



COPYRIGHT PROTECTION IN THE DIGITAL ERA: HYPERLINKING AND THE RIGHT OF COMMUNICATION TO THE PUBLIC. THE *GS MEDIA* CASE

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ABSTRACT: How to reconcile the free flow of information on the internet and copyright protection? That is the fundamental issue underlying the preliminary questions referred to the CJEU in the *GS Media* case. After *Svensson* and *BestWater*, this case again offered an opportunity for the Court to clarify how hyperlinks to works protected by a copyright should be treated under the EU copyright law framework. In these previous cases, the Court had already established that the provision of a hyperlink to a website where a work protected by a copyright was freely available with the consent of the copyright holder was not an infringement of EU copyright law. In *GS Media*, the CJEU had to decide whether the posting of a hyperlink to such a work published on a website without the authorisation of the copyright holder was an infringement of EU copyright law, in particular of the right of communication to the public, ensured by Art. 3, para. 1, of the Directive 2001/29, of certain aspects of copyright and related rights in the information society.

KEYWORDS: internal market – intellectual property – Directive 2001/29 – copyright and related rights in the information society – communication to the public – hyperlinking.

I. THE CONCEPT “COMMUNICATION TO THE PUBLIC” AND HYPERLINKING

Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (Directive 2001/29)¹ foresees three exclusive rights for the author of a protected work: a right of reproduction,² a right of communication to the public³ and a right of distribution.⁴ Taking into account the fast-changing technological developments in the digital era, it is not surprising that the CJEU has been confront-

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¹ 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.

² Directive 2001/29, Art. 2, cit.

³ *Ibid.*, Art. 3.

⁴ *Ibid.*, Art. 4.

ed with numerous questions of interpretation of the directive.⁵ This is especially true for the exclusive right of “a communication to the public”, as formulated in Art. 3, para. 1, of the Directive 2001/29, which is also at issue in the *GS Media* case.⁶ In line with Art. 8 of the WIPO Copyright Treaty,⁷ Art. 3, para. 1, of the Directive 2001/29 provides that authors can authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. Although this broadly phrased provision was designed to offer a flexible response to the challenges brought about by new technologies and information tools, the multiple ways in which protected works would find their way to the public could not have been foreseen at the time of the adoption of the directive. One of the controversial issues in this respect is the question whether hyperlinking to websites is “a communication to the public” in the sense of Art. 3, para. 1, of the Directive 2001/29.⁸

According to settled case law of the CJEU, the concept of a “communication to the public” includes two cumulative criteria, namely, an “act of communication” of a protected work and the communication of that work to a “public”.⁹ With regard to the first aspect, it has been established that it covers every transmission or retransmission of a work which uses a specific technical means, including the making available to the public of the works in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity.¹⁰ In the much discussed¹¹

⁵ Court of Justice, judgment of 31 May 2016, case C-117/15, *Reha Training*; Court of Justice, Order of 21 October 2014, case C-348/13, *BestWater*; Court of Justice, judgment of 13 February 2014, case C-466/12, *Svensson*; Court of Justice, judgment of 7 March 2013, case C-607/11, *ITV Broadcasting*; Court of Justice, judgment of 15 March 2012, case C-135/10, *SCF*; Court of Justice, judgment of 15 March 2012, case C-162/10, *Phonographic Performance*; Court of Justice, judgment of 13 October 2011, cases C-431/09 and C-432/09, *Airfield*; Court of Justice, judgment of 4 October 2011, cases C-403/08 and C-429/08, *FAPL*; Court of Justice, judgment of 7 December 2006, case C-306/05, *SGAE*. See also M. LEISTNER, *Europe's Copyright Law Decade. Recent Case Law of the European Court of Justice and Policy Perspectives*, in *Common Market Law Review*, 2014, p. 559 *et seq.*; B. HUGENTHOLTZ, *Copyright in Europe: Twenty Years Ago, Today and What the Future Holds*, in *Fordham Intellectual Property Media & Entertainment Law Journal*, 2013, p. 513 *et seq.*

⁶ Court of Justice, judgment of 8 September 2016, case C-160/15, *GS Media*.

⁷ WIPO Copyright Treaty of 20 December 1996.

