



Intellectual Property Law for Solicitors: When sharing Hyperlinks is an Almighty Sin

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Raison d'être

I want to discuss in this article about what it says in the tin, about hyperlinks. Let's start with a full and frank disclosure, almost all of us have done it at some point in our lives i.e., shared hyperlinks. Whether be it by sharing a social media post, either in a professional capacity e.g., LinkedIn or in a personal capacity e.g., Facebook or be it in a mass email to the whole office (and sometimes, perhaps, inadvertently even copying the Opposition solicitors) interesting information or perhaps, even in a Whatsapp group chat – point is, some time or another, wilfully or otherwise, hyperlinks had been shared. Putting hand to heart, how many of those have we actually sought out to find out from the rightholder of that copyrighted information, to confirm if he/she/they are content with this? I suppose, not too many times. Well, if that is the case then we really should be cautious and rightfully so, due to the Court of Appeal's decision in late March 2021 in *Tuneln Inc v Warner Music UK Limited and Sony Music Entertainment UK Limited* [2021] EWCA Civ 441. When it comes to sharing hyperlinks, the question really is, whether 1) Is a communication 2) to the Public. The answer may surprise you.

Tuneln Inc v Warner and Sony

This was a very interesting case and whilst, there are various aspects that arose from this case, I want to focus purely on sharing hyperlinks. In summary, Tuneln allowed its users to have access to radio stations from various parts of the world and that was done through hyperlinks. Warner and Sony main points were that Tuneln was in breach of copyright on those works, in absence of appropriate licence in essence, under s.20 Copyright, Designs and Patents Act 1988 due to Infringement by Communication To The Public (CTTP). It is this CTTP, that relates to the aspect of sharing hyperlinks. The Court of Appeal held that what Tuneln did was not act, akin to a search engine e.g., Google, but basically, equipped their customers to breach copyright and as such infringed under CTTP.

To understand this better, Lord Justice Arnold gave an exemplary and what, I can only say as possibly one of the most thrilling judgments to read. It is a shame, perhaps, his exemplariness was not fully appreciated by others, however, LJ Arnold brilliantly went through the adventure on how CTTP would be viewed. For the purposes of this article, I am simply going to touch on some of the salient CJEU cases that LJ Arnold eminently referred to, for readers to comprehend the picture.

Case C-466/12 *Svensson v Retriever Sverige AB* [EU:C:2014:76] ("*Svensson*")

In summary, this was a case about Claimant journalists whose work was already freely available on the web. The Defendants were providing hyperlinks to their subscribers to access works which included the journalists work. The Claimants case was that there was CTTP without their authorisation. CJEU determined that yes, there was CTTP but that did not require the Claimant's authorisation. The reason being, when Claimants made available their works on the web without any restrictions, anyone could view that and those public formed part of the public that could view the Claimants work through the Defendants hyperlinks. As such, there was no "*New Public*" [paragraph 97 of *Tuneln*].

Case C 160/15 *GS Media BV v Sanoma Media Netherlands BV* [EU:C:2016:644] (“GS Media”)

In summary, this was a case where a female TV star had various photoshoots for *Playboy* magazine, by the Claimant publisher. The Defendants, on at least 3 occasions, shared hyperlinks to different websites where anyone could illegally download those pictures. CJEU considered 2 stage tests for CTTp, 1) whether such hyperlink sharing was for “profit” [paragraph 103 of *TunelIn*] and 2) whether the perpetrator did not know or could not have reasonably known that it was shared illegally. If 2) is, yes perpetrator had/ought to have knowledge then naturally it was CTTp, as such infringement. If 1) is, yes for profit hyperlink was shared, then a presumption of CTTp. In this case, the Defendants were found liable for infringement under CTTp as they operated for profit and could not rebut that they did not know that it was shared illegally.

Case C 527/15 *Stichting Brein v Wullems* [EU:C:2017:300] (“Filmspeler”)

In summary, in this case, the Defendant sold a multimedia player which had hyperlinks to take his customers to third party websites which streamed protected works without authorisation generally. CJEU held that it was CTTp to New Public because without the Defendant’s intervention his customers would have difficulty accessing the “benefit” [paragraph 108 of *TunelIn*] illegally to those works.

Case C 610/15 *Stichting Brein v Ziggo BV* [EU:C:2017:456] (“Pirate Bay”)

Everyone probably knows all too well about the Pirate Bay website, where users shared bit torrent files of protected works illegally peer-to-peer. CJEU found against Pirate Bay for CTTp, as they operated more than just a search engine, by indexing, categorising and filtering contents. They knew the contents were illegal and the communication was to New Public, as the appropriate rightholders never consented to such acts for their protected works.

