' (2016) 38(12) *E.I.P.R* 768-771.
36. Strowel A. & Hanley V. et al *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* 1 ed (2009).
37. Tarkiainen, Roosa 'Tipping the scale in GS Media: a proposal to restore the balance between rightholders and internet users' (2017) 12(6) *JIPLP* at 502-509.

Websites:

1. Copyright Office, Report On The Making Available Right In The United States 49(2016), available at 'https://www.copyright.gov/docs/making_available/making-available-right.pdf' accessed on 17th March 2020.
2. European Commission 'Questions and Answers on the United Kingdom's withdrawal from the European Union on 31 January 2020' available at https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_104, Accessed on 06 August 2020.
3. Okorie, Chijioke 'Long walk to copyright reform: South Africa's Copyright Amendment Bill is back to the National Assembly' available at <https://ipkitten.blogspot.com/2020/06/long-walk-to-copyright-reform-south.html>, accessed on 15 December 2020.
4. Parliamentary Monitoring Group, 'Copyright Amendment Bill (B13-2017)' available at <https://pmg.org.za/bill/705/> accessed on 18 August 2020.
5. Reynolds, Matt 'What is Article 13? The EU's divisive new copyright plan explained' available at <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban> accessed on 10 December 2020
6. World Intellectual Property Organisation 'What is Intellectual Property' available at <https://www.wipo.int/about-ip/en/>, Accessed on 01 May 2020.
7. World Intellectual Property Organisation 'Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Acts, 1971)' available at <https://www.wipo.int/publications/en/details.jsp?id=3172&plang=HU>, Accessed on 01 January 2020.