Linking and making available on the internet

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Questions

I. Current law and practice

Preliminary remark

The Belgian copyright law[1] does not contain any specific legal provision regarding linking (neither linking in general, nor certain specific methods of linking).

A number of court decisions have been issued regarding linking, but most decisions pre-date the CJEU *Svensson* judgment.[2] The Belgian Supreme Court (Cour de cassation) has rendered a decision on hyperlinking in 2014,[3] to our knowledge the only recent decision on the matter.

The recent European and Belgian decisions on linking and copyright have been commented and interpreted by Belgian scholars. However, there is no unanimity, as will be detailed here below.

Our study is therefore intended to provide for open options based on the most relevant Belgian court decisions and reflecting the different opinions among the Belgian scholars.

(1) The Code of Economic Law (hereafter "CEL"), Book XI.

(2) Judgment in *Svensson*, C-466/12, ECLI:EU:C:2014:76.

(3) Cass., 24 June 2015, R.G. No. P.15.0194.F, accessible via: http://jure.juridat.just.fgov.be/JuridatSearchCombined/?lang=fr&jur=1, also published in *A&M* 2015, 277, and *JT* 2016, 144, observations by L. Van Reepinghen and C. De Clercq, hereafter "*Bord de l'eau*" decision. The facts are described in the decisions of the first instance and appellate courts (in criminal matters): corr. Bruxelles, 25 April 2013, *A&M* 2015, 308; CA Bruxelles, 13 January 2015, *A&M* 2015, 290.

1) **Does your Group's current law have any statutory provision that provides for protection of an author's making available right, in line with Article 8 of the WCT?**

Yes. Article XI.165, § 1, 4°, CEL provides for such protection:[4]

> "§ 1. *Only the author of a literary and artistic work shall enjoy the right of communicating his work to the public, by any mean whatsoever, including the making available to the public of their works in such a way that these works are accessible to the members of the public from a place and at a time individually chosen by them.*"

2) **If no, does your Group's current law nevertheless protect the making available right or a right analogous or corresponding thereto? If so, how?**

Not applicable.

3) **Under your Group's current law, if:**

   a) **a copyrighted work has been uploaded to a website with the authorization of the copyright holder; and**

   b) **is publicly accessible (i.e. there are no access restrictions), would the act of providing a user-activated hyperlink to the starting page of the website to which the work has been uploaded be considered a "communication" of the copyrighted work?**

The Belgian copyright law does not contain any a specific legal provision on hyperlinking.

Therefore, it is for the judge to decide whether and upon which conditions the act of providing a user-activated link has to be considered "a communication" of the copyrighted work.

At this point there is only one landmark decision in this respect, namely a judgment issued by the Belgian Supreme Court. Hereinafter, reference will be made to this decision as the "*Bord de l'eau*"[5] decision.

However the circumstances of this case were slightly different from those in question 3. More precisely, the case decided by the Supreme Court concerned a situation where a person had been found providing a link on his Facebook profile to an external website he managed, where the work could

(4) Non-literal translation from the French text: "§ 1. (...) *L'auteur d'une œuvre littéraire ou artistique a seul le droit de la communiquer au public par un procédé quelconque, y compris par la mise à disposition du public de manière à ce que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement.* (...)".

(5) This is the name of the publisher of the work at stake, who is to be considered the copyright owner.

be downloaded *without* the author's consent.[6] The Supreme Court is not explicit about the fact that the work had been made available to the public *without* the author's consent on said external website but this is derived from the circumstances as described in the decisions of the first instance and appellate courts (see below, question 4).

The Court ruled that placing a hyperlink allowing the download of a protected work hosted on an external website (the linked website) is a "communication" (and even a "public communication" under the circumstances at hand – see below, question 4).[7]

The Court has not made a clear distinction between two acts (in this case both done by the same person and without the author's consent): (i) the act of making the work available to the general public on the linked-to website (ii) the act of posting a link to that page on a Facebook profile, accessible to the "friends" of the Facebook user.

The outcome of this case may be similar to the ruling in *Svensson*, the Supreme Court has not made any explicit reference to the CJEU's case law, neither has it applied the "new public" criterion. Instead, it has stated that there may be no public communication if the work is "freely accessible on another site".

Legal scholars are divided on the issue of linking.