Case C-161/17 *Land Nordrhein-Westfalen v Renckhoff* [EU:C:2018:634] (“Renckhoff”)

In summary, in this case, the Claimant photographer took a picture which he authorised a travel agent to use on their website. A school pupil for his school project used the photo and it was subsequently uploaded on the school’s website. The Claimant brought an action against the Defendant school. CJEU held CTTp as the Claimant author never authorised for the second publishing in school website and on each occasion, rightholder permission is required. Here, the issue was not of hyperlink but of taking the actual work i.e., the photo and the author would have no control when to take off whenever he wanted to. Importantly, here the author never actually took account of the category of public, who will have access to his work through the school website, compared to when he gave authorisation for the travel agent website.

Case C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV* [EU:C:2019:1111] (“Tom Kabinet”)

This case mainly dealt with the use of second-hand e-book and CJEU held that it was CTTp since the author would have licenced to his users to use and those the Defendant was providing to as second hand, without licence, were not public that the author accounted for. As such, they amounted to New Public.

Case C 392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* [EU:C:2021:181] (“VG Bild”)

The case facts are somewhat complex but the relevant aspect, in summary, is whether the Defendant could ask the Claimant to put in restriction to its users, even though the Defendant’s work is generally available freely on the web. CJEU reminded that each act of communication must be authorised by the rightholder, that is because, the initial public accounted for are not the same public in subsequent publications, as such they are New Public. Otherwise, the author would be left with the situation of either accepting unauthorised use of his work or give up his work by licencing. I envisage such was said because surely, the alternative and best option would be the rightholder actually have the right to decide what to do with his work, rather than being held hostage to ransom regarding his intellectual property.

Conclusion and My opinions on defence strategies

LJ Arnold concluded that New Public “depends on the scope of the authorisation by the right holders of the original communication” [paragraph 138 of *TunelIn*]. With that being the case, I opine, one should ask oneself, what would one think of, next time, before sharing a hyperlink. Whether sharing a hyperlink on one’s own website or whether a client comes to one with such a conundrum, can one confidently say no infringement of CTTp? Perhaps, a better question, would be that in fact, is there no New Public at play?

Well, to answer the question, I suppose much depends on how one may argue about the scope of New Public. I use the word “scope” voluntarily, as such would potentially assist in referencing to purposive construction – a fact Patent litigators would be well aware from *Icescape v Ice-World* [2018] EWCA Civ 2219. In *TunelIn*, the court was content to stick to CJEU precedents, particularly for the purposes of legal certainty and I can see much wisdom in that. However, I opine a flexible approach is necessary as well when arguing cases on New Public. Unlike Trademark, where survey evidence is frowned upon to an extent, CTPP did not have the restrictions set on it officially as of yet. A good litigator could, possibly focus on showing the scope of New Public would be within the remits of the original authorisation. That overlap of the public in the geometric circles may avail when faced with such CTPP accusations.

Additionally, *GS Media* talked about “profit” of the perpetrator but *Filmspeler* focused on “benefit” of the customers of the perpetrator. There is clearly subtle yet, crucial distinctions among the two and I opine if emphasis can be shifted more towards the subjective viewpoint of the accused, then there may be scope for suitable defence for negating purposes. Importantly, if in fact, the scope and extent of either of these terms are brought into question, that itself may open up further defence avenues. Such as, does it have to be monetary profit, or does the benefit only have to be that dopamine rush?

Finally, it goes without saying, a litigator needs to actually believe in the case they fight. *TunelIn* had the triumph card in its hand of Brexit. It had everything to play for, to distinguish it out of the CJEU decisions. Yet, the Master of the Rolls felt that the arguments were not convincing, in this respect. I have no doubt the lawyers who argued for *TunelIn*, did the best they possibly could but I have learned over my career it is better to argue a few solid good points rather than an array of mixed points. It may sound litigation 101 but many, including myself from time to time, fail to appreciate this fully, perhaps, *inter alia*, due to client expectations or resources pressure. However, it must not be forgotten it is the Judge making the decision and it is best to make his/her life as easy as possible. Already the Judiciary is overworked due to continued cuts and naturally, the Judge has other commitments as well, so best to fire arsenals that are short and sweet – of course, maintaining the relevant professional rules at all times.

I conclude by saying that hyperlink is an address. An address to someone's home in the World Wide Web. Just like, one would not expect or appreciate, an unannounced or uninvited guest at one's doorstep in the physical world, hyperlink is to an extent akin to that. Therefore, the delicate balancing exercise, I opine, one must ask when sharing hyperlink is to ask oneself, is the step that I am about to take is a step too far?

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