⁸ See ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE (ALAI), *Opinion on the criterion “New Public”, developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public*, in ALAI, 17 September 2014, www.alai.org; EUROPEAN COPYRIGHT SOCIETY, *Opinion on the Reference to the CJEU in Case C-466/12 Svensson*, in *University of Cambridge Faculty of Law Legal Studies Research Paper Series*, Paper No. 6/2013, 15 February 2013, ssrn.com; A. TSOUTSANIS, *Why copyright and linking can tango*, in *Journal of Intellectual Property Law & Practice*, 2014, p. 499 *et seq.*; P. HONKASALO, *Links and copyright law*, in *Computer Law & Security Review*, 2011, p. 262 *et seq.*

⁹ *Reha Training*, cit., para. 39; *Svensson*, cit., para.16; *ITV Broadcasting*, cit., para. 21.

¹⁰ *Reha Training*, cit., paras 38-39; *Svensson*, cit., para. 19; *ITV Broadcasting*, cit., para. 24.

¹¹ M. SCHELLEKENS, *Reframing hyperlinks in copyright*, in *European Intellectual Property Review*, 2016, p. 401 *et seq.*; T. HEADDON, *An epilogue to Svensson: the same old new public and the worms that didn't turn*, in

Svensson case, the Court plainly decided that the provision of clickable links to protected works is an act of communication because it amounts to making the works available to a public in the meaning of Art. 3, para. 1, of the Directive 2001/29.¹² With regard to the second aspect, the term “public” refers to an indeterminate number of potential recipients and implies a fairly large number of persons.¹³ Given that clickable links are aimed at all potential users of a website, hyperlinks are considered to fulfil this criterion.¹⁴ Moreover, the protected work must be communicated by a specific technical method different from that of the original communication¹⁵ or must be transmitted to a “new public”, a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public.¹⁶ In the *Svensson* case, the Court decided that by providing clickable links to a protected work freely available on a website, the work was communicated through the same technical means, the internet, and was not transmitted to a “new public”, since the access to the work on the website was not subject to any restrictive measures and all Internet users could therefore have free access to them. Hence, Art. 3, para. 1, of the Directive 2001/29 did not apply and the rights of the copyright holder were not infringed.¹⁷ In *BestWater*, the Court came to the same conclusion with regard to hyperlinks using a framing technique.¹⁸

In *GS Media*, the Court was again confronted with the issue of hyperlinking. The facts of the case were as following. Early October 2011, Sanoma, the publisher of Playboy magazine, commissioned a photographer, Mr C. Hermès, to take pornographic photos of the Dutch media celebrity Ms Dekker, and planned to publish these photos in the December 2011 edition of the magazine. Mr Hermès granted Sanoma authorisation to publish the photos on an exclusive basis and to exercise the rights and powers arising from his copyright. However, at the end of October 2011, the editors of GeenStijl, a popular news website operated by GS Media, received the photos in a message from a person using a pseudonym through a hyperlink that referred to an online data storage

Journal of Intellectual Property Law & Practice, 2014, p. 464 *et seq.*; A. MOIR, R. MONTAGNON, H. NEWTON, *Communication to the public: the CJEU finds linking to material already “freely available” cannot be restricted by copyright owners: Nils Svensson and Others v Retriever Sverige AB (C-466/12)*, in *European Intellectual Property Review*, 2014, p. 400 *et seq.*; E. AREZZO, *Hyperlinks and Making Available Right in the European Union – What Future for the Internet After Svensson?*, in *International Review of Intellectual Property and Competition Law*, 2014, p. 524 *et seq.*; M. BURRI, *Permission to Link. Making Available via Hyperlinks in the European Union after Svensson*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 2014, p. 245 *et seq.*

¹² *Svensson*, cit., paras 19-20.

¹³ *Reha Training*, cit., para. 41; *Svensson*, cit., para. 21; *ITV Broadcasting*, cit., para. 32.

¹⁴ *Svensson*, cit., para. 22.

¹⁵ *ITV Broadcasting*, cit., paras 37-40.

¹⁶ *Reha Training*, cit., para. 45; *Svensson*, cit., para. 24; *SGAE*, cit., paras 40-42.

¹⁷ *Svensson*, cit., paras 26-28.