Some hold the opinion that such a link does constitute an act of communication, depending on the audience of the targeted webpage ("new public").[8]

Others hold the opinion that such a link does not constitute an act of communication,[9] invoking different reasons:

(6) Cass., 24 June 2015, R.G. No. P.15.0194.F (*cf.* footnote 3).

(7) Non-literal translation from French: "*L'établissement d'un lien permettant de télécharger une œuvre protégeable par le droit d'auteur est une communication publique qui ne peut intervenir sans l'accord du titulaire des droits, sauf si cette œuvre est librement accessible sur un autre site*".

(8) L. VAN REEPINGHEN and C. DE CLERCQ, "Les hyperliens sur internet: lorsque l'ubiquité de la toile vient au secours du droit d'auteur", note under Supreme Court, 24 June 2015, *JT* 2016, 146; A. STROWEL, "Établir un hyperlien ne constitue pas une 'communication au public' selon la Cour de justice de l'Union européenne", *A&M* 2014, 3-4, 228-232; A. STROWEL, "La Cour de justice confirme qu'établir un hyperlien ne constitue pas une 'communication au public', mais ne clarifie rien quant aux conditions implicites de son raisonnement. À propos de l'ordonnance *BestWater* et de l'arrêt *C-More Entertainment*", *A&M* 2015, 2, 176-180; A. STROWEL raises many questions, so far unanswered, regarding this criterion of the "new public".

(9) S. DUSOLLIER, "Les hyperliens en droit d'auteur européen: quand tout devient communication", *RDTI* 2014, 57. This is consistent with the *Opinion on The Reference to the CJEU in Case C-466/12* Svensson, European Copyright Society, 2013, accessible via : https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/european-copyright-society-opinion-on-svensson-first-signatoriespaginatedv31.pdf.

(i) Lack of transmission of the copyrighted work through a hyperlink

The actual transmission of the work is considered crucial for a communication, by reference to consideration 23 of the Information Society Directive.[10] The argument is that the placing of a hyperlink does not entail a transmission and should therefore not be considered a communication.

Even if the internet user clicks on such a link, the copyright work will stay on the original webpage, while the hyperlink only provides for the direct link to that webpage.[11]

A mere technical intervention to guarantee or improve the reception of a transmission is not equivalent to an act of communication, neither does a hyperlink.[12] Assimilating hyperlinks to acts of communication would imply that every technical means to facilitate the access to copyright protected works would constitute an act of communication,[13] having as a result that the entire internet would be abounded with acts of communication.[14]

(ii) Availability of alternative sources

Hyperlinks refer to works that are available elsewhere on the internet, a hyperlink is in itself not a *necessary* intervention to make the work accessible to the public (this is done by making the work available on the initial web page).[15]

The link allows the transmission by a third party (on the web page to which the link points), but this is not considered sufficient to constitute a distinct act of communication to the public.

The hyperlink remains intact, even if the work is altered or removed from the page where the hyperlink points to.

(10) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *Official Journal*, L 167, 22 June 2001, P.0010-0019, co 23: "This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts."

(11) S. Dusollier, *op. cit.*, 50-51, referring to the European Copyright Society, Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*, 15 February 2013.

(12) S. Dusollier, *op. cit.*, 52.

(13) S. Dusollier, *op. cit.*, 57.

(14) S. Dusollier, *op. cit.*, 52.

(15) S. Dusollier, *op. cit.*, 51.

(iii) Hyperlinks are electronic footnotes

Hyperlinks are "electronic footnotes", a "location tool": they only refer to another internet source which can be accessed by clicking on the link. The only function of such a footnote is to provide source information.[16]

Several of these arguments can be found in the opinion of Advocate General Wathelet in the *GS Media* case. He put forward that "hyperlinks which, even directly, lead to copyright protected works do not 'make these available' to the public where these are already freely accessible on another website" and as a result only serve to facilitate their discovery. The actual act of "making available" is the action of the person who effects the initial communication.[17] More generally, the Advocate General considers that hyperlinking to a work freely available on another website cannot be qualified as an act of communication to the public, since the hyperlink is not indispensable to the making available to the public of the work.[18] Any other interpretation of the notion of "communication to the public" would considerably impede the functioning of the internet and would impair the development of the information society.[19]

4) If yes, would such an act be considered as communication "to the public"?

