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Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty

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Abstract Prompted by the decisions of the CJEU in *Svensson* and *GS Media*, this paper attempts to unmask the potential copyright liability of an internet user who engages in hyperlinking, framing and/or inline linking from a principled and conceptually coherent perspective. The overall discourse in this paper will be guided by the following two questions:

1. Do these forms of online activity constitute acts of communication (or making available) in the first instance?
2. Should they fall within the purview of Art. 3(1) of the EU Information Society Directive and be subject to potential primary/direct liability (as opposed to accessory/indirect liability)?

It is hoped that this paper will offer a rational view of the ongoing debate (and provide sensible answers to these questions) by drawing on the established jurisprudence of the courts in Europe, the UK and elsewhere, as well as by having regard to the various interpretations of the concept of “publication” in the law of defamation (in particular, Canadian law).

Keywords Communication (or making available) to the public right · Copyright · EU law · Defamation law · Hyperlinks · Framing · Inline linking · Knowledge · Consent · New public · Online infringement

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1 Introduction

With copious amounts of information available, it can be quite daunting for online users to navigate the internet without a reference tool to guide them. Hyperlinks (or hypertext links) assume this very important role within the architecture of the World Wide Web because, from a technical perspective, they are essentially HyperText Markup Language (“HTML”) instructions that direct a user’s web browser to another website (the “target website”), another online document or another section within the same website/document.¹ Internet users are therefore transferred by hyperlinks from one webpage to another almost instantaneously, regardless of where the servers hosting these webpages may be located. Connecting webpages (and the information they contain) through hyperlinks – which clearly reflects the spirit of interconnectedness on the internet and which has now become a widely accepted practice in the online environment – obviously allows users to locate and access the information they desire far more efficiently than would otherwise be possible.² Unfortunately, some of these hyperlinks also lead internet users to target websites on which copyright-infringing content (or other unauthorised material) may be accessed, either through streaming, downloading or both.

It is appropriate, at this juncture, to introduce the various types of links that have collectively shaped the World Wide Web as we know it today. They can broadly be classified into four types: surface (or simple or shallow) links; deep links; framing (or framed links); and inline links (or embedded links).

Surface links simply direct users from the linking website to the homepage of the target website. Deep links, on the other hand, direct users from the linking website to a deeper/inner page within the target website, thereby circumventing the advertising business and revenue of the homepage in some instances. Both surface and deep links require the user to click on the link provided – typically a Uniform Resource Locator (“URL”) address – in order to be taken to the relevant content. These user-activated links will generally be referred to in this paper as hyperlinks.

Whilst the effect of clicking on a surface or deep link is to transport a user from the linking website to the target website (without any reference at all to the former), this is not the case where framing is concerned. As its name suggests, an important feature of framing is that the contents of the target website will be displayed within a frame located on the linking website.³ As such, “the title of the page (above the toolbar) and the address of the linking site (in the address box) are not replaced by the title and address of the [target website]”.⁴ The user who remains on the linking website may

¹ Strowel and Hanley (2009), p. 72. For the avoidance of doubt, this paper is not concerned with links that are themselves infringing in nature – e.g. links that contain a set of words that are collectively protected by copyright (e.g. news headlines in *Shetland Times Ltd v Dr Jonathan Wills* [1997] FSR p. 604) or links that are represented by a clickable “thumbnail” image which is protected by copyright (see, e.g., *Kelly v Arriba Soft Corp* 77 F. Supp.2d p. 1116 (CD Cal 1999)).

² Strowel and Ide (2001), p. 403 at p. 404. See also Collins (2010) at [5.42]: “Hyperlinks are the synapses connecting different parts of the world wide web. Without hyperlinks, the web would be like a library without a catalogue: full of information, but with no sure means of finding it”.

³ Strowel and Ide (2001), p. 403 at pp. 407–408.

⁴ Strowel and Hanley (2009), p. 73.

therefore not realise that he is actually viewing content that comes from another source. Framing is often automatic in nature but can also be user-activated.

Similar to framing, inline links (or embedded links or inline linking) function in the following way: whilst a user is still on the linking website, content from the target website – such as an image/photo or a sound/video clip (having its own URL address where that element is stored in digital form) – is automatically displayed on or embedded within the linking website without the user having to click on any visible link.⁵ Given the automatic character of such links, users are again given the impression that they are viewing an element contained within (and stored on) the linking website, when in actual fact that element emanates from the target website.⁶ Inline links help to save valuable digital space on the server hosting the linking website because these embedded elements are not actually reproduced/stored on that server at any point in time (but only temporarily on the user’s screen).⁷

As is also well known, Art. 3(1) of the EU Information Society Directive (the “InfoSoc Directive”)⁸ implemented Art. 8 of the WIPO Copyright Treaty 1996 in EU law. The WIPO Treaty introduced, for the first time, the broad (umbrella) right of “communication to the public” – which includes a *distinct* right of “making available to the public”.⁹ As the CJEU rightly pointed out in *C More Entertainment AB v Linus Sandberg*,¹⁰ the right of making available to the public “forms part of” the “wider” concept of communication to the public.¹¹ It is also generally accepted that the making available right is intended to encompass interactive *on-demand* transmissions, characterised by the fact that members of the public may access the relevant copyright work(s) from a place and at a time individually chosen by them.¹²

The following two overarching questions will guide the overall discourse in this paper:

1. Do these ubiquitous online practices (hyperlinking in general, framing and inline linking) – which essentially provide users with on-demand access to material located elsewhere on the internet – constitute acts of communication (or making available) to begin with?
2. Should they fall within the purview of Art. 3(1) of the InfoSoc Directive (particularly where the material in question had been made freely available on the internet without the consent of the copyright owner) and be subject to potential primary/direct liability (as opposed to accessory/indirect liability)?

⁵ Strowel and Ide (2001), p. 403 at p. 408.

⁶ *Ibid.* See also *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers* [2004] 2 SCR 427 at [25]; *Kelly v Arriba Soft Corp* 336 F.3d p. 811 at p. 816 (9th Cir. 2003); *Perfect 10 Inc v Google Inc* 508 F.3d p. 1146 at p. 1156 (9th Cir. 2007).

⁷ Strowel and Hanley (2009), p. 72.

⁸ 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 (the “InfoSoc Directive”) ([2001] OJ L 167/10). See also Recital 23.

⁹ For a historical introduction to the “making available” right, see Arezzo (2014) p. 524.

¹⁰ *C More Entertainment AB v Linus Sandberg* (Case C–279/13) EU:C:2015:199.

¹¹ *Ibid.*, at [24].

¹² *Ibid.*, at [26].

Understandably, a ruling against all forms of linking in the copyright context will clearly result in deleterious consequences for the World Wide Web.

According to the European Copyright Society (ECS),¹³ hyperlinking in general should not be considered an act of communication (or making available) to the public under Art. 3(1), but might in certain circumstances amount to (knowingly) facilitating primary acts of copyright infringement (i.e. attracting accessory/indirect, but not primary/direct, liability). The ECS has also argued that framing should not be treated any differently from hyperlinking for copyright purposes.¹⁴

On the other hand, the Executive Committee of the Association Litteraire et Artistique Internationale (ALAI) has taken the view that Art. 3(1) “covers links that enable members of the public to access specific protected material”, but not “links that merely *refer* to a source from which a work may subsequently be accessed”.¹⁵ In essence, deep links, inline links and framing should all infringe, but not surface links.

Turning finally to the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPI), the Executive Committee fairly recently adopted the following Resolutions (amongst others):¹⁶

The act of placing a framed link or an embedded link should constitute a communication to the public, at least when the manner in which the work has been framed or embedded misleads the public into believing that the party engaging in the framing or linking is the source of the work. [Resolution No. 5];

Linking to a copyrighted work which circumvents a technological restriction, in particular but not limited to a technical protection measure, pay wall or a password protection on a website, should attract liability under copyright law. [Resolution No. 8].

Given the slew of views expressed above, quite where the line should be drawn in light of the realities of modern day internet communications and the public interest can no doubt be a matter of intense debate and differing perspectives. In this branch of copyright law, clearly more than one view is possible and, at the end of the day, there is perhaps no single correct answer.

Be that as it may, this paper will attempt to offer a rational view of the ongoing debate (and hopefully provide sensible answers to the questions posed above) by drawing on the established jurisprudence of the courts in Europe, the UK and

¹³ “Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*” (“ECS Opinion”) (15 February 2013). <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/> (accessed 20 November 2017). *See*, in particular, [6]–[7].

¹⁴ *Ibid.*, at [53].

¹⁵ Report and Opinion “on the making available and communication to the public in the internet environment – focus on linking techniques on the internet” (“ALAI Report”) (16 September 2013). <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf> (accessed 20 November 2017). *See*, in particular, page 1 of the “Executive Summary” (emphasis in original).

¹⁶ Resolution on “Linking and making available on the Internet” (“AIPPI Resolution”) (20 September 2016). <http://aippi.org/wp-content/uploads/2016/10/Resolution-on-Linking-and-making-available-on-the-Internet-English.pdf> (accessed 20 November 2017).

elsewhere, as well as by having regard to the various interpretations of the concept of “publication” in the law of defamation (in particular, Canadian law). We begin first with an analysis of CJEU jurisprudence.

