

Italy: Linking, Searching, Scraping: What's Going On In Europe And Italy

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Article by [Antonella Barbieri](#) and [Marco Bellezza](#)

Portolano Cavallo Studio Legale



A recent judgment of the Court of Justice of European Union (CJEU) ([Case C-466/12](#), popularly known as the *Svensson case*) confirms its approach to give growing attention to the economic impact and practical implications of the decision when interpreting applicable EU provisions.

At the same time, in Italy, discussions on the new [Regulation of Italian Communication Authority](#) on the enforcement of copyright in the context of online and audiovisual media services is turning more and more into discussions on having different rights applying in the online world with respect to the offline world, taking into account that the bundle of uses is different and access and protection of contents online can be better reached through new technologies.

The *Svensson* case concerned the extension of the notion of "communication to the public" as provided by EU copyright law, Article 3, paragraph 1 [Directive 2001/29/EC](#) on the harmonization of certain aspects of copyright and related rights in the information society.

According to such provision: "1. Member States **shall provide authors with the exclusive right to 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".

The case was brought to the CJEU following a Swedish litigation involving journalists and the owners of a website which provided visitors with links to the journalists' articles that were published on freely accessible newspapers' websites. The journalists sought compensation from the website owners claiming that the website owners infringed on their exclusive right to make their articles available to the public by providing the aforementioned links on the website.

The national Swedish Court decided to refer four questions to the CJEU for preliminary ruling. The questions proposed to the CJEU involve the limits and boundaries of the protection to authors' exclusive right of communicate their works to the public vis-à-vis the provision of links on the internet. The questions included:

1. Does providing a clickable link to protected works constitute a communication to the public within the meaning of the Directive 2001/29/EC?
2. Is the answer to question one in any way affected if the clickable link directs users to a free website or a website where the access is restricted?
3. In answering question one, should any distinction be drawn between cases where the protected work is shown after a click on another website and cases where such work is shown in a way that gives the impression that it is on the original website (i.e. framing)?
4. Is it possible for Member States to provide the authors' exclusive right with a wider protection than the one provided by the Directive?

Regarding question one, as clarified in the past by the CJEU, communication to the public includes, "[...] *two cumulative criteria, namely, an 'act of communication' of a work and the communication of that work to a 'public'*" (paragraph 16 of the decision). According to the CJEU's interpretation, providing a clickable link to protected work falls within an 'act of communication.' Likewise, a website manager providing the clickable link is making a 'communication to the public' as there is an act of communication to an indeterminate number of potential recipients.

However, to provide the authors or rights holders with an exclusive right to authorize communication of their work, it is necessary that the public being communicated to is a 'new public' in respect to the public originally targeted by the right holders. In short, the rights holders' authorization is not required when the relevant act of communication to the public, such as providing a clickable link to protected works, targets the same public as the initial communication. The CJEU therefore ruled that since the journalists published their articles on the internet, and the articles were accessible for free, the 'public' targeted by the website manager who provided the clickable links was the same public initially targeted by the authors.

With this focus on the target public, in answering question three, the CJEU decided that there is no distinction between cases where the protected work is shown after the client is redirected to another website and cases where it is not clear that the client is being redirected if the targeted 'public' is the same in both accounts.

Responding to the second question, the CJEU stressed that the authorization of the right holder is always required when the access to the relevant contents is protected by means of technological measures or when the relevant content is no longer accessible on the website where the communication commenced. In those cases, indeed, it is arguable that the provision of the clickable link is targeted to a 'new public' than the one considered by the subject who made the initial communication.

In regards to the fourth question, the European Court recalled that a key aim of Directive 2001/29/EC is to, "[...] *remedy the legislative differences and legal uncertainty that exist [among Member States] in relation to copyright protection.*" From this perspective, allowing a Member State to provide a wider protection to right holders, by extending the concept of 'communication to the public,' would conflict with the aims of the Directive, and would adversely impact the functioning of the internal market by increasing the differences between national laws that the Directive seeks to prevent.

As anticipated, the core of the discussions in place among operators is that granting the same level of protection in the online world sometimes conflicts with the economic purpose of putting that content online: generating traffic is what actually matters, and linking is nothing more than a transfer of traffic. Nevertheless, the decision on the business model, including definition of targeted public, remains upon each operator.