In the "*Bord de l'eau*" case, the Belgian Supreme Court has issued a decision on the sharing of a hyperlink on a page of a Facebook "wall" (thus a page that is not accessible to the public at large, but only accessible to a "private" group).[20]

The Court rejected the argument made by the defendant (link provider) that the message was only shared with a limited circle of friends (and therefore not a "public"). It was considered that, where a person posts a message containing a hyperlink to the entire text of a book (hosted on an external website owned by the same person) on a "Facebook wall", the full content of the book is made accessible to a multitude of internet users (beyond the circle "friends"). Admittedly, in this case, the accessibility of the link was limited to a group of friends. However, it has been decided that said friends could transmit it to other persons, so that ultimately the content of the book linked-to could be potentially disseminated among multiple internet users.

(16) R. De Corte, "Skynet veroordeeld voor hyperlinks", *de Juristenkrant* 1999, 1.

(17) Opinion of Advocate General M. Wathelet in *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*, Case C-160/15, ECLI:EU:C:2016:221, § 54.

(18) Opinion of the Advocate General in *GS Media*, ECLI:EU:C:2016:221, § 60.

(19) Opinion of the Advocate General in *GS Media*, ECLI:EU:C:2016:221, § 77.

(20) See above. The decision was issued in a criminal case.

Unfortunately, the Court does not distinguish clearly between the initial (unauthorized) making available of the work on the defendant's own external website and the sharing of the link to that website in the defendant's Facebook message. It concludes however that the posting of a hyperlink allowing "a large community of internet users" to download the protected work is a "public communication" for which the author's consent is required, "unless the work is freely accessible on another website".[21]

Admittedly, the Supreme Court indicates that the posting of a hyperlink is *not* a public communication when the work is "freely accessible on another website", but it does not clarify this reservation. Although the judgments of the CJEU are not mentioned, it can be presumed that the Belgian judge refers here to the *Svensson* and *BestWater* rulings. It could be deduced that, in line with said judgments, the Belgian Court considers that there is no communication to the public when the work has been made accessible to the community of the internet users at large, in an unrestricted manner. Moreover, despite the fact that it is not explicit, the decision of the Belgian Supreme Court seems to imply that the work is *not* freely accessible on the website of the publisher, i.e. *with the authorization* of the copyright owner. Conversely, it seems to suggest that the mere circumstance that the work is accessible to the community of the internet users at large on the external website of the link provider (*without the authorization* of the copyright owner) is insufficient to conclude that there is no communication to the public. Unfortunately, the Court leaves room for speculation where it fails to be precise on what constitutes "free access" (with or without the author's consent? With or without technical restrictions?) and where the legitimate access (with the author's consent, without technical restrictions) on some other website held by a third party could constitute such "freely accessible site".

In this decision, the Belgian Supreme Court did not apply the "new public" criterion established by the CJEU in *Svensson* and *BestWater*.

In scholarly literature, it is observed that according to the case law of the CJEU, the existence of a distinct act of communication to the public largely depends on the way the copyright protected work has been made available on the original website:[22] the public envisaged by the hyperlink must be compared to the public envisaged by the right holders at the moment of the first communication on the internet.

(21) Cass., 24 June 2015, R.G. No. P.15.0194.F.

(22) L. Van Reepinghen and C. De Clercq, "Les hyperliens sur internet: lorsque l'ubiquité de la toile vient au secours du droit d'auteur", note under Supreme Court, 24 June 2015, *JT* 2016, 146-147.

Some Belgian scholars question this "new public" approach:

- It is questioned whether a copyright work that is freely accessible on the internet should automatically be considered as addressed to all internet users. This entails that such a work cannot be communicated to a "new public" on the internet. It is argued that the right holder should not be deprived of the possibility to further define the targeted public (even when publishing it on a website). These scholars hold the opinion that the internet users should not be considered as the one and only public that remains the same over the years, i.e. every website can target a specific audience different from other websites even without restrictions to the website.[23]
- Under the recent case law of the CJEU (ITV/TV catch up), the new public criterion is only applicable when both the initial and the subsequent transmissions are made through the "same technical means". However, the "same technical means" is not a straightforward criterion in the convergent environment of the internet.[24]
- To the extent that the "new public" criterion will not apply when the access to the communicated copyrighted work is subject to access restrictions through contractual terms and conditions, the question arises whether said restrictions can be opposed and enforced *vis-à-vis* third parties. Moreover, since the (free) accessibility might change over time, it could be questioned whether the link provider can be obliged to monitor the access restrictions, etc.[25]

In this respect we also refer to ALAI's reflection that the "new public" criterion developed in the CJEU's case law construing the exclusive right of communication to the public, is in conflict with international treaties and the Information Society Directive.[26]

5) If yes, does that constitute direct infringement of the making available right, assuming there are no exceptions or limitations to copyright protection that apply?