2 A Critical Look at Relevant CJEU Jurisprudence

Undoubtedly, any discussion of copyright liability for hyperlinking must begin with the CJEU’s seminal and well-known decision in *Nils Svensson et al. v Retriever Sverige AB* (“*Svensson*”).¹⁷ The main issue in this reference for a preliminary ruling was whether the provision of “clickable links” (deep links in this case) directing internet users to copyright works on the target website amounted to a “communication to the public” within the meaning of Art. 3(1) of the InfoSoc Directive.¹⁸

It should be mentioned at the outset that the analysis undertaken in this paper will focus principally on the first element of the right of communication¹⁹ – namely, whether the hyperlinker, via the act of hyperlinking, had himself engaged in an “act of communication” (leaving aside the other criterion as to whether such communication was “to the public”).²⁰

Reiterating the principle that the right of communication must be “construed broadly”,²¹ the CJEU in *Svensson* appears to have articulated a test for the existence of an “act of communication” in the following terms: the hyperlinker must have provided users of the linking website with “direct access” to copyright works on the target website.²² Alternatively, a work is said to have been communicated if it is “made available to a public in such a way that the persons forming that public *may* access it, irrespective of whether they avail themselves of that opportunity”.²³ If a

¹⁷ *Nils Svensson et al v Retriever Sverige AB* (“*Svensson*”) (Case C-466/12) EU:C:2014:76; [2014] WLR(D) p. 67; [2014] 3 CMLR p. 4; [2014] ECDR p. 9; [2014] Bus LR p. 259; [2015] EMLR p. 5. The detailed facts are set out in the judgment at [8] *et seq.*

¹⁸ *Svensson* at [13].

¹⁹ It is trite law that the concept of “communication to the public” includes two cumulative criteria, namely an “act of communication” of a copyright work and the communication of that work to a “public”: *Svensson* at [16].

²⁰ For further commentary on – and critique of – the “to the public”/“new public” criterion, see Ginsburg (2014); Gothy (2015); Strowel and Ide (2001), p. 403 (especially at pp. 412–415); Hugenholtz and van Velze (2016), p. 797; Karapapa (2017), p. 63; Bently and Sherman (2014), p. 169. One commentator has labelled the “new public” criterion “an (at best) enigmatic concept”: Dinwoodie (2017), p. 12. Additionally, some commentators have suggested that the “implied licence” theory can better explain and justify the “new public” criterion, while others have argued that it may actually be in conflict with international treaties (such as the Berne Convention and the WIPO Copyright Treaty) as well as the InfoSoc Directive.

²¹ *Svensson* at [17].

²² *Svensson* at [18] and [30]. This test has been endorsed (in various forms) in subsequent cases before the CJEU: see *BestWater International GmbH v Michael Mebes et al* (Case C-348/13) EU:C:2014:2315 at [15]; *GS Media BV v Sanoma Media Netherlands BV et al* (“*GS Media*”) (Case C-160/15) EU:C:2016:644 at [43]; *Stichting Brein v Jack Frederik Wullems* (Case C-527/15) EU:C:2017:300 at [37]; *Stichting Brein v Ziggo BV et al* (Case C-610/15) EU:C:2017:456 at [34].

²³ *Svensson* at [19] (emphasis added) – endorsed again, more recently, in *Stichting Brein v Jack Frederik Wullems* (Case C-527/15) EU:C:2017:300 at [36].

hyperlinker satisfies this test (of providing users with direct access or of users themselves being able to obtain access), then arguably there is an act of communication (or making available) on his part for which he may be found primarily/directly liable for copyright infringement (subject of course to such communication being made “to the public”).

At this juncture, it is appropriate to pause and consider whether the test of “access” thus postulated by the CJEU can be criticised for being much too broad and uncertain in scope. As a preliminary matter, it is somewhat surprising for the CJEU to suggest that the hyperlinker, in supplying the relevant hyperlink, had provided internet users with “direct access” to copyright works on the target website. The party who had granted “direct access” to these works in the first instance must surely be the owner of the target website – the person who has absolute autonomy and control over the (unauthorised) works uploaded on his website. Internet users can always obtain their own access to unauthorised material by visiting the target website directly without having to rely on the hyperlink.²⁴ Accordingly, the party who ought to assume primary/direct liability for the unauthorised communication to the public of copyright-protected works must logically be the owner of the target website (i.e. the uploader of unauthorised material), a point to which we shall return in greater detail below.

As to the other formulation of the test (of users being able to *obtain access*), consider the following scenario. Let us assume that A provides a link on his website to B’s website which, in turn, provides a link to unauthorised material on the target website. Who, in this example, has provided internet users with “direct access” to such material? Applying the CJEU’s test of “direct access”, the answer must be B (the primary/direct infringer). But why not A as well – did he not also provide users with “access” of some sort?

More pertinently, is A’s conduct (and indeed intent) any different from B’s? Applying the alternative formulation of the test for the existence of an “act of communication”, is it not true that ultimately, internet users can still *obtain access* to unauthorised material on the target website through the use of *either* hyperlink (which gives access)? Indeed, this must be so regardless of the number of intermediaries there are in the hyperlinking chain because it would otherwise seem absurd for the law of copyright to treat A and B (and C and so on) any differently. However, this line of argument would then lead to the equally absurd consequence that primary/direct copyright liability may well arise in relation to *all* hyperlinkers in the chain, regardless of how far removed any one of them is from the source website. Is this view of copyright law – that the right of communication (or making available) is no more than a pure “access” right – defensible?

Clearly, there are difficulties with the CJEU’s test for the existence of an “act of communication” in both its formulations – i.e. providing users with (direct) access to, or users being given the opportunity to access, unauthorised material. In fact, the “intervention to give access” test has been described to be “much too broad” and “untenable”, because “if communication really is that broad, then lending libraries, video rentals, bookshops (which permit browsing), retailers who have works of

²⁴ See also Strowel and Ide (2001), p. 403 at p. 425.

applied art on display, and even art galleries are involved in communicating to the public”.²⁵ This is also a point to which we shall return in greater detail below.

There is, however, a silver lining in the *Svensson* decision. At paragraph 31 of the judgment, the CJEU opined thus:

where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only, and the link accordingly *constitutes an intervention without which those users would not be able to access the works transmitted*, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders’ authorisation is required for such a communication to the public.²⁶

Although the CJEU was specifically addressing the “new public” criterion in the paragraph cited above,²⁷ the court’s *dicta* might, serendipitously, point us to yet another formulation of the test for an “act of communication” which is far more circumscribed and (in this author’s view) tenable. In other words, instead of framing its arguments and reasoning from the perspective of the “new public” criterion, the CJEU in *Svensson* could have taken the opportunity to clarify that an act of communication (or making available) only occurs when the defendant has intervened in such a manner that users would otherwise not be able to obtain access to unauthorised material on the target website *but for* the defendant’s deliberate intervention (the “but for” test). This, it is submitted, would have been the preferable approach.

How then can we apply the “but for” test in context? One classic example of the application of the “but for” test may be gleaned from the very paragraph cited above.²⁸ Where a given hyperlink does indeed provide “direct access” to unauthorised material owing to its circumvention effect,²⁹ the hyperlinker can be taken to have engaged in an act of communication (or making available) because he has intervened in such a way that online users would otherwise not be able to access such material on the target website *but for* his deliberate intervention.³⁰

As mentioned, this was not how the CJEU in *Svensson* approached the matter. Instead, the Court took the view that “the provision of clickable links [without distinguishing between the various types of links and *quaere* automatically triggered links] to protected works *must be considered to be ‘making available’ and,*

²⁵ Bently and Sherman (2014), pp. 162–163 (citation omitted).

²⁶ Emphasis added.

²⁷ For the avoidance of doubt, the CJEU’s analysis at [31] was concerned with the question whether there had been a communication to a “new public”, rather than whether there had been an “act of communication” in the first instance within the meaning of Art. 3(1) of the InfoSoc Directive.

²⁸ *Svensson* at [31].

²⁹ In allowing users to by-pass technological protection measures put in place by the copyright owner, such as paywalls and other subscription-based services. Cf. Resolution No. 8 of the AIPPI Resolution.

³⁰ Cf. Hugenholtz and van Velze (2016), p. 797 (in particular, the “Conclusion” section).

therefore, an ‘act of communication’, within the meaning of [Art. 3(1)]”.³¹ The conclusion that was ultimately reached, however, was that the provision of deep links by the defendant to works *freely available* on the target website did *not* constitute a communication (or making available) “to the public” because there was no “new public” on the facts of the case.³²

It is therefore clear from the *Svensson* decision that the mere provision of “clickable links” (which circumvent access restrictions applied by the target website *or otherwise*) will amount to an act of communication (or making available) within the meaning of Art. 3(1). However, in a somewhat contrived fashion, the CJEU nevertheless managed to safeguard the architecture and smooth functioning of the internet – by preserving the legitimacy of hyperlinking under certain limited circumstances – through the “new public” criterion articulated in the following terms:³³

in order to be covered by the concept of “communication to the public” ..., a communication ... concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the internet, and therefore by the same technical means, must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public.

In other words, the “new public” criterion will *not* be satisfied if: (1) the hyperlinker has employed the same technical means as those employed by the copyright owner to offer access to the copyright work (e.g. in *Svensson*, the technical means of communication were identical – both involving communications on the internet); and (2) the target audience of the communication effected through the hyperlink is the same as the target audience of the initial communication effected by the copyright owner (i.e. the conditions of access, if any, must be the same for both sets of communication). It was precisely the “new public” criterion (rather, a lack thereof on the facts) that enabled the CJEU in *Svensson* to reject copyright liability on the part of the defendant hyperlinker.

The next CJEU case of relevance to our discussion was one that concerned the act of framing (or “transclusion”). In *BestWater International GmbH v Michael Mebes et al.*,³⁴ the defendant used the framing technique to insert into his webpage a copyright work obtained from the target website which had already been made freely available to the public (specifically, on YouTube). It is fair to suggest that if the CJEU in *Svensson* had taken the view that the act of deep linking (on the facts of that case) did amount to an act of communication (or making available),³⁵ then a

³¹ *Svensson* at [20] (emphasis added).

³² *Svensson* at [25]–[28].

³³ *Svensson* at [24], and endorsed again in *GS Media* at [37].

³⁴ *BestWater International GmbH v Michael Mebes et al* (“*BestWater*”) (Case C-348/13) EU:C:2014:2315. This is an unpublished decision in the German and French languages only.