¹⁸ *BestWater*, cit., paras 17-19.

file. Notwithstanding repeated requests from Sanoma to GS Media in order to prevent the photos at issue being published on the *GeenStijl* website, and after publication, to take down the hyperlinks referring to the photos, GS Media nevertheless published on the *GeenStijl* website three articles relating to the photos of Ms Dekker, all accompanied by a hyperlink that directed to different websites allowing users to download the photos of Ms Dekker. Sanoma brought an action against GS Media, which eventually led the Supreme Court of the Netherlands to refer to the CJEU a request for a preliminary ruling in essence asking whether, and in what possible circumstances, the fact of providing a hyperlink to protected works that are freely available on another website without the consent of the copyright holder, constitutes a “communication to the public” within the meaning of Art. 3, para 1, of the Directive 2001/29.¹⁹

Both AG Wathelet and the Court started their analysis by stressing that, as Directive 2001/29 aims to establish a high level of protection of authors, the concept “communication to a public” must be interpreted broadly.²⁰ They also both emphasized the importance of hyperlinks for the freedom of expression and information on the internet and warned that a general obligation for all internet users to check whether the initial communication to the public of a protected work freely accessible on the internet was effected with or without the copyright holder’s consent could disrupt the balance sought under Directive 2001/29 between the freedom of expression and the public interest, on the one hand, and the interests of copyright holders in an effective protection of their intellectual property rights, on the other hand.²¹ However, apart from these similarities, the AG and the Court took an entirely different approach to the analysis of Art. 3, para. 1, of the Directive 2001/29.

II. AG WATHELET’S CRITERION OF “INDISPENSABILITY” OF THE INTERVENTION

AG Wathelet boldly proposed to grasp the opportunity presented by the case to turn over the *Svensson* judgment. In line with previous case law, AG Wathelet engaged in an analysis of the two cumulative aspects of the concept “communication to a public”, namely, an “act of communication” of a protected work and the communication of that work to a “public”, but while remaining within this established structure, he introduced a new emphasis on the criterion of the “indispensability” of the intervention.

With regard to the first aspect of Art. 3, para. 1, of the Directive 2001/29, AG Wathelet rejected the Court’s decision in the *Svensson* case that hyperlinks are an “act of communication” and instead considered that hyperlinks even when directly leading to protected works, do not “make available” those works to a public if these works are already freely

¹⁹ Opinion of AG Wathelet delivered on 7 April 2016, case C-160/15, *GS Media*, paras 9-20, 34; *GS Media*, cit., paras 6-25.

²⁰ Opinion of AG Wathelet, *GS Media*, cit., para. 50; *GS Media*, cit., para. 30.

²¹ Opinion of AG Wathelet, *GS Media*, cit., paras 77-78; *GS Media*, cit., paras 44-45.

accessible on another website. In his opinion, the hyperlink merely facilitates the finding of the works while it is the action of the person who effected the initial communication which constitutes the actual “making available” of the work.²² He pointed to the *FAPL* case to argue that for an act to come within the scope of Art. 3, para. 1, of the Directive 2001/29, the intervention must be vital or indispensable in order to benefit from or enjoy works.²³ He also stressed that, unlike the Court considered in *Svensson*²⁴ and *SGAE*,²⁵ the criterion of indispensability must in the first place be assessed in the examination of the existence of an “act of communication”.²⁶ Consequently, he decided that the intervention of *GS Media* was not indispensable to the making available of the photos in question to users, including those who visit the *GeenStijl* website.²⁷

This line of reasoning of the AG is in consonance with the judgments of the German Federal Constitutional Court in the *Paperboy* case²⁸ and the Norwegian Supreme Court in the *Napster* case.²⁹ Both these national courts rejected the qualification of hyperlinking to a protected work as “a transmission” or a “making available” of the work, irrespective of whether the link refers to lawfully or unlawfully posted material. In deciding so, both courts put an emphasis on the fact that hyperlinks provide no independent and immediate access to the work, but mainly pertain to the facilitation of access to the work.³⁰

With regard to the second aspect of Art. 3, para. 1, of the Directive 2001/29,³¹ AG Wathelet argued that while there is a “public” consisting of an indeterminate and fairly large number of recipients, the criterion of a “new public” is not applicable, because the copyright holder has not authorised the initial communication to the public.³² In the alternative, the criterion of indispensability would have to be applied in the examination of whether the works were made available to a “new public”. This led him to the conclusion that in so far the photos were freely accessible to the general internet public on the other websites mentioned, the intervention by *GS Media* was not indispensable for the making available of the works to a “new public” and therefore Art. 3, para. 1, of the Di-

²² Opinion of AG Wathelet, *GS Media*, cit., para. 54.

²³ Opinion of AG Wathelet, *GS Media*, cit., paras 55-57.