In the post *Svensson* era, in the "*Bord de l'eau*" case (see above), the Belgian Supreme Court has considered a hyperlink as a communication to the public, qualifying this act as a direct copyright infringement.

(23) L. Van Reepinghen and C. De Clercq, *op. cit.*, 147; S. Dusollier, *op. cit.*, 56.

(24) S. Dusollier, *op. cit.*, 54.

(25) A. Strowel, "La Cour de justice confirme qu'établir un hyperlien ne constitue pas une 'communication au public', mais ne clarifie rien quant aux conditions implicites de son raisonnement. À propos de l'ordonnance *BestWater* et de l'arrêt *C-More Entertainment*", *A&M* 2015, 178.

(26) ALAI's opinion, pp. 2 and following.

Some Belgian scholars are however of the opinion that indirect copyright infringement is more suitable in this respect (see questions 15 and 16).

In the pre *Svensson* and *BestWater* era, there was no consistency in Belgian case law regarding the use of direct or secondary infringement (see below questions 15 and 16).

6) If the answer to question 5 is no, on what basis would infringement be denied (e.g. by application of the theory of an implied license)?

In the "*Bord de l'eau*" case, the Supreme Court has indicated that the providing of a hyperlink allowing the download of a protected work is a communication to the public for which the author's consent is required, "*unless the work is freely accessible on another site*".[27]

The scope of this reservation is unclear. It has been commented here above (question 4).

Other than in this case, the Belgian courts have not yet ruled on this issue.

At this point, the *Svensson* ruling of the CJEU should serve as a guideline. As a consequence, for the time being, the Belgian judges are expected to take the view that a hyperlink shall not be considered an infringement of the communication right if it does not address a "new public" in comparison to the public of the first communication. It remains to be seen whether the future ruling of the CJEU in the *GS Media* case or *Brein* case[28] will cause any change in this respect.

In scholarly literature, the position has been taken that the link to a protected work should not be considered an infringement on the basis of an "implied licence to link" from the right holder who authorised the initial communication of her work on a web page. According to some Belgian scholars[29] the linking would then be justified by an implicit and automatic consent (licence), derived from the mere fact of making a copyrighted work available on the initial website. This theory is however met with other questions, knowing that Belgian Copyright law requires that the evidence of the author's consent be delivered towards the author in writing.[30] On the other hand, if hyperlinking is not considered a communication to the public, the implied consent's validity can be upheld on the basis of the general principles of contract law.[31]

(27) Cass., 24 June 2015, R.G. No. P.15.0194.F.

(28) Request for a preliminary ruling from the Rechtbank Midden-Nederland (Netherlands) lodged on 5 October 2015 – *Stichting Brein v Jack Frederik Wullems*, currently trading under the name "*Filmspeler*", Case C-527/15.

(29) A. STROWEL, "Liaisons dangereuses et bonnes relations sur l'internet. À propos des hyperliens", *A&M* 1998, 301, referring to L. STANGRET, "The legalities of linking on the world wide web", *Communications Law* 1997, 204; M. BUYDENS, *Auteursrechten en internet*, 1998, 85, referrals therein.

(30) Article XI.167, §§ 1-2, CEL.

7) If the relevant act is deep linking as described in paragraph 11 above, would the answers to questions 3 to 6 be different? If yes, how?

Belgian case law so far has not established a distinction between deep linking and hyperlinking.

Commenting on *Svensson, BestWater* and *C More Entertainment*, some Belgian scholars observe that the type of linking technique used is not relevant for the assessment on copyright infringement. By contrast, the way the work is shown on the linking site (and whether it could cause confusion for the visitor) is relevant to examine whether this practice qualifies as unfair competition.[32]

Consequently there is currently no legal basis to distinguish according to the type of linking. The copyright analysis set out in 3) to 6) applies mostly for deep linking, with the exception of the implied license doctrine.[33]

8) If the relevant act is framing as described in paragraph 12 above, would the answers to questions 3 to 6 be different? If yes, how?

Belgian case law so far does not provide for any precedents regarding framing and the difference with hyperlinks.