³⁵ *Svensson* at [20].

fortiori, the act of framing must also constitute the same. We shall, however, return to this proposition in greater detail below.

Ultimately, and unsurprisingly, the court in *BestWater* decided that there was no breach of the right of communication to the public because the copyright work in question (which was freely available on YouTube) was not communicated to a “new public” nor was it communicated using a specific technical method different from that of the original communication.³⁶ It is apposite to point out, at this juncture, that neither in *Svensson* nor in *BestWater* did the CJEU have to consider whether primary/direct liability can arise where the hyperlink in question directs users to a copyright work on the target website (or where the framing website embeds such a work) – though freely accessible by the public – which had been uploaded *without the consent of the copyright owner*.³⁷

The CJEU finally had the opportunity to address this very question in the high-water-mark case of *GS Media BV v Sanoma Media Netherlands BV et al.* (“*GS Media*”).³⁸ This was a reference for a preliminary ruling from the Supreme Court of the Netherlands and involved hyperlinking to a target website which contained material, though freely accessible by the public, that had been made available *without the consent of the copyright owner*.

Advocate General (AG) Melchior Wathelet’s Opinion,³⁹ with which this author respectfully agrees, may be summarised thus:

1. The AG opined that hyperlinking should not fall within the ambit of Art. 3(1) because “hyperlinks which lead, even directly, to protected works do not ‘*make available*’ those works to a public where the works are already freely accessible on another website, but merely facilitate the finding of those works”.⁴⁰ Instead, the AG agreed with the observation made by the Portuguese Republic that “the act which constitutes the actual ‘making available’ was the action by the person who effected the initial communication [i.e. the owner of the target website]”.⁴¹
2. In order to establish an “act of communication”, “the intervention of the ‘hyperlinker’ must be vital or indispensable in order to benefit from or enjoy works”.⁴²
3. In the AG’s view, “the criterion that an intervention must be indispensable can be approached *only in examining the existence of an act of communication*

³⁶ *BestWater* at [15]–[18].

³⁷ *GS Media* at [43]. *Svensson* and *BestWater* appear to have settled the question that there is no breach of the right of communication to the public where the hyperlink leads users to material that is freely available on the target website *with the consent of the copyright owner*: see *GS Media* at [40]–[42].

³⁸ *GS Media* (Case C-160/15) EU:C:2016:644; [2017] 1 CMLR p. 30. For a comment on this decision, see Eleonora Rosati, “*GS Media* and its Implications for the Construction of the Right of Communication to the Public within EU Copyright Architecture” (2017) 54(4) *Common Market Law Review* p. 1221.

³⁹ *GS Media BV v Sanoma Media Netherlands BV et al.* (“*GS Media (Opinion)*”) (Case C-160/15) EU:C:2016:221.

⁴⁰ *GS Media (Opinion)* at [54] (emphasis in original).

⁴¹ *Ibid.*

⁴² *GS Media (Opinion)* at [57]. It is submitted that the AG’s view – of an intervention which “must be vital or indispensable” – accords with the “but for” test proposed by this author earlier (see the text accompanying note 27, above).

[because] [i]t is at that point that there is possibly a ‘making available’ within the meaning of Article 3(1)”.⁴³

The AG finally came to the conclusion that the mere provision of hyperlinks in this case did not result in an “act of communication” within the meaning of Art. 3(1) because the intervention of the hyperlinker was “not indispensable” to the making available of the relevant copyright works to the public.⁴⁴ Further underscoring the AG’s views is the fact that this Opinion was driven largely by policy considerations underlying the proper functioning and the very architecture of the internet, in particular the social benefits of hyperlinking in the overall development of the information society. A conclusion to the contrary would therefore have undermined one of the principal objectives of the InfoSoc Directive.

The CJEU, in its judgment, acknowledged (as did the AG) the “indispensable” role played by the communicator and the “deliberate” nature of his intervention.⁴⁵ The Court then laid down the following test for determining when an “act of communication” occurs – when the defendant intervenes, in full knowledge of the consequences of his action, to provide users with *access* to a copyright work (the “intervention to give access” test); and this is *particularly* the case where, *in the absence of that intervention*, internet users would *not*, in principle, be able to enjoy the copyright work in question.⁴⁶

On one view, the “intervention to give access” test in *GS Media* may be regarded as a plain restatement of the *Svensson* test – i.e. of providing users with (direct) access or of users being given the opportunity to gain access. This interpretation of an “act of communication” has already been criticised earlier in this paper for being much too broad and uncertain in scope. Another perspective of the *GS Media* test is that the CJEU had taken one step further (than in *Svensson*) in providing us with a *specific (albeit non-exhaustive) example* of when an act of communication (or making available) may arise – namely, when the defendant has intervened in such a manner that users would otherwise not be able to obtain access to the copyright work *but for* the defendant’s deliberate intervention. It will be recalled that this particular example supplied by the CJEU in *GS Media* mirrors precisely the “but for” test – proposed by this author above – for determining when an act of communication (or making available) may be established. And although this particular example was also featured in the CJEU’s analysis in *Svensson*,⁴⁷ it was raised solely in the context of discussing the “new public” criterion. Be that as it may, insofar as hyperlinking is concerned, the CJEU in *Svensson* had already decided, categorically, that “the provision of clickable links to protected works *must be considered to be ‘making available’ and, therefore, an ‘act of communication’*”.⁴⁸ Curiously, the CJEU did not cite or comment on this particular finding in its judgment in *GS Media*.

⁴³ *GS Media (Opinion)* at [59] (emphasis added).

⁴⁴ *GS Media (Opinion)* at [60].

⁴⁵ *GS Media* at [35].

⁴⁶ *Ibid.* Curiously, the CJEU in *GS Media* did not cite the *Svensson* decision in this regard, nor address its various formulations of the test of “access”.

⁴⁷ *Svensson* at [31].

⁴⁸ *Svensson* at [20] (emphasis added).

Nevertheless, it is submitted that, on the whole, the CJEU in *GS Media* could still have re-crafted the test for the existence of an “act of communication” by making it more *watertight*. In particular, the Court could have stipulated that the “but for” test must be satisfied on the facts before an act of communication (or making available) can be established. As compared to the “intervention to give access” test (which ought to have been judicially jettisoned), this “but for” approach not only gives full effect to the “indispensable” role played by the communicator, it also accords with objectivity and fairness and, above all, provides greater certainty to all members of the online community who routinely engage in hyperlinking.⁴⁹

The reservations expressed by this author above – as regards the very amorphous and unsatisfactory “intervention to give access” test – could well have played on the minds of the learned judges in *GS Media*, perhaps subconsciously. This is because, instead of relying on the “new public” criterion to safeguard the architecture and smooth functioning of the internet (as did the CJEU in *Svensson*),⁵⁰ the Court in *GS Media* decided to adopt yet another approach (an absolutely novel one at that!) to regulate the potential copyright liability of a defendant hyperlinker.

Where the posting of a hyperlink was carried out *without a profit motive*, the CJEU found it relevant to consider whether the hyperlinker possessed *actual or constructive knowledge* that the hyperlink would direct users to material which had been made freely available on the target website *without* the consent of the copyright owner.⁵¹ On the other hand, where the posting of hyperlinks was carried out *for profit*, a *rebuttable presumption* will arise (so declared the CJEU) that the hyperlinker possessed actual knowledge of the same.⁵² Therefore, if a not-for-profit hyperlinker does indeed possess actual or constructive knowledge and if a for-profit hyperlinker is unable to rebut the presumption of actual knowledge, then primary/direct copyright liability – for the breach of the right of communication to the public – will flow accordingly.

Some personal observations are apposite at this juncture. Curiously, why does the CJEU consider the “profit-making nature” of the activity to be relevant in the overall assessment (or in the raising of a rebuttable presumption) of primary/direct liability for hyperlinking? Bearing in mind that unauthorised hyperlinking may

⁴⁹ Cf. Midelieva (2017), p. 479 at p. 482 and p. 486.

⁵⁰ The various difficulties with using the “new public” criterion (or the affiliated concept of “consent” on the part of the copyright owner) as a control mechanism in the overall determination of copyright liability for hyperlinking were duly acknowledged by the CJEU at [22] and [46] of its judgment in *GS Media*.

⁵¹ *GS Media* at [47]. It has been observed that this knowledge requirement “seems to effectively establish a notice and takedown system under the head of primary liability”: Leistner (2017) p. 327 at p. 329. See also *GS Media* at [53].

⁵² *GS Media* at [51]. It is not immediately apparent why a for-profit hyperlinker should be “expected” to carry out “the necessary checks” on the copyright status of the material to which the hyperlink leads. Is there a general duty imposed on him by the law of copyright to conduct due diligence searches prior to the posting of hyperlinks and if so, what form of checks (and their extent thereof) would be “expected” of the hyperlinker? Further, what does “for profit” (or “pursuit of financial gain”) mean – would this include all operators of commercial websites? Arguably, a vast majority of publicly accessible websites containing hyperlinks can be deemed “for profit” websites. It is a shame that the CJEU did not attempt to clarify the boundaries of this element.

result in the infringement of what is essentially a strict liability tort (namely, a breach of the right of communication to the public), has the CJEU unwittingly conflated primary/direct liability principles with the appropriate factors that a court may consider at the point when the defendant pleads the *fair use/dealing defence* to copyright liability (one of which concerns “the purpose and character of the use/dealing, including whether such use/dealing is of a *commercial nature* or is for non-profit educational purposes”)?⁵³

Further, by introducing the knowledge requirement on the part of the hyperlinker in both for-profit and not-for-profit scenarios, the *GS Media* decision has caused greater confusion and uncertainty in the law as the CJEU appears to have again conflated the distinct concepts of primary/direct liability on the one hand and accessory/indirect liability on the other.⁵⁴ As is conventional wisdom, the breach of a copyright owner’s exclusive right(s) – such as the right of communication to the public – gives rise to a strict liability tort. The state of mind/motives of, and knowledge possessed by, the alleged infringer ought to be of *no relevance* at all in the court’s assessment of primary/direct liability.⁵⁵

If knowledge were indeed a relevant consideration in this regard, would it be tenable (for example) for the owner of the target website to plead non-infringement as well because, in uploading material on his website (without a profit motive), he did *not* possess actual or constructive knowledge that such material had been made freely available by him without the consent of the copyright owner? For the purposes of ascribing liability, can we rationally distinguish the culpability of the uploader of infringing material in this instance from that of the hyperlinker, both of whom have been alleged to have infringed the *same* exclusive right? With respect, the CJEU’s take on the question of knowledge on the part of the defendant hyperlinker will no doubt lead to many other problematic consequences.