²⁴ *Svensson*, cit., paras 27 and 31.

²⁵ *SGAE*, cit., para. 42.

²⁶ Opinion of AG Wathelet, *GS Media*, cit., paras 58-59.

²⁷ *Ibid.*, paras 60-61.

²⁸ German Federal Constitutional Court, judgment of 17 July 2003, I ZR 259/00.

²⁹ Norwegian Supreme Court, judgment of 27 January 2005, HR-2005-00133-A.

³⁰ Norwegian Supreme Court, judgment of 27 January 2005, cit., paras 46-48; German Federal Constitutional Court, judgment of 17 July 2003, cit., para. 42.

³¹ Given that AG Wathelet considers the first cumulative aspect not to be fulfilled, the second aspect is discussed in the alternative.

³² Opinion of AG Wathelet, *GS Media*, cit., paras 66-67.

rective 2001/29 did not apply.³³ Only when a hyperlink would enable users to circumvent restrictions that limit access to protected works, would the hyperlink constitute an indispensable intervention without which those users could not enjoy the works and must it be authorised by the copyright holder pursuant to Art. 3, para. 1, of the Directive 2001/29.³⁴

Apart from the criterion of “indispensability” of the intervention and the cumulative two-step analysis, AG Wathelet rejected any other criterion to be taken into account for the interpretation of Art. 3, para. 1, of the Directive 2001/29. In this perspective, the lack of consent of the copyright holder for the placement of his work online is immaterial.³⁵ Hence, AG Wathelet essentially suggested to decouple hyperlinking from the field of copyright law, with the exception of hyperlinks enabling the circumvention of restrictions put in place on third-party websites to limit access to protected works. In deciding so, AG Wathelet revealed himself as a true advocate of the free flow of information on the internet. Finally, the AG also discussed some alternative legal remedies available for the copyright holder, including legal proceedings against intermediaries.³⁶ In this respect, AG Wathelet followed the example of several national courts to opt for secondary liability in the context of hyperlinking.³⁷

III. THE CJEU’S AMALGAM OF CRITERIA

The Court’s judgment did not follow the approach suggested in AG Wathelet’s Opinion and came to a completely different conclusion. Although the Court acknowledged that it is necessary to consider the indispensable role played by the user and the deliberate nature of its intervention,³⁸ the essence of the Court’s analysis was based on two other criteria: the profit-making nature of the intervention, and the knowledge by the intervener of the lack of consent by the copyright holder. While the Court did refer to its case law requiring two cumulative aspects,³⁹ it did not go into a classic separate analysis of these two criteria, but followed a different, rather confusing structure. First, the Court repeated its previous case law⁴⁰ according to which the concept of “communication to the public” requires an individual assessment, taking into account several complementary criteria, which are not autonomous but interdependent and may in different situa-

³³ *Ibid.*, paras 69-70.

³⁴ *Ibid.*, para. 73.

³⁵ *Ibid.*, paras 61,75-79.

³⁶ *Ibid.*, paras 80-87.

³⁷ See also, Amsterdam Court of Appeal, judgment of 15 June 2006, [2006] ECDR 21; Norwegian Supreme Court, judgment of 27 January 2005, cit., paras 46-48; German Federal Constitutional Court, judgment of 17 July 2003, cit., para. 42.

³⁸ *GS Media*, cit., para. 35.

³⁹ *Ibid.*, para. 32.

⁴⁰ *Reha Training*, cit., para. 35; *SCF*, cit., para. 79; *Phonographic Performance*, cit., paras 29-30.

tions be present to widely varying degrees and must therefore be applied both individually and in their interaction with one another.⁴¹ Then, after underlining both the importance of the copyright holder's consent⁴² and the risk for the freedom of expression,⁴³ the Court covered four possible scenarios involving various criteria to be considered for the interpretation of Art. 3, para. 1, of the Directive 2001/29.

In a first scenario, the Court considered that when the posting of a hyperlink to a work freely available on another website is carried out by a person without that person making a profit, that person cannot be expected to know that the work had been published on the internet without the consent of the copyright holder. Consequently, there is no infringement of Art. 3, para 1, of the Directive 2001/29.⁴⁴ In this context, the Court observed that it is difficult for individuals who wish to post hyperlinks to ascertain whether the website to which those links are referring, provides access to works which are protected and whether the copyright holders of those works have consented to their posting on the internet, especially when it concerns sub-licenses. 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.⁴⁵ Interestingly, the Court also remarked that when the work was already available with unrestricted access on the website to which the hyperlink provides access, all internet users could, in principle, already have access to it even in the absence of that intervention.⁴⁶ Hence, in this scenario, the Court seemed to embrace the criterion of "indispensability" of the intervention and favored the freedom of the internet over the copyright holder's interests.