For the same reasons as set out for deep linking, there is currently no legal basis for distinguishing according to the type of linking.

9) If the relevant act is embedding as described in paragraph 13 above, would the answers to questions 3 to 6 be different? If yes, how?

Belgian case law so far does not provide for any precedents establishing a distinct treatment of embedded links.

For the same reasons as set out for deeplinking and framing, there is currently no legal basis for distinguishing according to the type of linking.

(31) P. MAERTENS, "Het auteursrechtelijk statuut van deep linking", *Jura Falconis* 2002-2003, I, 11, and cited references.

(32) A. STROWEL, "Établir un hyperlien ne constitue pas une 'communication au public' selon la Cour de justice de l'Union européenne", *A&M* 2014, 231; A. STROWEL, "La Cour de justice confirme qu'établir un hyperlien ne constitue pas une 'communication au public', mais ne clarifie rien quant aux conditions implicites de son raisonnement. À propos de l'ordonnance *BestWater* et de l'arrêt *C-More Entertainment*", *A&M* 2015, 178.

(33) Pre *Svensson*, it has been argued that the "implied licence" approach could only justify a regular hyperlink, but not a deeplink. See P. MAERTENS, "Het auteursrechtelijk statuut van deep linking", *Jura Falconis* 2002-2003, I, 15-16, and cited references.

10) If the website displays a statement that prohibits the relevant act of linking or linking generally, would the answers to questions 3 to 9 be different? If yes, how?

So far, there is no Belgian case law dealing with a situation where the linked-to website displays a statement that prohibits the relevant act of linking or linking generally.

In the reasoning above, the answer to the question of whether the act of linking constitutes a communication to the public depends on whether the work linked-to has already been made available to all members of the public.

If the work linked-to has already been made available to all members of the public, the act of linking does not constitute an act of communication to the public. There is no legal basis to hold that the answer would change if the linked-to website displays a statement that prohibits the relevant act of linking or linking generally.

11) If the copyrighted work has been uploaded on the website with the authorization of the copyright holder but the access to the work has been restricted in some way (e.g. a subscription is required in order to access the copyrighted work), would the answers to questions 3 to 9 be different? If yes, how?

Belgian case law so far does not provide for any precedents which specifically address the consequences of access restrictions that are imposed by the author.

However, as a matter of principle, it should be considered that under Belgian law, also in light of *Svensson* and *BestWater*, the author is free to restrict the access to his work through subscriptions, terms and conditions, or technical measures, etc. As a consequence, if a third party provides a link to the work, whereby he allows internet users to circumvent the restrictions in order to access the work, he may be considered committing an act of communication to the public. Moreover, he may be considered committing acts of unlawful circumvention of technological protection measures. Also, he may be found liable for assisting third parties in beaching a contract.

Having said that, many questions may arise in this context including with regard to the opposability of and the enforceability of the restrictions against internet users. Obviously, these questions require a further analysis which exceeds the limits of the present document.

12) If the copyrighted work has been uploaded on the website without the authorization of the copyright holder, would the answers to questions 3 to 9 be different? If yes, how?

Although the "*Bord de l'eau*" judgment of the Belgian Supreme Court is not entirely clear (see above, question 4), it seems to indicate that in a situation where the copyright protected work has been uploaded on the external website *without* the authorization of the author,[34] the act of providing a link to the work constitutes a communication to the public, subject to the consent of the copyright holder.

13) Under your Group's current law, if a copyrighted work is made available on a webpage without any access restrictions, would that work be considered as having been made available to all members of the public (i.e. globally) that have access to the Internet?

No specific analysis on this has been carried out in Belgian case law so far.

Applying the "new public" criterion set out by the CJEU, one might assume that the making available of a copyright protected work without any access restrictions means that the work has been made available to all internet users globally. Some Belgian scholars strongly criticize this however (see above, question 4).

14) If no, why not? For example, would such communication be considered as directed only to certain members of the public (e.g. people living in a certain country or region, or people who speak a certain language)? If yes, under what circumstances?

As indicated under question 4, some Belgian scholars consider that the mere circumstance that a work is made available on the Internet without any access restrictions is insufficient to conclude that it is freely accessible to all the internet users at large.[35]

They seem to imply that every website depending on its content can have a particular target audience. However, they do not provide with specific guidelines that would allow to define the scope of such a particular audience. They probably consider that this definition will happen through an ad hoc assessment taking into account all relevant facts.