For the sake of doctrinal clarity, it will again be explained below that copyright liability for hyperlinking ought to be examined through the lens of *accessory/indirect liability* (or liability which is *derivative* in nature), rather than primary/direct liability which is strict.⁵⁶ This is where it will be incumbent on the trial judge – in the course of determining liability – to inquire into the motives of (and knowledge possessed by) the alleged infringer. It is unfortunate that the *GS Media* decision has given rise to numerous doctrinal challenges, although ironically, all

⁵³ See, e.g., Sec. 107 of the US Copyright Act 1976 (17 USC §107) and Sec. 35(2)(a) of the Singapore Copyright Act 1987 (emphasis added).

⁵⁴ Accessory/indirect liability should be interpreted broadly to include other associated legal concepts, such as contributory liability and authorisation liability. In these areas of the law outside of primary/direct liability, the knowledge possessed by the alleged infringer (or lack thereof) is of utmost relevance in ascertaining liability. For instance, a hyperlinker – in the absence of actual knowledge – may nevertheless be imputed with constructive knowledge of the occurrence of copyright infringement because he ought to have carried out “the necessary checks” to determine whether the target website to which the hyperlink leads was hosting copyright-infringing material.

⁵⁵ See also Clark and Dickenson (2017), p. 265 at p. 269 (“In doing so the CJEU in *GS Media* removes primary copyright infringement – at least within the context of hyperlinking – from the ambit of strict liability, a concept which is not foreseen in the InfoSoc Directive.”).

⁵⁶ For a commentary that argues in favour of a theory of indirect infringement to better deal with hyperlinking scenarios, see Schellekens (2016), p. 401 at pp. 405–407.

these challenges could well have arisen because of the CJEU's own mindfulness in adopting a *quasi* human rights approach to balancing the various competing interests in relation to the practice of hyperlinking on the internet.⁵⁷

Brief mention will now be made of the recent CJEU decision in *Stichting Brein v Ziggo BV et al.* (“Ziggo”).⁵⁸ Although this case did not involve hyperlinking as such, it is nevertheless instructive in illustrating how the right of communication to the public in Art. 3(1) – as presently construed by the CJEU – can be used to regulate not just hyperlinking activity on the internet, but also other forms of online intervention that provide users with unauthorised access to copyright material.

Ziggo was a case that involved the operators of The Pirate Bay (TPB), which made available to users an indexing and file-sharing platform on which large quantities of copyright-infringing material may be located, freely accessed and shared in the context of a peer-to-peer network. The plaintiff copyright foundation sought an order from the Dutch courts to compel the defendant internet access providers to block the domain names and Internet Protocol addresses of TPB so as to prevent the services of these providers from being used to infringe copyright. The principal question that was referred by the Supreme Court of the Netherlands to the CJEU for a preliminary ruling was whether TPB itself had breached the right of communication to the public through the operation of its online file-sharing platform.

From the operational set-up and architecture of the file-sharing system, it was clear that TPB played an *instrumental* role – or, in the words of the CJEU, an “indispensable”⁵⁹ or “essential”⁶⁰ role – in enabling its users to obtain (direct) access to vast amounts of copyright-infringing content. Irrefutably, the operator of TPB had intervened, in full knowledge of the consequences of its action, to provide its users with access to unauthorised material, clearly satisfying the “intervention to give access” test. Applying the stricter “but for” test proposed by this author, it may also be forcefully argued that online users would otherwise not be able to obtain access to these works – or would only be able to do so with immense difficulty – *but for* TPB's deliberate intervention.⁶¹ This is because there is unlikely to be any one source (other than TPB's BitTorrent protocol) to which internet users can turn to obtain access and therefore, from their perspective, the TPB platform does, in a real (“but for”) sense, make available the unauthorised content to them in breach of copyright.⁶²

⁵⁷ See *GS Media* at [31] and [45].

⁵⁸ *Stichting Brein v Ziggo BV et al* (“Ziggo”) (Case C-610/15) EU:C:2017:456.

⁵⁹ *Ziggo* at [26].

⁶⁰ *Ziggo* at [37].

⁶¹ *Ziggo* at [36].

⁶² For an English case that reached a similar outcome, see Arnold J's decision in *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch) (especially at [45]–[46]).

3 Linking on the Internet and Copyright Liability

As mentioned in the Introduction above, an important objective of this paper is to seek rational answers to the following two questions:

1. Do these forms of online activity – hyperlinking in general, framing and inline linking – constitute acts of communication (or making available) in the first instance?
2. Should they fall within the purview of Art. 3(1) of the InfoSoc Directive and be subject to potential primary/direct liability – as opposed to accessory/indirect liability – for the breach of the right of communication (or making available) to the public?

3.1 Hyperlinking in General

Insofar as hyperlinking is concerned, the CJEU in *Svensson*, having articulated the “intervention to give access” test, summarily expressed the view that the mere “provision of clickable links to protected works *must be considered to be ‘making available’ and, therefore, an ‘act of communication’*”.⁶³ Subject to satisfying the “new public” criterion, a hyperlinker under such circumstances would have been found *primarily* liable in copyright for the breach of the right of communication (or making available) to the public. This author respectfully disagrees, as have other commentators.⁶⁴ Crucially, does a hyperlink provide internet users with “direct access”, or the opportunity to gain access, to unauthorised material on the target website?

Clearly, the owner of the target website (on the assumption that he is also the initial uploader of the unauthorised material in question) is in every instance the primary actor, without whose intervention an infringing copy of the copyright work would not have found its way to the portals of the internet. He must therefore be regarded in law as the primary/direct infringer – i.e. the party who *first* provided the online community with direct, on-demand access to that particular infringing copy.⁶⁵

The hyperlinker, however, is at least one step removed from this process. What a hyperlink does, in essence, is to direct users (and facilitate users’ access) to another location on the internet. It is simply a very convenient tool that provides a pathway for users to access information and other online material that have already been made available elsewhere on the internet. A hyperlink merely serves as a *secondary* point of access and provides *indirect* access at best.⁶⁶

⁶³ *Svensson* at [20] (emphasis added).

⁶⁴ See, e.g., Bently and Sherman (2014), pp. 169–170: “we think that the Court of Justice would be wise to revisit its assumption that the creation of a hyperlink is a making available (or communication) of a work at all”.

⁶⁵ Indeed, online users can still obtain their own access to the infringing work in question – independently of the hyperlink – by visiting the target website directly. Cf. also AG Wathelet’s views in *GS Media (Opinion)* at [54]. See, further, *Crookes v Newton* [2011] 3 SCR 269 at [29] and [41].

⁶⁶ Take, for example, the analogy of a library. A particular book (like a work uploaded on the target website) is either available or it is not. Just because the library also provides a catalogue (cf. hyperlink) which makes the book more accessible to a user does not change the fact that the book already exists in

Compelling arguments have been raised that hyperlinks function in a manner akin to the roles played by directional signs,⁶⁷ bibliographic footnotes/citations and library catalogues. For example, the Copyright Board of Canada has opined that hyperlinks “represent an electronic directory of addresses”.⁶⁸ In his “Commentary on Web Architecture”, Sir Tim Berners-Lee (a man widely credited as the inventor of the World Wide Web)⁶⁹ was of the view thus: “The intention in the design of the web was that normal links should simply be references, with no implied meaning”.⁷⁰

It has also been argued that hyperlinks are the electronic equivalent of bibliographic footnotes/citations in a document,⁷¹ which only inform the reader of (but typically assume no responsibility for) the source from which the quotation/authority is taken – i.e. a pure reference tool or “location tool”.⁷² It would indeed be ludicrous to suggest that the author of the document has provided access to (or made available) the source in question just by the insertion of footnotes per se. Logically, it is the reader who must still avail himself of (or gain his own access to) the relevant material, for example by visiting a library or consulting a database (both of which provide access). Similarly, using a hyperlink to access online material is akin to using a library’s catalogue or card index to gain access to specific bibliographic items within the library far more quickly and efficiently.⁷³ Surely, it is the library that provides its users with access and not the catalogue or card index per se.⁷⁴

Footnote 66 continued

the library and is available to all library users. Even if there were no catalogue on hand, that book still exists regardless, although it will be much harder to locate. *See also* the CJEU’s own *dicta* in *GS Media* at [48]. *See, further*, Strowel and Ide (2001), p. 403 at p. 425: “[A]s the work is already available to the entire internet community at the linked site’s web address, we cannot be dealing with a new act of making it available to the public. The link does not extend the work’s audience: surfers who access the work by activating the link can also consult the page directly (as long as they know its URL). Concluding that there is a new communication to the public does not seem justified (and would cause considerable difficulties in terms of copyright management)”.

⁶⁷ *Pearson Educ Inc v Ishayev* 963 F. Supp.2d p. 239 at pp. 250–251 (SDNY 2013).

⁶⁸ *Tariff 22*, Copyright Board of Canada (1999) 1 CPR (4th) 417 (27 October 1999). This case was eventually heard by the Supreme Court of Canada: *see Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers* [2004] 2 SCR 427. *See also Perfect 10 Inc v Google Inc* 508 F.3d p. 1146 at p. 1161 (9th Cir. 2007).