A second scenario occurs when a person knew or ought to have known that the posting of the hyperlink provides access to a work illegally placed on the internet, for example when the person was notified thereof by the copyright holders. In that case, there is a "communication to the public" within the meaning of Art. 3, para. 1, of the Directive 2001/29.⁴⁷ Hence, in this scenario, the Court replaced the objective criterion of "indispensability" of the intervention by the subjective criterion of "knowledge" of the lack of authorisation. Remarkably, the Court noted that copyright holders in all cases have the possibility of informing the person posting the hyperlink of the illegal nature of the publication of the protected work on the internet and of taking action against them if they

⁴¹ *GS Media*, cit., paras 33-34.

⁴² *Ibid.*, paras 42-43.

⁴³ *Ibid.*, paras 44-46.

⁴⁴ *Ibid.*, para. 47.

⁴⁵ *Ibid.*, para. 46.

⁴⁶ *Ibid.*, para. 48.

⁴⁷ *Ibid.*, para. 49.

refuse to remove that link.⁴⁸ This seems to imply a notice and take down procedure similar to the one in the context of secondary copyright liability for intermediaries.⁴⁹

In the third scenario, the Court again puts an emphasis of the criterion “indispensability” of the intervention. In line with AG Wathelet’s Opinion and the *Svensson* case,⁵⁰ the Court decided that when the posting of a hyperlink allows users to circumvent the restrictions taken by the website where the protected work is posted in order to limit the public’s access, the posting of such a hyperlink is a deliberate intervention without which those users could not benefit from the works and therefore requires the copyright holder’s consent under Art. 3, para. 1, of the Directive 2001/29.⁵¹

In a fourth scenario, the Court put forward another subjective criterion, namely, the profit making nature of the intervention. In this respect, the Court stated that when the posting of a hyperlink that refers to a protected work is carried out for profit, there is a rebuttable assumption that the posting took place with the full knowledge of the protected nature of that work and the possible lack of consent for publication by the copyright holder, because it is expected of the person who posted such a link for profit, to carry out the necessary checks to ensure that the work concerned is not illegally published on the website referred to by the posted hyperlink. When the presumption cannot be rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a “communication to the public” within the meaning of Art. 3, para. 1, of the Directive 2001/29.⁵² By putting forward the pursuit of financial gain as a criterion, the Court departed from its previous case law in *ITV Broadcasting*, *FAPL* and *SGAE*, where the profit-making nature of an act was considered nor irrelevant, neither an essential condition for it to fall within the scope of Art. 3, para. 1, of the Directive 2001/29.⁵³

When applying these criteria to the case in the proceedings, the Court came to the conclusion that as GS Media operated the *GeenStijl* website for profit and it could not rebut the presumption that the posting of the hyperlinks to the photos occurred in full knowledge of the illegal nature of that publication, the provision of the hyperlink was a “communication to the public” within the meaning of Art. 3, para. 1, of the Directive 2001/29.⁵⁴ According to the Court, the other factors mentioned by the referring national court were irrelevant, including the fact that the works in question had not yet been

⁴⁸ *Ibid.*, para. 53.

⁴⁹ Compare to Art. 14, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. See E. ROSATI, *Hyperlinks and communication to the public: early thoughts on the GS Media decision*, in *IPKat*, 8 September 2016, ipkitten.blogspot.lu.

⁵⁰ *Svensson*, cit., paras 27, 31.

⁵¹ *GS Media*, cit., para. 50.

⁵² *Ibid.*, para. 51.

⁵³ *ITV Broadcasting*, cit., paras 42-43; *FAPL*, cit., para. 204; *SGAE*, cit., para. 44 .