(34) In that case, the external website is owned by the link provider himself.
(35) L. VAN REEPINGHEN and C. DE CLERCQ, *op. cit.*, 147; S. DUSOLLIER, *op. cit.*, 56.

15) If under your Group's current law the circumstances described above do not constitute direct infringement, would any of those circumstances support a finding of indirect or secondary copyright infringement?

It has been explained here above that under the "*Bord de l'eau*" case law of the Belgian Supreme Court, the act of providing a link to a work seems to constitute an act of communication to the public, subject to the author's consent, "unless the work is freely accessible on another website". In other words, such an act does constitute in principle a direct infringement.

However, as indicated under question 5, some Belgian scholars criticise the qualification of direct copyright infringement. They are of the opinion that the liability for providing hyperlinks must be assessed in light either of the anti-circumvention legal provisions if the hyperlink enables to circumvent the technological protection measures or of the indirect liability for enabling an unauthorized access to the work.[36]

In the pre *Svensson* and *BestWater* era, Belgian courts have used the concept of secondary infringement (or indirect liability).

It has been considered that providing hyperlinks to works that have been made available to the public without the authorization of the right holder constitutes an act of tort (i.e. secondary infringement) when the link provider knows or ought to know that the making available of the linked works is not authorized.[37] Also worthy of mention is the decision that found that an internet hosting provider is liable for secondary infringement in a situation where it failed to remove diligently hyperlinks to illegal files after being explicitly notified by the right holders that those links referred to illegal content.[38]

There has been no consistency in Belgian case law in using the concept of direct[39] or secondary infringement[40] or sometimes a combination of both.[41]

However, in the post *Svensson* and *BestWater* era, Belgian courts are expected to mostly rely on the concept of direct infringement as applied by the CJEU and Belgian Supreme court already.

(36) A. Strowel, "Le Cour de justice confirme qu'établir un hyperlien ne constitue pas une 'communication au public', mais ne clarifie rien quant aux conditions implicites de son raisonnement à propos de l'ordonnance *BestWater* et de l'arrêt *C-More Entertainment*", *A&M* 2015, 176.
(37) Court of appeal of Antwerp, 26 June 2001.
(38) Court of appeal of Brussels, 13 February 2001.
(39) Court of first instance of Brussels, 14 January 2008.
(40) Court of first instance of Ghent, 27 June 2014; Court of appeal of Antwerp, 26 June 2001; Court of appeal of Brussels, 13 February 2001.
(41) Court of first instance of Brussels, 23 December 2014.

16) If yes, please identify the circumstance(s) in which indirect or secondary copyright infringement would be applicable.

In the pre *Svensson* and *BestWater* era, indirect or secondary infringement has been found applicable in various situations (see above, question 15).

II. Policy considerations and possible improvements to your current law

17) How does your Group's current law strike a balance between a copyright owner's ability (or inability) to control the act of linking by others to their copyrighted work and the interests of the copyright owner, the public and other relevant parties?

Neither Belgian case law or scholars so far provide any specific guidance for such balance.

18) Are there any aspects of your Group's current law that can be improved? For example, by strengthening or reducing the copyright owner's control over linking?

Admittedly, the Belgian Supreme Court recognized that the act of providing a link to a work hosted on an external website is subject to the consent of the copyright holder "unless the work is freely accessible". However, it failed to clarify the key notion of "free accessibility".

Generally speaking, the Belgian case law should be encouraged to give additional guidance about the ability of the right holder to target a specific audience when he authorizes the initial making available to the public on the Internet. In this respect, attention could be paid to the opposability and the enforceability of access restrictions to internet users.

III. Proposals for harmonization

19) Does your Group consider that harmonisation in this area is desirable?

If yes, please respond to the following questions without regard to your Group's current law.

Even if no, please address the following questions to the extent your Group considers your Group's laws could be improved.

Yes. However, the members of the Belgian Group hold different opinions as to the qualification of hyperlinking practices in copyright terms.

20) Should an act of linking (hyperlinking to the starting page, deep linking, framing and/or embedding) to a website containing a copyrighted work be considered a "communication" of the copyrighted work?

There is no consensus in the Belgian Group as to the qualification of "hyperlinking" as an act of "communication". As has been established here above (question 3), some consider that the act of communication requires a "transmission", that the "act of making available" requires more than the mere pointing to a work available on another web page or the providing of a reference (an electronic footnote) to the location of a work on the web.