⁶⁹ *See* the World Wide Web Foundation website at <http://webfoundation.org/about/sir-tim-berners-lee/> (accessed 20 November 2017).

⁷⁰ Berners-Lee (1997).

⁷¹ The footnote argument was raised by the Portuguese Republic in its written observations to the CJEU in the *GS Media* case: *see GS Media (Opinion)* at [23]–[24]. *See also Crookes v Newton* (2009) 311 DLR (4th) 647 (British Columbia Court of Appeal) at [89].

⁷² Bently and Sherman (2014), pp. 164 and 170.

⁷³ *See Ticketmaster Corp v Tickets.Com Inc* 54 USPQ2d p. 1344 (CD Cal 2000); *Crookes v Newton* (2009) 311 DLR (4th) 647 (British Columbia Court of Appeal) at [89].

⁷⁴ *Cf.* Eady J’s illuminating *dicta* in *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EWHC 1765 (QB); [2010] 3 All ER p. 548 at [52]: “an analogy may be drawn perhaps with a search carried out in a large conventional library. If a scholar wishes to check for references to his research topic, he may well consult the library catalogue. On doing so, he may find that there are some potentially relevant books in one of the bays and make his way there to see whether he can make use of the content. It is hardly realistic to attribute responsibility for the content of those books to the compiler(s) of the catalogue”.

Consider also the following argument from the perspective of “control”. To what extent is a hyperlinker’s potential liability in copyright implicated when the owner of the target website (the initial uploader and primary actor) decides to remove the infringing work from the internet or to otherwise alter the contents of the target website from non-infringing to copyright-infringing? Typically, a hyperlinker does not possess any control at all over the source material, as to which he is alleged to have made available to the public. Whether the hyperlink does in fact provide access to (and make available) material on the target website depends entirely on the continued availability – and, in some cases, legitimacy – of the source material.⁷⁵ Clearly, it is the owner of the target website who has complete autonomy and editorial control. Under such circumstances, is it still arguable that the hyperlinker ought to assume primary/direct liability (for making available the targeted material) on the basis of an activity that is entirely dependent on contingencies which are beyond his control?

This is perhaps where it may be helpful to clearly distinguish the term “access” from the notion of “making available”. In short, “accessibility” does not necessarily mean “availability” under the InfoSoc Directive. This is because whilst every instance of making available constitutes an act of providing access, it must be borne in mind that not every intervention which purports to provide/facilitate access amounts to an act of making available. This distinction is important in ensuring that the “making available” right is not conveniently labelled a pure “access” right.⁷⁶ It is submitted that this proposition must be correct, particularly when we consider the following argument which flows from our earlier discussion. A hyperlink clearly facilitates access to, but does not always make available, material on the target website in cases where the material to which the hyperlink originally led is now no longer available on the target website or has since changed in form and substance.

For all these reasons, it ought to be clear that the hyperlinker – unlike the owner of the target website – is not the primary actor in his own right and should therefore not be regarded in law as a primary/direct infringer who is in breach of the right of communication (or making available) to the public.

However, this does not mean that the hyperlinker is completely absolved of all liability in every instance. It will be recalled that in the *GS Media* decision, the CJEU had adopted the view that knowledge on the part of the hyperlinker is now a relevant consideration in the overall determination of copyright liability. This particular aspect of the Court’s judgment – in bringing the mental element into the fray when the legal issue at hand is essentially one of strict liability – has already been critiqued above for its lack of doctrinal coherence.

⁷⁵ See, e.g., the *dicta* of the German Federal Court of Justice (*Bundesgerichtshof*) in *Paperboy*, Case I ZR 259/00 [2005] ECDR (7) p. 67 at [42]: “If the web page containing the protected work is deleted after the setting of the hyperlink, the hyperlink misses”. See also the CJEU’s own admission in *GS Media* at [46]: “Moreover, the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it”. See, further, *Crookes v Newton* [2011] 3 SCR 269 at [27]. Crucially, does a hyperlinker (who supplied the link to the target website *prior* to these subsequent developments) have a continuing duty to monitor the legitimacy of the material to which the hyperlink leads or be otherwise subject to potential primary/direct copyright liability?

⁷⁶ Cf. the views expressed in the ECS Opinion at [25]–[26].

Nevertheless, the Court’s novel approach in this regard implicitly suggests that the CJEU was perhaps more comfortable in imposing liability on a hyperlinker only when he is in possession of actual/constructive knowledge that the hyperlink in question will ultimately direct users to unauthorised material on the target website. If this were truly the Court’s intent,⁷⁷ then it is submitted that the better way forward – particularly given the various doctrinal difficulties canvassed above – is for the courts to examine the potential copyright liability of hyperlinkers through the lens of accessory/indirect liability instead.⁷⁸ In other words, a hyperlinker ought to be made liable (if at all) purely on the basis of his role as an *accessory* to the unauthorised acts of the primary infringer (i.e. the owner of the target website).⁷⁹

The accessory/indirect liability approach is preferable for a number of reasons. First, unlike primary/direct liability which is strict, it focuses the inquiry squarely on the hyperlinker’s state of mind and is therefore compatible with the reasoning of the CJEU in *GS Media*. For example, a hyperlinker may well face an action for *authorising* infringement (which is enshrined in English, Canadian, Australian and Singaporean copyright law)⁸⁰ because it has been persuasively argued that liability by authorisation is composed of “a conduct element and a *mental* element”.⁸¹ Although it is true that authorisation liability has generally been regarded in the copyright statutes of many jurisdictions as falling within the ambit of primary liability, it “clearly maps in substance to conventional forms of secondary or joint tortfeasor liability”.⁸²

Second, by taking the accessory/indirect liability approach to examining a hyperlinker’s potential liability in copyright, we can safely avoid the potential drawbacks associated with the “new public” criterion espoused in *Svensson*,⁸³ particularly in circumstances where the copyright owner has since withdrawn his consent to material hosted on the target website which was freely available to the public previously. A hyperlinker – who had posted links to such material *prior to*

⁷⁷ Cf. the sentiments expressed by the CJEU in *GS Media* at [45].

⁷⁸ This author has deliberately refrained from using the expression “secondary liability”, preferring instead “accessory/indirect liability” or liability which is *derivative* in nature. In certain jurisdictions, “secondary liability” may arise where the alleged defendant has commercially exploited infringing copies of copyright material – conduct that is materially different from that undertaken by accessories or indirect infringers.

⁷⁹ For judicial and academic support of this proposition, see, e.g., *TONO et al v Frank Allan Bruvik d/b/a Napster* [2006] 37 IIC p. 120 (Supreme Court of Norway); *Stichting BREIN v Techno Design* [2006] ECDR p. 21 (Amsterdam Court of Appeal); Savola (2014) EIPR p. 279 at p. 288; Hornle (2014), p. 439 at p. 443; Leistner (2017), p. 327 at p. 332; Mideliëva (2017), p. 479 at p. 487; Bently and Sherman (2014), pp. 169–170.

⁸⁰ See Sec. 16(2) of the UK Copyright, Designs and Patents Act 1988; Secs. 3(1) and 27(1) of the Canadian Copyright Act 1985; Sec. 36(1) of the Australian Copyright Act 1968; and Sec. 31(1) of the Singapore Copyright Act 1987.

⁸¹ Arnold and Davies (2017), p. 442 at p. 462 (emphasis added). The authors also assert thus: “It seems plain, however, that there must be a mental element: authorisation could hardly be a doctrine of strict liability” (*ibid.*, at p. 464). See, further, Saw CL and Chik WB, “Revisiting Authorisation Liability in Copyright Law” (2012) 24 Singapore Academy of Law Journal p. 698 (especially at [39] *et seq.*)

⁸² Dinwoodie (2017), Chapter 1, p. 6.

⁸³ Cf. *GS Media* at [22] and [46], as well as *supra* note 20.

the copyright owner's revocation of consent – ought to be able to avoid a finding of accessory/indirect liability where he can establish that he did not know and could not reasonably have known that the relevant material is now available on the internet without the consent of the copyright owner.

Finally, the accessory/indirect liability approach provides far greater certainty and assurance to all hyperlinkers in the online community. In this author's view, it seems highly unjust to saddle them with the added responsibility of having to monitor the legitimacy of the content to which the hyperlink leads, or be otherwise subject to potential primary/direct liability. Conversely, where a hyperlinker has received notification from the copyright owner that consent has since been withdrawn (and a corresponding request to remove the link), he should, quite rightly, be subject to copyright liability if he so chooses to ignore such notification.

3.2 Framing and Inline Linking

We turn our discussion now to other forms of linking on the internet, namely framing and inline linking.⁸⁴ Intuitively, the practical effects of framing and inline linking – which are often automatically triggered – may signify that these online practices (unlike hyperlinking) possibly lead to different legal consequences in copyright law. It will be recalled that in framing, content from the target website is retrieved by a user's web browser and displayed on the linking website itself, thereby giving the impression that the user is viewing content that is contained within (and stored on) the linking website.⁸⁵

On one view, framing and inline linking ought to constitute acts of communication (or making available) under the InfoSoc Directive because these online practices (particularly where the user is not required to click on any visible link) do provide users – much more overtly than does hyperlinking – with automatic and/or more direct access to unauthorised material on the target website.⁸⁶ It may also be argued that the alleged defendant in such cases has somehow endorsed (or taken *responsibility* for) the material drawn from the target website as such material has now formed an integral part of the linking website.⁸⁷ It is also true in such cases that whilst the alleged defendant has no control whatsoever over the material hosted on the target website, he does possess absolute control over whether his own website ought to display such content in the first instance. Accordingly, it may be postulated

⁸⁴ It is beyond the scope of this paper to consider whether framing and inline linking might be objectionable under the laws of unfair competition and passing off, or whether they might otherwise amount to a breach of a copyright owner's moral rights.