Now, this CJEU ruling maintains a certain degree of Internet openness at the EU level, allowing linking to free websites without the prior permission of the relevant right holder. Having regard to the practical implication arising therefrom, as far as the single operator is interested in protecting the contents more than in generating traffic, it will arrange for a subscription (either for free or with charge) to access the content. Thus the business model of the operator will include data collection and, when applicable, collection of subscription fees. Moreover, as a result, the operator will be able to oppose to linking on the basis that, given such organization, persons forming its public are only those who registered to its website, and, in such circumstances, possible provision on a different website of clickable links to works available on its website would constitute "act of communication to the public" which has to be authorized by the copyright holder.

Most importantly, this decision forms an important precedent in CJEU case law and will influence the ongoing debate about the boundaries of the exclusive rights granted by EU copyright Law in the digital era.

It might be interesting to mention here that also when dealing with dedicated meta search engines and database, the approach of the Court referred somehow to the business model, in terms of protection of financial and professional investments and normal exploitation of a database ([Case C-202/12 Innoweb BV v Wegener ICT Media BV and Wegener Mediaventions BV](#)). Indeed, also the concept of "re-utilization" refers to acts of making available to the public, and the activity of the operator of a dedicated meta search engine was taken into account by the Court in the sentence, as opposite to a general search engine. In particular, it was pointed out that the dedicated meta search engines does not have its own search engine scanning other website. Instead, it makes uses of the search engines on the websites covered by its services. In this case, the Court said that, since the "*purpose of the activity is to provide access to the entire contents of that database by a means other than that intended by the maker of that database, whilst using the database's search engine and offering the same advantages as the database itself in terms of searches...it creates a risk that the database maker will lose income, in particular the income from advertising on its website, thereby depriving that maker of revenue which should have enabled him to redeem the cost of the investment in setting up and operating the database.*" In addition, the Court said that "*making that search engine available on the Internet – comes close to the manufacture of a parasitical competing product...albeit without copying the information stored in the database concerned. In view of the search options offered, such a dedicated meta search engine resembles a database, but without having any data itself*".

Moreover, it is worth noting that the mentioned sentence on *sui generis* right of the database maker also specifies conditions relates to the way the meta engine is structured to offer its services such as the range of functionalities offered, the translation of end user queries in real time, the criteria used to present the results. Again, all of them are operational aspects strictly connected to the possibility for the database maker to receive a return on his investments.

In the upcoming months, the CJEU is expected to decide cases on copyright in the digital area, including the [C-More case \(C-270/13\)](#) (which will likely be dismissed due to its resemblance to the [Svensson](#) case), the [BestWater case \(C- 348/13\)](#) and the [Public Relations Consultants Association case \(C-360/13\)](#). It will be interesting to see how the Court will continue reshaping, or maintaining, elements of prevailing copyright rules.

In Italy, here we mention a case over a dispute about the practice of screen scraping (decision of June 4, 2013 of the Court of Milan, in the [Viaggiare S.r.l. vs Ryanair Ltd](#) case), representing the first time that an Italian court addresses the issue of the lawfulness of screen scraping practices. Well, it is interesting to note here that, according to the Court, there was no infringement by Viaggiare of Ryanair's:

- a. **trademark rights** - by showing Ryanair's logo via its website without Ryanair's consent since, according to the Court,

such use falls within the "descriptive use" exception set out by Section 21 of the Italian IP Code (Legislative Decree 30/2005), thus it is lawful even without Ryanair's authorization; . In this respect the Court says that Viaggiare "uses the defendant's logos, as well as those of other air carriers, only to inform prospective clients about the real identity of the relevant air carrier [...].

- b. **database rights** - by "screen scraping" Ryanair's website to provide consumers with relevant information on flights (e.g. place of departure and arrival, time, date, price, etc.), since Ryanair's database cannot be deemed "creative," thus it is not eligible for database copyright protection under the Italian Copyright Law (Law 633/1941). Moreover, the Court gives relevance to the fact that the screen scraping carried out by Viaggiare did not trigger the reproduction of the Ryanair's website but only the reproduction of piece of information contained in the website;
- c. **sui generis database rights** - by screen scraping. In this respect the Court notes that Ryanair has in principle *sui generis* database rights on the relevant database (which contains information on flights), having provided evidence of significant investments made to collect and present the relevant contents of said database. However, in the specific case, the Court states, amongst others, that Ryanair has not suffered an undue prejudice to its investments as a consequence of the screen scraping activity, being this demonstrated by the circumstance that Ryanair does not prevent to extract and reuse data on flights included in its database to protect its investments.

The complete scenario includes also an ongoing debate at European Level on the reshaping of copyright rules for this digital era, with a [public consultation](#) by the European Commission which recently ended.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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Authors

Antonella Barbieri

Marco Bellezza