Other members hold the opinion that these arguments are not convincing and that hyperlinks should be considered as a "communication" of the work.

21) If yes, should such an act of linking be considered a communication "to the public"?

Following the decision of the Belgian Supreme Court, the sharing of a hyperlink on a Facebook wall is considered a communication to a public; hence the adding of a hyperlink on a webpage can most likely be considered a communication to a "public".

However, it has not been clarified how the "new public" criterion should be applied. The Belgian Group sees mainly practical issues in this criterion, such as:

- Determining of the public of the initial communication,
- The delineation between the public of the initial communication and the public of the page on which the hyperlink was added,
- The effective exercise by right holder of the communication right,
- The clearing of the communication right by the administrator of the linking webpage.

22) If yes, should such an act of linking constitute infringement of the making available right, assuming no exceptions or limitations to copyright protection apply?

As discussed here above (question 6), there may be circumstances under which a hyperlink does not amount to an infringement of the right of communication to the public, for instance, where it is found that the hyperlink does not communicate the work to a "new public" (in relation to the public of the initial communication) or where the right holder has implicitly (or explicitly) authorised the hyperlinking.

23) Having regard to your answers to questions 20 to 22, should different forms of linking (hyperlinking to the starting page, deep linking, framing or embedding) be treated equally or differently? If yes (in any case), why?

Various factual elements could be considered relevant in the finding of an infringement of the communication right.

The visitor's experience. A regular hyperlink will lead the visitor of the linking site away from the linking site to the target site. This creates a different user experience than an embedded link or a framed link, where the visitor can access the linked-to work without leaving the linking page.

Monetising opportunities. A hyperlink has a different impact on the exploitation of the linked-to work than embedded or framed linking. A hyperlink is less likely to affect the monetisation opportunities of the linked-to work (on the linked-to page) than an embedded or framed link. Moreover, the linking website may create an opportunity to monetise works hosted on the target website.

Database rights. A reference can be made to the case law of the CJEU on the database rights, where the effect on the income of the primary website is taken into account,[42] which raises the question whether these economic considerations should play a similar role in copyright matters.

24) If yes in any case, in relation to each such case, should the finding be one of direct or indirect infringement? If yes (in either case), why?

The Belgian Group is divided on the matter. Some consider that an unauthorised hyperlink should in some cases be considered a direct infringement of the communication right, while others prefer an indirect infringement in case the link points to a webpage where the work is made available without the author's consent.

25) Do your answers to any of questions 20 to 24 depend on whether the website expressly displays a statement that prohibits the relevant act of linking or linking generally? If yes (in any case), please explain.

No.

26) Do your answers to any of questions 20 to 24 depend on whether the public's access to the work uploaded on the website is limited in any way? If yes (in any case), please explain, including limitations that should be relevant.

In line with the above (question 11), the author should be free to restrict the access to his work, e.g. through subscriptions, terms and conditions, or technical measures.

(42) Judgment in *Innoweb v. Wegener ICT Media BV, Wegener Mediaventions BV*, Case C-202/12, ECLI:EU:C:2013:850.

Such restrictions may have an impact on the answer to the question as whether the act of linking constitutes a communication to the public. Indeed, if a third party provides a link to the work, whereby he allows internet users to circumvent the restrictions in order to access the work, he may be considered committing an act of communication to the public.

Having said that, many questions may arise in this context including with regard to the opposability of and the enforceability of the restrictions against internet users. Obviously, these questions require a further analysis which exceeds the limits of the present document.

27) Do your answers to any of questions 20 to 24 depend on whether the copyrighted work has been uploaded on the website without the authorization of the copyright holder? If yes (in any case), please explain.

No.

The point is not whether the work has been unauthorized for communication on the linked-to website. It is rather whether the work has been authorized for communication to all members of the public on any website whatsoever.

28) If there has already been an authorized communication of the copyrighted work directed to certain members of the public, should a finding of infringement of the making available right depend on a subsequent act of unauthorized communication of the said work to a "new public"? If yes, please propose a suitable definition for a "new public".

There is no unanimity as to the answer to this question.

Some consider that the notion of new public is inappropriate.

Those in favour of this concept do not necessarily promote another definition for the "new public" than "a public that has not been taken into consideration by the author when he authorized the initial communication". This last definition is flexible enough to allow an assessment on a case by case basis, and therefore it should stay as is.