⁸⁵ See also *Svensson* at [29].

⁸⁶ Cf. the views expressed by Deschamps J – in the context of the law of defamation in Canada – in *Crookes v Newton* [2011] 3 SCR 269 at [96].

⁸⁷ This was indeed the view taken by the German Federal Court of Justice (*Bundesgerichtshof*) in *Die Realitat I* [2014] GRUR p. 818. See also the views of Sir Tim-Berners Lee in his "Commentary on Web Architecture": "embedded objects, and background sounds and images are by default to be considered part of the document The author of a document has responsibility for the content, even if the images he or she includes are from another web site" (Berners-Lee (1997)).

that framing and inline linking do fall within the natural and ordinary meaning of the expression “making available”.⁸⁸

On the other hand, it is also possible to examine the acts of framing and inline linking in a different light and to come to the view that they are not altogether different from hyperlinking *in substance*. Whether the alleged defendant has created a hyperlink on his website to unauthorised material on the target website or has otherwise provided a frame (or embedded an element) within his own website that displays infringing content from the target website, it is important to remember that:

1. the unauthorised material in question was already in existence on the internet, having been uploaded or initially made available to the public by the owner of the target website (i.e. the primary actor); and
2. from a technical point of view, it is the user’s web browser (or the user himself) that interacts *directly* with the server hosting the unauthorised material on the target website through the means supplied by the alleged defendant – whether it be a hyperlink, framing or inline linking.⁸⁹

Further, insofar as the existence of an “act of communication” is concerned, it cannot be sensibly argued that the alleged defendant in a framing/inline linking scenario had intervened in such a manner that users would otherwise not be able to obtain access to unauthorised material on the target website *but for* the defendant’s deliberate intervention. Much like in hyperlinking, the “but for” test proposed by this author above – in preference to the “intervention to give access” test – would *not* have been satisfied either on these facts. As mentioned, online users can still obtain their own access to (pre-existing) unauthorised material by visiting the target website directly, without having to rely at all on the defendant’s intervention (whether by way of hyperlinking, framing or inline linking).

Finally, as regards the element of “control”, the arguments to be made are also not dissimilar. Whilst it is true that the alleged defendant who intervenes by way of framing or inline linking has complete autonomy in determining the compositional make-up of the linking website, it remains the case that he does not possess any control whatsoever over the contents hosted on the target website (i.e. whether they continue to remain available on the internet and in exactly the same form). As in the

⁸⁸ See Page 1 of the “Executive Summary” of the ALAI Report and Resolution No. 5 of the AIPPI Resolution. See also the Canadian Supreme Court’s *obiter dicta* in *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers* [2004] 2 SCR 427 at [102]: “Of course an Internet Service Provider in Canada can play a number of roles. In addition to its function as an intermediary, it may as well act as a content provider, or create *embedded links* which *automatically* precipitate a telecommunication of copyrighted music from another source. In such cases, copyright liability *may* attach to the added functions” (emphasis added). See, further, Leistner (2017), p. 327 at pp. 329–330.

⁸⁹ In hyperlinking, it is the user’s web browser that takes the user directly to the target website. In framing and inline linking, the unauthorised material in question is electronically transmitted from the target website directly to the user’s computer screen through the user’s web browser. See, further, *Perfect 10 Inc v Google Inc* 508 F.3d p. 1146 at p. 1161 (9th Cir. 2007): “HTML instructions do not themselves cause infringing images to appear on the user’s computer screen. The HTML merely gives the address of the image to the user’s browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user’s computer screen”.

case of hyperlinking, framing and inline linking clearly facilitate a user's access to – but do not always make available – material on the target website.

Therefore, *in substance*, both framing and inline linking – despite the automatic character of such links which differentiate them *in form* from hyperlinking – only function as *secondary* points of access. They are no more than online tools that greatly facilitate/enhance a user's access to pre-existing material which he may otherwise have had difficulty locating on the internet. For providing users with *indirect* access, the alleged defendant in a framing/inline linking scenario ought to assume (if at all) accessory/indirect liability only.⁹⁰ He should therefore not be regarded in law as a primary/direct infringer of copyright.⁹¹

Before leaving the issue of framing and inline linking, brief mention will be made of the principle of technological neutrality. As is well known, upholding technological neutrality is a fundamental tenet in the drafting, interpretation and application of any law regulating electronic communications on the internet. This is particularly pertinent in the context of the present discussion because framing and inline linking on the one hand and hyperlinking on the other do, *in substance*, perform the same function of ultimately connecting users with material found elsewhere on the internet (even if the precise technical means employed to perform this function differ). If it is true that the same regulatory principles should apply regardless of the technology used, then it is submitted that framing and inline linking – on the same basis as how hyperlinking ought to be regulated – should likewise not attract primary/direct copyright liability. Instead, *all* forms of linking on the internet should be examined through the lens of accessory/indirect liability only (save for situations in which the “but for” test is satisfied on the facts).

This argument is also attractive from a policy perspective. If it is the case that only some forms of linking on the internet can potentially give rise to primary/direct liability (e.g. framing) but not others (e.g. surface linking),⁹² then it seems highly unlikely that anyone in the shoes of a link-setter will be willing to assist the online public further by facilitating even greater access to third-party material through the use of deep links, framing and inline linking (surface links being less helpful by nature) and then risk increased exposure to legal liability in the process. Regrettably, internet users will find themselves caught between a rock and a hard place. For our purposes, is this perplexing state of affairs not contrary to the general public interest and detrimental to “the proper functioning and the very architecture of the internet”?⁹³

⁹⁰ See Strowel and Hanley (2009), pp. 83–84: where the authors argue, relying on the *Tariff 22* case before the Copyright Board of Canada ((1999) 1 CPR (4th) 417 (27 October 1999)), that “some form of ‘authorization’ [or ‘endorsement’] is arguably involved in the case of embedded links, which results in the possibility of holding the provider of an automatic link as *indirectly liable* for copyright infringement under Canadian law (and under other laws based on the UK-originated concept of ‘authorization’)” (emphasis added). See, further, the decision of the US Court of Appeals for the 9th Circuit in *Perfect 10 Inc v Google Inc* 508 F.3d p. 1146 at p. 1161 (9th Cir. 2007).

⁹¹ This view is consistent with the position adopted in the ECS Opinion. See, in particular, [53]: “In principle, we are unable to see why ‘framing’ as it is often called, should be treated any differently for copyright purposes from hyperlinking”.

⁹² Cf., in this regard, the views adopted in the ALAI Report and AIPPI Resolution.

⁹³ Per AG Wathelet in *GS Media (Opinion)* at [78]. Cf. also Midelieva (2017), p. 479 at pp. 485–486.

4 Lessons from Elsewhere

It may be helpful to briefly examine how other jurisdictions deal with the potential copyright liability of online users who engage in hyperlinking, framing and/or inline linking.

In England, for example, the question has arisen in the context of applications for website-blocking orders under Sec. 97A of the UK Copyright, Designs and Patents Act 1988 (which implemented Art. 8(3) of the InfoSoc Directive). On facts akin to inline linking (where an embedded player on the linking website provided internet users with access to the unauthorised streaming of copyright films and TV programmes hosted on third-party websites), Arnold J in the English High Court expressed the view that “the mere provision of a hyperlink is [arguably] not enough to constitute communication to the public (particularly if the hyperlink is not directly to a source of the copyright work)”.⁹⁴ His Lordship further opined that it would arguably make “no difference whether clicking on the links results in framing (i.e. the work being presented within the frame of the operator’s website) or not”.⁹⁵

Ultimately, Arnold J adopted the following test for liability – i.e. whether the alleged infringers had intervened in such a “highly material way” as to make the copyright works in question available to the public.⁹⁶ It was found on the facts that this test had been satisfied.⁹⁷ Even though the alleged infringers did not themselves host or make available the infringing content (but had merely provided users with access to such content hosted elsewhere), they did, however, provide search facilities to enable users to identify their preferred films and/or TV programmes, as well as index, aggregate, reference, moderate and/or otherwise provide editorial oversight for the infringing content.⁹⁸ In short, they were *primary* actors/infringers in their own right. Bearing in mind that the English courts are, at present, required to pay deference to CJEU case law, it is this author’s opinion that Arnold J’s test – where the defendant must have intervened in a “highly material way” – is, in substance, not incompatible with the test set out by the CJEU in *GS Media* for determining when an “act of communication” may arise (and, in particular, with the specific example raised by the Court therein).⁹⁹

More pertinently, even if Arnold J were wrong in his conclusion that the alleged infringers were primarily liable in copyright for the breach of the right of

⁹⁴ *Paramount Home Entertainment International Ltd & Ors v British Sky Broadcasting Ltd & Ors* (“*Paramount v BSKyB*”) [2013] EWHC 3479 (Ch) at [32] and [37]. Cf. *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch) at [125] (per Kitchin J).

⁹⁵ *Paramount v BSKyB* at [32].

⁹⁶ *Ibid.* Similar cases decided by Arnold J include *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch) and *Football Association Premier League Ltd v British Sky Broadcasting Ltd* [2013] EWHC 2058 (Ch).

⁹⁷ *Paramount v BSKyB* at [34].

⁹⁸ *Ibid.*, at [5]. For a similar case, see *Paramount Home Entertainment International Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 937 (Ch) (before Henderson J).

⁹⁹ See *GS Media* at [35] and also the text accompanying *supra* note 46. It will be recalled that the specific example supplied by the CJEU in [35] mirrors the “but for” test proposed by this author above.

communication to the public, his Lordship was nevertheless prepared to hold them liable for authorising infringement as well as on the basis of joint tortfeasorship.

