

by Lundbeck that the agreements enabled the parties to avoid significant litigation costs were rejected, partly it seems because the agreements made no reference to those costs (at [388]). Although the agreements did not contain an explicit no-challenge clause, the Court was satisfied that, in practice, the level of the payments removed any practical incentive to contest the validity of Lundbeck's patents (at [398], [399]). But this approach is problematic in practice. How large do payments have to be before they amount to a restriction by object? Should the fact that the payments reflected the expected profits of the generics have assumed such importance in the Court's judgment? If payments are calculated by reference to avoided litigation costs, will they be compatible with Article 101 TFEU (an approach that would appear consistent with the majority view in *Actavis* (133 S.Ct. at 2236))? The Court in *Lundbeck* did not provide clear answers to these questions.

The Court of Justice has previously rejected arguments for an expansive interpretation of the restriction by object concept (Case C-67/13 P, *Groupement des cartes bancaires v Commission* EU:C:2014:2204 at [58]). Yet, on one view, that is precisely what the Court has done in *Lundbeck*. An effects-based approach would have required proof of an appreciable restriction of competition, taking account (inter alia) of Lundbeck's market share and the level of competition in the market. The judgment is now under appeal, offering an opportunity for the Court of Justice to provide clarity on some of the difficult questions left unanswered by the General Court.

MARK FRIEND

Address for Correspondence: Allen & Overy LLP, One Bishops Square, London, E1 6AD, UK. Email: mark.friend@allenoverly.com. All views expressed are personal

HYPERLINKS AND COPYRIGHT INFRINGEMENT

DOES the posting of a hyperlink to somebody else's work that has been uploaded onto the Internet infringe their copyright? Although dissenters did exist, most copyright lawyers long assumed that the answer to that question was an obvious "no". In 2014, this nonchalant approach was rejected by the CJEU in *Svensson* (Case C-466/12, EU:C:2014:76) in favour of a more complex analysis. More recently, the CJEU's approach to hyperlinks has been further developed in *GS Media* (Case C-160/15, EU:C:2016:644).

As both judgments make clear, the answer depends on the interpretation of the notion of "communication to the public". This is established as an exclusive right of copyright-holders by Article 3(1) of the Information Society Directive ([2001] OJ L 167/10). As no definition of that right is given in that provision, the CJEU has outlined it in its case law.

According to the Court, the concept of communication to the public requires two cumulative elements: an “act of communication” and a “public” (Case C-607/11, *ITV Broadcasting* EU:C:2013:147, at [21], [31]). With regard to the first, the “indispensable role” played by the user through a “deliberate intervention” (Case C-162/10, *Phonographic Performance (Ireland)* EU:C:2012:141, at [40]) has been held to be relevant: the user must have intervened, in full knowledge of the consequences of her action, to give access to a protected work to persons who would not otherwise have been able to enjoy it (Case C-306/05, *SGAE* EU:C:2006:764, at [42]). With regard to the second, the Court has emphasised that a “public” refers to a group of people of an indeterminate number that is of a certain, not insignificant size (C-135/10, EU:C:2012:140, at [83]–[87]). It is necessary that either this “public” be a “new” one, namely one that was not already taken into account by the copyright holder when she authorised the initial communication to the public of her work (Cases C-403/08 and C-429/08, *FAPL* EU:C:2011:631, at [97]), or that the communication take place through technical means different from those which she employed (Case C-607/11, *ITV Broadcasting* EU:C:2013:147, at [26]–[28]). Finally, whether or not the “communication” is of a profit-making nature should also be taken into account (Cases C-403/08 and C-429/08, *FAPL* EU:C:2011:631, at [204]). Notably, these criteria are not autonomous, but interdependent (Case C-135/10, *SCF* EU:C:2012:140, at [76]–[79]). As the Court has stressed, “they must be applied individually and in the light of their interaction with one another, given that in different specific situations, they may be met to varying degrees” (Case C-135/10, *SCF* EU:C:2012:140, at [76]–[79]). Consequently, an “individual assessment” of the circumstances of each case is necessary (Case C-162/10, *Phonographic Performance (Ireland)* EU:C:2012:141, at [29]).

The CJEU first applied this case law to hyperlinking in *Svensson*. There, it declared that, given that linking affords users direct access to works, it must be considered to constitute an act of communication (at [18]–[20]). Nevertheless, no infringement was found in that case, as the second element of a “public” was missing. Pertinently, the linking in *Svensson* was to content that had been made freely available online with the right-holder’s permission. The Court concluded that, in such cases, the hyperlinker’s communication could not be understood to be to a “new public”, as the public targeted by the right-holder’s initial communication would encompass all Internet users (at [25]–[28]).