⁵⁴ *GS Media*, cit., para. 54.

published in another way with the consent of that copyright holder, that providing the hyperlinks made it much easier to find the protected works, as the website on which they were available was not easily findable by the general internet public, and that whoever posted those links knew or ought to have been aware of those facts.⁵⁵

Finally, in the operative part of the judgment, the Court did not mention all four scenarios, nor did it refer to the criteria of the cumulative two-step test or the criterion of indispensability, but it concluded that

“in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ [...], it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.”⁵⁶

IV. CONCLUSION

As in *Svensson* and *BestWater*, *GS Media* again presented the CJEU with the question of how to deal with hyperlinking under Art. 3, para. 1, of the Directive 2001/29. The main difference in *GS Media* was the lack of the copyright holder’s consent to publish the protected works on the website referred to by the hyperlink at issue. While AG Wathelet suggested to turn over *Svensson* and to assess the legality of hyperlinks by applying the criterion of the indispensability of the intervention in the first cumulative step, the Court rejected this approach and put forward an amalgam of both objective and subjective criteria, without clearly indicating how to fit them within the classic two-step analysis of a “communication to a public” under Art. 3, para. 1, of the Directive 2001/29.

Although AG Wathelet decisively went for an approach favouring the free flow of information on the internet, the Court eventually opted for a pragmatic approach, which in this case turned out in favor of the rights of the copyright holder. The Court’s judgment is in line with the *Svensson* judgment in that it, though indirectly, accepts hyperlinking as an “act of communication”, but it stands out by a new emphasis on the “knowledge” of the illegal nature of the publication of the work and the “profit making nature” of the intervention. Whereas the outcome of the case is understandable in light of the facts of the case, it is to be deplored that the Court, instead of clarifying the scope of Art. 3, para. 1, of Directive 2001/29, has contributed to its complexity. In this respect, several points of criticism are in place.

First, as in *Svensson*, the Court did not provide an in-depth legal or technical explanation of why a hyperlink constitutes a transmission and thus neglected to support its

⁵⁵ *Ibid.*, paras 26, 54.

⁵⁶ *Ibid.*, para. 56.

decision with regard to the first step of the two-step analysis by a substantiated reasoning.⁵⁷ Second, it is entirely unclear how these new criteria relate to the other criteria previously applied by the Court. Whereas the Court in its reasoning referred to all criteria generally applied in the context of Art.3, para 1 of the Directive 2001/29,⁵⁸ the operative part of the judgment only mentions the criteria “knowledge” and “financial gain”.⁵⁹ This brings about legal uncertainty, which is further amplified by the Court’s emphasis on the need of an individual assessment and the interdependency between the criteria, which should be applied “both individually and in their interaction with one another”.⁶⁰ Third, the Court did not sufficiently indicate how the new subjective criteria should be applied. How should a user determine whether he/she is pursuing a financial gain? When is the income generated by a user sufficient in order to trigger the presumption of “knowledge” of the illegality of the reference? With regard to the criterion of “knowledge”, it is unclear under what circumstances other than upon a notice from the copyright holder, a user who does not pursue a financial gain “knew or ought to have known”⁶¹ the illegality of the reference. Fourth, the judgment seems to entail a takedown obligation for the user who posts a hyperlink referring to a protected work when there is a notification by the copyright holder that the work has been published without its consent. But while the notice and takedown system in the context of secondary liability is subject to precisely circumscribed conditions in order to guarantee the freedom of expression,⁶² the Court does not mention how such a system should function in the context of Art. 3, para. 1, of the Directive 2001/29. Finally, unlike AG Wathelet, the Court did not consider the legal remedies to which the copyright holder could resort alternatively.⁶³ Although this was not directly asked by the referring national court, it is a relevant element to take into consideration in order to strike the right balance between the freedom of information and the right of protection of intellectual property rights.

In conclusion, over the entire line, the reasoning of AG Wathelet is more convincing by presenting one clear objective criterion instead of providing an amalgam of criteria without the sufficient details and the necessary structure to apply them. Consequently, it remains to be seen how the Court will decide in the pending cases C-527/15 (*Stichting Brein I*) and C-610/15 (*Stichting Brein II*). To be continued...

⁵⁷ See also E. AREZZO, *Hyperlinks and Making Available Right in the European Union*, cit., p. 539.

⁵⁸ *GS Media*, cit., paras 32-37.

⁵⁹ *Ibid.*, para. 56.

⁶⁰ *Ibid.*, paras 33-34.

⁶¹ *Ibid.*, para. 49.

⁶² See Directive 2000/31/EC, Art. 14.

⁶³ For an overview, see M. SCHELLEKENS, *Reframing hyperlinks in copyright*, cit., p. 405 *et seq.*