29) If a copyrighted work is made available on a webpage without any access restrictions, should there be any circumstances under which the work should be considered as not having been made available to all members of the public that have access to the Internet? If yes, under what circumstances?

As mentioned here above (question 4) some scholars consider that the lack of access restrictions does not imply in itself that the work has been made available to all internet users.

However, it could be objected that in the absence of access restrictions, potential link providers and the internet users in general are unable to determine whether the copyright owner has limited his authorization to a specific group within the community of the internet users.

Obviously, there is no unanimity as to the question whether in the absence of objective access restrictions other factors could justify that the author's authorization is limited to a portion of the internet public at large.

30) Please comment on any additional issues concerning linking and the making available right you consider relevant to this Study Question.

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Summary

The Belgian copyright law does not contain any specific legal provision regarding linking (neither linking in general, nor specific methods of linking). It is consequently for the Belgian judge to decide whether and on which conditions the act of providing a user-activated link is considered "a communication" of the copyright protected work.

A number of court decisions have been issued regarding linking, but most decisions pre-date the CJEU *Svensson* judgment. The landmark decision regarding linking is a decision of the Belgian Supreme Court of 2014, pursuant to which posting a hyperlink allowing "a large community of internet users" to download the protected work is a "public communication" for which the author's consent is required, "unless the work is freely accessible on another website". Unfortunately, this Supreme Court decision is not very precise and it needs further clarification. Although the judgments of the CJEU are not mentioned, one can presume that the Supreme Court considered the *Svensson* and *BestWater* rulings and the "new public" criterion (which has been criticised by some legal scholars).

Post *Svensson*, the Supreme Court qualifies a hyperlink as a direct copyright infringement (although some Belgian scholars are of the opinion that a qualification as indirect or secondary infringement is more suitable; pre *Svensson* decisions treated linking to unauthorised works as direct and/or indirect infringement).

No court decisions are known on contractual restrictions on hyperlinking or the circumventing of access restrictions.

Belgian case law does not provide for any precedents establishing a distinct treatment of the different linking methods. However, various factual elements could be considered relevant in this respect, e.g. the visitor's experience, monetising opportunities and the analogy with database rights.

Résumé

Le droit d'auteur belge ne comprend aucune disposition légale spécifique concernant la fourniture de liens (ni les liens en général, ni des procédés spécifiques).

Par conséquent, il appartient au juge belge de décider si, et à quelles conditions, la fourniture d'un lien peut être considérée comme une « communication » de l'œuvre protégée.

Un certain nombre de décisions ont été rendues concernant la fourniture de liens, mais la plupart de ces décisions sont antérieures à l'arrêt de la C.J.U.E., *Svensson*. La décision majeure concernant la fourniture de liens est une décision de la Cour de cassation belge, selon laquelle l'insertion d'un hyperlien permettant à « une large communauté d'internautes » de télécharger l'œuvre protégeable est une « communication publique », qui ne peut intervenir sans l'accord du titulaire des droits, sauf si cette œuvre est librement accessible sur un autre site. Malheureusement, cette décision de la Cour de cassation n'est pas très précise et elle nécessite des éclaircissements. Bien que les arrêts de la C.J.U.E. n'y soient pas mentionnés, l'on peut présumer que la Cour de cassation a pris en considération les décisions *Svensson* et *BestWater* et le critère du « nouveau public » (lequel a été critiqué par une partie de la doctrine). Dans l'ère post-*Svensson*, la Cour de cassation qualifie un lien hypertexte comme une violation directe du droit d'auteur (alors que, certains auteurs de doctrine belge estiment que la responsabilité indirecte ou secondaire est plus appropriée; de leur côté, certaines décisions nationales antérieures à *Svensson* ont traité la fourniture de liens tantôt comme une atteinte directe, tantôt comme une atteinte indirecte). Il n'existe pas de jurisprudence connue à propos des limitations contractuelles à la fourniture de liens ou du contournement de restrictions d'accès.

Il n'y pas de précédents dans la jurisprudence belge qui prévoirait un traitement distinct selon le procédé utilisé pour fournir le lien. Cependant, divers éléments pourraient être considérés comme pertinents à cet égard comme l'expérience du visiteur, le but de lucre et l'analogie avec les droits relatifs aux bases de données.