Over in Dublin, the Copyright Review Committee, in its report titled “Modernising Copyright”,¹⁰⁰ came to the view that “links simply convey that something exists; but they do not, by themselves, publish, reproduce or communicate its content”.¹⁰¹ The report, however, goes on to suggest that a hyperlinker may be exposed to copyright liability where “the provider of the link, at the time that he or she provided it, *knew or ought to have been aware* that it connects with an infringing copy, unless the provision of the link is in the public interest”.¹⁰² Although the report stops short of identifying precisely whether such liability is primary/direct or indirect/derivative in nature, this author is of the view, on reading the report as a whole, that the Committee had accessory/indirect liability in mind because of the relevance of the hyperlinker’s knowledge or state of mind.

A similar view has been taken in Australia. In *Cooper v Universal Music Australia Pty Ltd*,¹⁰³ the defendant created and operated the website “mp3s4free.net” which allowed internet users – via hyperlinks – to illegitimately access and download music files for free from third-party websites. After considering all the factors in Sec. 101(1A) of the Australian Copyright Act 1968,¹⁰⁴ the Full Federal Court held that the defendant was liable for *authorising* infringements of copyright. It was clear on the facts that the “mp3s4free.net” website, on which these hyperlinks were found, had been deliberately designed to facilitate unauthorised access by internet users to copyright material located elsewhere. Crucially, the Court in this case did not hold the defendant liable as a primary/direct infringer of copyright but instead found him liable on the basis of authorisation liability (i.e. accessory/indirect liability).

Turning to the United States, a similar trend is discernible. The act of hyperlinking in this jurisdiction does not give rise to claims for primary/direct infringement.¹⁰⁵ Instead, a hyperlinker may be found liable for *contributory* infringement because he is the party “who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another”.¹⁰⁶ Notably, other forms of accessory/indirect liability in the US include vicarious liability and inducement liability.¹⁰⁷

¹⁰⁰ Report of the Copyright Review Committee (2013).

¹⁰¹ *Ibid.*, at p. 53.

¹⁰² *Ibid.* (emphasis added).

¹⁰³ (2006) 237 ALR p. 714; [2006] FCAFC 187 (Full Court of the Federal Court of Australia).

¹⁰⁴ Act No. 63 of 1968 (Cth).

¹⁰⁵ See, e.g., *Ticketmaster Corp v Tickets.Com Inc* 54 USPQ2d p. 1344 (CD Cal. 2000). However, hyperlinking to protected content via the circumvention of technological protection measures (such as encryption) may instead amount to a violation of the DMCA: see 17 USC §1201 and *Universal City Studios Inc v Reimerdes* 111 F Supp.2d p. 294 (SDNY 2000).

¹⁰⁶ *Gershwin Publishing Corp v Columbia Artists Management Inc* 443 F.2d p. 1159 at p. 1162 (2nd Cir. 1971). See also *Intellectual Reserve Inc v Utah Lighthouse Ministry Inc* 75 F Supp.2d p. 1290 (D Utah 1999); *Pearson Educ Inc v Ishayev* 963 F Supp.2d p. 239 (SDNY 2013).

¹⁰⁷ See, e.g., *MGM Studios Inc v Grokster Ltd* 545 US p. 913 (2005).

As regards framing and inline linking specifically, these online practices similarly do not give rise to primary/direct liability – for the breach of a copyright owner’s “display right” pursuant to 17 USC §101 – because American courts take the view that no copy has been made of the copyright work (e.g. an image) and stored on the linking website.¹⁰⁸ As explained by the US Court of Appeals for the Ninth Circuit: “Google [the defendant] may facilitate the user’s access to infringing images. However, such assistance raises only contributory liability issues, and does not constitute direct infringement of the copyright owner’s display rights”.¹⁰⁹

Clearly, a round-up of the foregoing discussion reveals that the weight of judicial opinion generally lies in favour of treating such forms of online activity – hyperlinking, framing and inline linking – as giving rise, in appropriate circumstances, to accessory/indirect liability only.

5 Having Regard to the Law of Defamation

Interestingly, valuable comparisons may be drawn with the concept of “publication” in the law of defamation to which our discussion seemingly digresses at this juncture. An important ingredient of the tort of defamation concerns the *publication* by the defendant of defamatory material relating to the plaintiff to a third party. Generally speaking, publication occurs when a person, intentionally or negligently, takes part in or authorises the communication of defamatory material to a third party.¹¹⁰ In other words, one crucial aspect of publication involves the *making available* of defamatory material by the defendant to a third party.¹¹¹

In England, the common law would likely treat hyperlinkers – whose links lead internet users to defamatory material – as publishers of such material where it can be established that they have “a degree of awareness or at least an assumption of general responsibility” for the material.¹¹² More generally, for the defendant to be held liable as a publisher, there must be “knowing involvement in the process of publication”¹¹³ or he must have “knowingly participated” in the publication of

¹⁰⁸ See, e.g., *Perfect 10 Inc v Google Inc* 508 F.3d p. 1146 (9th Cir. 2007); *Flava Works Inc v Gunter* 689 F.3d p. 754 (7th Cir. 2012).

¹⁰⁹ *Perfect 10 Inc v Google Inc* 508 F.3d p. 1146 at p. 1161 (9th Cir. 2007).

¹¹⁰ *Webb v Bloch* (1928) 41 CLR p. 331 at pp. 363–366 (High Court of Australia).

¹¹¹ In *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR p. 575, Gleeson CJ, McHugh, Gummow and Hayne JJ opined thus (at [26]): “it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which *the publisher makes it available* and a third party has it available for his or her comprehension” (emphasis added). See also Deschamps J’s speech in *Crookes v Newton* [2011] 3 SCR 269 at [55]: in the common law of defamation, “publication has two components: (1) an act that *makes* the defamatory information *available* to a third party in a comprehensible form, and (2) the receipt of the information by a third party in such a way that it is understood” (emphasis added).

¹¹² *Bunt v Tilley* [2006] EWHC 407 (QB); [2006] 3 All ER 336 (QB) at [22] (per Eady J). See also Collins (2014), p. 101. It appears that the common law position in Australia is similar: see *Duffy v Google Inc* [2015] SASC 170 (per Blue J) and *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350 at [29] (per Beech-Jones J).

¹¹³ *Bunt v Tilley* [2006] EWHC 407 (QB); [2006] 3 All ER 336 (QB) at [23].

defamatory material.¹¹⁴ It does not suffice if the defendant “merely plays a passive instrumental role in the process”.¹¹⁵

Be that as it may, it is noteworthy that these common law principles of publication have since been altered by Sec. 10(1) of the UK Defamation Act 2013. According to this provision, in respect of causes of action accruing after 1 January 2014, the English courts do not have jurisdiction to hear and determine defamation actions brought against persons who are not an “author”, “editor” or “publisher” of the statement complained of – as these terms are defined in Sec. 1 of the UK Defamation Act 1996 – “unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher”. For Sec. 10 purposes, a “publisher” means “a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business”.¹¹⁶

Insofar as the concept of “publication” under the current law of defamation in England is concerned, a leading commentator on the subject has expressed the following view in relation to linking on the internet:

The authors of defamatory online content will be treated as the publishers of any additional publications resulting from people following hyperlinks to that content provided by third parties. Internet users who follow ordinary hyperlinks are transported to the original author’s content. That content is then published to them, in the form intended by the original author. ... Properly understood, *ordinary linking cases do not involve the repetition or republication of material*: the link is merely the route by which the internet user comes to visit the content in the first place.¹¹⁷

It was further argued that “[a]lthough the technology is more complicated, the same position is likely to obtain in relation to framed content”.¹¹⁸

Prima facie, anyone who engages in hyperlinking, framing and/or inline linking appears to be shielded from defamation liability under English law at present because it seems rather implausible that a link-setter can ordinarily be said to fall within the statutory definition of a “publisher”. Instead, claimants in the UK must, in the first instance, commence action against the “author”, “editor” or “publisher” of the statement complained of. An English court can no longer hear a defamation claim against a secondary party unless the court is satisfied that it is not reasonably practicable for the claimant to proceed against the primary tortfeasor.

The legal position in Canada as regards tortious liability for hyperlinking to defamatory content has been authoritatively established by the decision of the

¹¹⁴ *Ibid.*, at [36].

¹¹⁵ *Ibid.*, at [23]. See also *Tamiz v Google Inc* [2013] 1 WLR p. 2151; *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2014] EMLR p. 11.

¹¹⁶ See Sec. 10(2) of the UK Defamation Act 2013 and Sec. 1(2) of the UK Defamation Act 1996.

¹¹⁷ Collins (2014), p. 103 (emphasis added).

¹¹⁸ *Ibid.*

Canadian Supreme Court in *Crookes v Newton*.¹¹⁹ In this particular case, it was alleged that one of the articles posted on a website operated by the defendant provided surface and deep links to third-party websites which contained defamatory information about the plaintiff. The plaintiff sued on the basis that two of these hyperlinks provided by the defendant had directed online users to defamatory material about the plaintiff and therefore the defendant should be taken to have published the defamatory information in question. Put simply, the issue before the Court was whether hyperlinking, in and of itself, amounted to “publication” for the purposes of the law of defamation in Canada.¹²⁰

As mentioned, an important feature of the concept of “publication” concerns the *making available* of defamatory information by the defendant to a third party.¹²¹ In the majority judgment delivered by Abella J (with whom Binnie, LeBel, Charron, Rothstein and Cromwell JJ agreed), her Honour expressed it thus: “To succeed in an action for defamation, the plaintiff must prove on a balance of probabilities that the defamatory words were published, that is, that they were ‘*communicated* to at least one person other than the plaintiff’”.¹²²

Framed in this way, it is submitted that the legal issue under consideration in *Crookes* (that of hyperlinking and “publication” in the law of defamation) is not, in substance, dissimilar to the principal issue under consideration in this paper (that of hyperlinking and “making available” in the copyright context).