The CJEU’s analysis in *Svensson* was controversial and has been heavily criticised. In the opinion it submitted to the CJEU on the case, the European Copyright Society argued that hyperlinking should not be considered an act of communication, because it merely provides information as to the location of content. Hyperlinks were thus more akin to mere citations. A note of caution was also struck by A.G. Wathelet in his later Opinion on *GS*

Media (EU:C:2016:221, at [54]–[60]). The AG relied on the CJEU’s earlier finding that, in order for an act of “communication” to occur, the defendants must have intervened in an “indispensable” way. According to the AG, this was not the case for hyperlinking, as was indicated by the Court’s own conclusion regarding the lack of a “new public” in cases where a work had lawfully been made freely available.

In any case, *Svensson* was confirmed by the CJEU in September 2016 in *GS Media*. While *Svensson* concerned hyperlinks to works that have been made freely available online with the consent of the right-holder, *GS Media* moved on to hyperlinks to works placed online without the right-holder’s consent.

The Court began its analysis by recognising the importance of hyperlinks to the sound operation of the Internet, as well as the importance of the Internet to freedom of expression and information (at [44] and [45]). It observed that, as a general rule, individuals who post links do not know and cannot reasonably know whether or not a work has been published on the Internet with the consent of the copyright holder. As a result, they cannot be said to have “intervened in full knowledge of the consequences of their conduct”, as the case law requires (at [46]–[48]).

In a significant twist, the Court then went on to declare that the situation would be entirely different where the poster knows or ought to know that the hyperlink would provide access to a work illegally placed online (at [49]). That could happen, for example, where the poster had received a notification to that effect. Moreover, when the posting of hyperlinks was undertaken for profit, it could be expected that the poster would carry out the “necessary checks” to ensure that the work was not illegally published on the website to which those hyperlinks led. As a result, a rebuttable presumption of knowledge has been created for profit-seeking hyperlinkers so that, unless they can prove otherwise, it is taken as given that any links they post to infringing material will be unlawful (at [51]). Finally, the Court also declared that such infringing hyperlinkers could not rely on one of the exceptions to copyright recognised by Article 5(3) of the Information Society Directive (at [53]).

What will the likely impact of this new decision be? The judgment sensibly appears to return the issue of hyperlinks to the first element of an act of “communication”: regardless of whether or not a “new public” is reached, it is now established that an infringement will only occur where the relevant act of intervention is done with actual or constructive knowledge. This waters down the controversial aspects of *Svensson*, while also allowing the Court not to stray too far from its own case law. At the same time, the dependence of communication to the public on the defendant’s knowledge has raised eyebrows, copyright infringement traditionally being understood to be a strict liability tort. Also interesting is the apparent insertion of a new judge-made “notice-and-takedown” system for hyperlinks, at least for non-profit-seeking linkers.

The future evolution of this line of reasoning will be interesting to follow. An obvious question is whether the presumption of knowledge for profit-seeking hyperlinkers should also be understood as applying to automatically generated links, such as those included in the lists of results generated by search engines. *GS Media* itself concerned links inserted through active human decision-making. Arguably, therefore, automatic linking is not affected and the judgment is likely, at least for the time being, primarily to affect online publishers. For them, its consequences could be considerable, as they are essentially transformed into the perpetrators of any infringement to which they link.

However, the most important potential implications of the judgment may be those beyond hyperlinking. It is worth asking: is a notification by the right-holder and a refusal by its target to take down now always to be understood as a requirement before any communication to the public can be found to have occurred? It is conceivable that this may be so at least for other indirect violations of that right. If so, curiously, what the CJEU appears to be doing is crafting a European accessory liability regime folded into the rules of primary liability. Arguably, this judicial harmonisation of accessory liability in copyright is not entirely undesirable. Indeed, it targets a real need: apart from hyperlinking, the difficulties surrounding the provisions on host service providers in the Commission's new Proposal for a Directive on Copyright in the Digital Single Market (COM/2016/593 final) are indicative of the problems that the lack of an EU framework for accessory copyright liability has created. Yet, the obvious answer here is not the overexpansion of direct copyright liability, but the creation of a specialised regime directed precisely towards the liability of those who act as accessories to the infringements of others – and a clear distinction between the rules governing each. Hopefully, the Court's otherwise strange refusal to recognise that infringing hyperlinkers may rely on the copyright exceptions normally available to direct infringers, but excluded for accessories, could be an indication that it understands this.

CHRISTINA ANGELOPOULOS

Address for Correspondence: Faculty of Law, University of Cambridge, CB3 9DZ, UK.
Email: cja58@cam.ac.uk