Pertinently, Abella J was quick to point out the similarities between hyperlinks and references,¹²³ saying that “[b]oth communicate that something exists [and where it exists], but do not, by themselves, communicate its content [to the user]”.¹²⁴ Furthermore, hyperlinks and references are, by nature, content-neutral:

¹¹⁹ *Crookes v Newton* [2011] 3 SCR 269. Although the outcome of the appeal was unanimous amongst all nine Supreme Court justices, six judges adopted the same reasoning and analysis (in the judgment delivered by Abella J), two judges substantially agreed with the reasoning of the majority (see the joint judgment of McLachlin CJ and Fish J), while Deschamps J delivered a sole-authored judgment based on a different set of reasoning and analysis.

¹²⁰ It is important to bear in mind that this judgment did not concern (and therefore did not address the legal implications of) other forms of linking on the internet, such as framing and inline linking: see *Crookes v Newton* [2011] 3 SCR 269 at [43] and [52].

¹²¹ *Ibid.*, at [16] and [55].

¹²² *Ibid.*, at [1] (emphasis added; citation omitted).

¹²³ *Ibid.*, at [27] (“Hyperlinks are, in essence, references”). For a contrary view, see Deschamps J’s judgment at [96]. With respect, however, this author takes issue with Deschamps J’s criticism of the footnote analogy as being overly formalistic in nature and too focused on differences in form/technicalities (rather than substance). The learned judge’s purported distinction between how a footnote operates in the analogue world and how a hyperlink functions in the online environment is, with respect, far too pedantic.

¹²⁴ *Ibid.*, at [30] (and see also [26]). Cf., further, the ECS Opinion at [6] and [40] *et seq.* Notably, courts in the US have also followed this line of reasoning, i.e. a hyperlink (like a mere reference) does not constitute a re-publication of the defamatory material in question: see *Salyer v S Poverty Law Center Inc* 701 F Supp.2d p. 912 at pp. 916–917 (WD Ky 2009); *In re Philadelphia Newspapers LLC* 690 F.3d p. 161 at pp. 173–175 (3rd Cir 2012); *US ex rel Klein v Omeros Corp* 897 F Supp.2d p. 1058 at p. 1074 (WD Wash 2012); *Life Designs Ranch Inc v Michael Sommer*, No 32922-4 (Court of Appeals of the State of Washington, Division III, 12 November 2015).

they express no opinion,¹²⁵ nor do they have any control over the contents to which they refer.¹²⁶ Her Honour also perceptively observed that a hyperlinker's participation "is merely *ancillary* to that of the initial publisher: with or without the [hyperlink], the allegedly defamatory information has already been made available to the public by the initial publisher or publishers' acts".¹²⁷

In the end, Abella J and five of her other colleagues were unwavering in their view that "[m]aking reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content".¹²⁸ Indeed, "[i]f a plaintiff wishes to prevent further publications of the defamatory content, his or her most effective remedy lies with the person who actually created and controls the content".¹²⁹

This author is in complete agreement with the views expressed in Abella J's illuminating judgment. There is, it is submitted, no basis at all on which the law can make a rational distinction between the potential liability of a defendant who supplies hyperlinks to defamatory content and one whose hyperlinks direct users to copyright-infringing material. In both scenarios, and for largely the same reasons, the hyperlinks operate as mere references that simply inform users of the existence of online material located elsewhere on the internet. These "location tools" do not, by themselves, communicate (or make available) the material in question to the end user. For the purposes of defamation law and copyright law, a hyperlinker's intervention in the online environment should be regarded as being purely *ancillary* to that of the initial publisher of defamatory content and the initial uploader of infringing material (on whom primary/direct liability ought to be imposed).

Admittedly, the values enshrined in the Canadian Charter of Rights and Freedoms – in particular, the public's interest in protecting freedom of expression – did underpin Abella J's reasoning and analysis in this case concerning the law of defamation.¹³⁰ Nevertheless, even though the objectives sought to be achieved through a healthy and vibrant IP ecosystem are not identical to those in the Canadian Charter, it is abundantly clear in IP that the law's ultimate objective is to strike the right balance between protecting the intangible, proprietary rights of the individual creator on the one hand and the *public interest in maintaining freedom of information, communication and expression* on the other.¹³¹ It is therefore submitted that the various policy perspectives adopted in Abella J's judgment (and associated legal reasoning) ought to apply with equal force in the copyright context as well.¹³² Accordingly, there is no reason why the law of copyright as regards potential liability for hyperlinking should not also evolve in tandem with current developments in the law of defamation – both in England and Canada.

¹²⁵ Note, however, Abella J's caveat in *Crookes v Newton* [2011] 3 SCR 269 at [40].

¹²⁶ *Ibid.*, at [26].

¹²⁷ *Ibid.*, at [26] (emphasis added).

¹²⁸ *Ibid.*, at [42].

¹²⁹ *Ibid.*, at [41].

¹³⁰ *Ibid.*, at [33].

¹³¹ See, e.g., *GS Media* at [31] and [45].

¹³² For example, see *Crookes v Newton* [2011] 3 SCR 269 at [36].

6 Conclusion

Svensson and *GS Media* were no doubt watershed judgments of the CJEU. Because they expose several doctrinal inconsistencies and consequently the Court's strained reasoning, they have also engendered much academic debate and legal uncertainty.

One commentator has sought to rationalise both decisions by arguing that they were, in effect, valiant attempts at establishing “harmonized norms of liability for facilitation of infringement that result in the *direct liability of the facilitator* for violation of the right of communication to the public”.¹³³ It was also suggested that this movement by the CJEU towards a European harmonisation of the law on accessory/indirect liability is due, in no small part, to the “‘very divergent solutions’ to the doctrine of derivative liability adopted by different EU member states”.¹³⁴

Given this lack of a pan-European framework for accessory/indirect liability, we can now better appreciate why the CJEU, insofar as a hyperlinker's potential liability in copyright is concerned, had to bend over backwards on various occasions in order to fit what is essentially a square peg¹³⁵ into a “hexagonal hole”.¹³⁶ As a consequence and as the discourse in this paper has clearly shown, EU copyright law – particularly in relation to the (harmonised) right of communication to the public – has become further mired in doctrinal chaos. The following examples provide a snapshot of some of the issues that currently plague the law in this area:

1. the unambiguous holding in *Svensson* that the mere “provision of clickable links to protected works *must* be considered to be ‘making available’ and, therefore, an ‘act of communication’”,¹³⁷
2. a broadly defined “intervention to give access” test for determining when an act of communication (or making available) may be established (in light of *Svensson* but not satisfactorily resolved in *GS Media*);
3. the problematic “new public” criterion (perpetuated in *Svensson* and its progeny);
4. a new judicially created “notice and takedown” regime – parked under the head of primary/direct liability – regulating not-for-profit hyperlinking scenarios (because of the relevance of a hyperlinker's state of mind and courtesy of *GS Media*);¹³⁸
5. an unfortunate conflation of copyright theories concerning primary/direct liability on the one hand and accessory/indirect liability on the other (courtesy of *GS Media*).

¹³³ Ginsburg J (2017), p. 7 (emphasis added).

¹³⁴ *Ibid.*

¹³⁵ That is, the imposition of primary/direct liability which is harmonised under the InfoSoc Directive.

¹³⁶ To borrow the analogy from *Crookes v Newton* [2011] 3 SCR 269 at [36]. See also Clark and Dickenson (2017), p. 265 at p. 277: “right holders are forced to try to stretch existing primary liability law to cover circumstances such as these, with the result that the CJEU is in turn required to employ ever more strained reasoning”.

¹³⁷ *Svensson* at [20] (emphasis added).

¹³⁸ See *supra* note 51.

To address some of these legal woes, there are now pressing calls from copyright scholars for legislative intervention and, in particular, legislative reform of Art. 3 of the InfoSoc Directive.¹³⁹

Notably, many jurisdictions have already developed a robust set of laws governing accessory/indirect liability – for example, in the law of copyright, the action for authorising infringement (as established in England, Canada, Australia and Singapore) as well as that for contributory infringement (as established in the US), to name just two. If the EU experience at present is anything to go by and if any lessons at all can be gleaned from how the concept of “publication” has been interpreted (and has indeed evolved) in the law of defamation (particularly in Canada), it is submitted that in all these jurisdictions, the act of linking to unauthorised material on third-party websites should not, as a matter of principle, attract primary/direct copyright liability (save for situations in which the “but for” test is satisfied on the facts).¹⁴⁰ For the sake of doctrinal clarity, and with the ultimate aim in mind of injecting greater certainty into the law and of restoring confidence in all members of the online community, it is hoped that this paper has sounded the clarion call for the law of copyright (in the EU and elsewhere) to decisively treat *all* forms of linking on the internet – on appropriate facts – as giving rise *only* to accessory/indirect liability.

Otherwise, as Abella J has perceptively cautioned, an unthinking and strict application of legal liability rules “would be like trying to fit a square archaic peg into the hexagonal hole of modernity”.¹⁴¹ Given the central role that links play in the present-day context of the internet, “we risk impairing its whole functioning”.¹⁴² Surely, this eventuality must be avoided at all cost.

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¹³⁹ See, e.g., Leistner (2017), p. 327; Schellekens (2016), p. 401 at p. 407; Savola (2014), p. 279 at p. 288.

¹⁴⁰ This does not, however, preclude potential liability (outside the realm of copyright) on the basis of joint tortfeasorship, which is a species of primary liability (*Football Dataco Ltd v Stan James Plc* [2013] EWCA Civ 27 at [100], *per* Sir Robin Jacob). The principles of joint tortfeasorship (or joint liability in tort) were succinctly set out by Lord Toulson in *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10 at [21].

¹⁴¹ *Crookes v Newton* [2011] 3 SCR 269 at [36].

¹⁴² *Ibid.*

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