
The Emerging European Approach To IP In The Online World

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Law360, New York (December 16, 2016, 11:15 AM EST) -- The last two decades of the internet have dramatically reshaped how we do business and produce, distribute and consume content. In the European Union, the internet is now the most important channel for content distribution and consumption and the dominant platform for purchasing goods and services. The rise of social media as a content portal has also accelerated exponentially over the past five years. This has led to some unique challenges for IP rights holders in enforcing their rights online, which result primarily from the following factors:

1. the rise of social media and peer-to-peer sharing means that rights holders have far less control over the dissemination of digital content;
2. the limitless nature of the internet makes it difficult to maintain traditional content distribution models along geographical boundaries, which rely on the territorial nature of existing copyright laws; and
3. the internet relies on a vast number of intermediaries that facilitate online commerce and distribution of digital content.

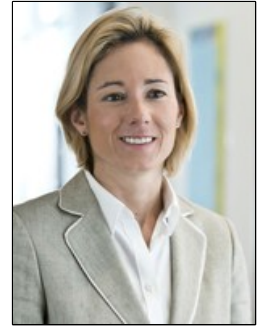
These challenges have had a profound impact on the development of intellectual property law and policy. This article reviews this landscape, and considers the delicate balancing act of protecting rights holders' interests without unduly compromising the freedom of the internet.

Linking and Rights Holder Consent

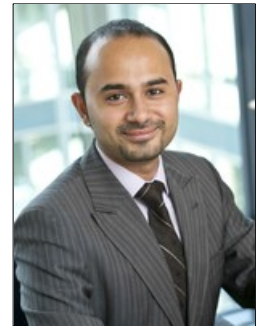
Traditionally, copyright owners have been able to control access to their works by actively managing the distribution channels for their content. Online distribution, however, is more difficult to control, as users are able to share content by readily linking content from a multitude of sources.

The ability to link content online has raised a number of questions over its lawfulness, and has led to the reevaluation of some fundamental concepts of copyright law. The issue centers on the interpretation of article 3(1) of the Information Society Directive 2001/29/EC ("InfoSoc Directive"), which provides that authors have the exclusive right to authorize or prohibit any communication to the public of their works.

The case law from the Court of Justice of the European Union ("CJEU") has distinguished between three scenarios: (i) where content is freely available and is published with the copyright owner's consent, (ii) where content is freely available but is published without the copyright owner's consent, and (iii) where content is made available by the rights holder only to a restricted audience.



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Freely Available Material Published with the Copyright Owner's Consent

Svensson, C-466/12, is the leading case in which the CJEU considered whether linking to freely available material which has been published with the copyright owner's consent constitutes a communication to the public (and thereby infringes copyright unless authorized). The CJEU held that the concept of "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." The court held that the links in this instance were "acts of communication" but did not constitute communication to a "public" because the communication was not to a "new public" — i.e., "a public not taken into account by the copyright holders when they authorized the initial communication to the public." The CJEU therefore held that a link to freely available material published with the copyright owner's consent did not infringe because the initial communication had already targeted all potential internet users.

Freely Available Material Published Without the Copyright Owner's Consent

The recent case of *GS Media v Sanoma*, C-160/15, addressed for the first time the issue of linking to freely available material published without the copyright owner's consent. The CJEU concluded that linking to a work that is freely available on another website will not constitute an act of communication to the public (and therefore be permissible) where the person doing the linking does not do so for financial gain and does not know and cannot reasonably know that the work has been published on the internet without the copyright owner's consent. On the other hand, the court introduced a rebuttable presumption when the posting of links is carried out for profit, on the basis that "it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead." It is unclear however how such a distinction between commercial and personal activity on the internet will be applied in practice.

Content Made Available to a Restricted Audience

In *GS Media*, the CJEU also confirmed that a link that allows users to circumvent the access restrictions on the website where the protected work is posted (e.g., subscriber only/payment) constitutes a "deliberate intervention without which those users could not benefit from the work broadcast." In such cases, all those users will be deemed to be a new public, and the link will accordingly infringe.

Exhaustion of Rights in an Online Environment

The above cases reveal some of the inherent challenges in applying traditional copyright concepts in an online world. Another way in which the internet has disrupted traditional content distribution models is by rendering geographical boundaries largely artificial. Traditionally, creative content has been licensed on a territorial basis due in part to the territorial nature of copyright and in part to the fact that different geographical markets command different values. Rights holders have managed to effect such territorial restrictions in the online world through the process of geoblocking, namely restricting access to digital content based upon a user's geographical location. In a virtually connected world however, consumers have become far less accepting of such restrictions.

In May 2015, the European Commission adopted the Digital Single Market Strategy, which *inter alia* was specifically aimed at reforming member states' copyright laws to ensure better functioning of applicable rules across borders and to allow for wider online access to content by users across the EU. This has led to two key recent legislative developments. First, in December 2015, the commission proposed an EU regulation on cross-border portability of online content services that would allow EU residents to travel with the digital content they have purchased or subscribed to at home. Second, the commission indicated that it would address "unjustified geoblocking" on the basis that it runs counter to the founding principles of the free market by stifling the free movement of goods and services. This culminated in a proposal for an EU regulation, published in September 2016, that sets out the rules on the exercise of copyright and related rights applicable to certain online transmissions and retransmissions of television and

radio programs. In the same month, the commission also published a preliminary report setting out the provisional findings of its inquiry into the e-commerce sector, in which it warned digital content providers that it may, on a case by case basis, take action against them on competition grounds for restricting access to online content through geoblocking.

The regulations proposed by the commission suggest that intervention in this area through copyright reform will be more limited than initially expected, though the recent e-commerce sector enquiry suggests there may be probes on the legitimacy of geoblocking for individual content providers on competition law grounds. Whichever approach the EU ultimately adopts, it is clear however that any change in this area could fundamentally alter the way in which copyright content is transmitted online and how such content is licensed across the continent. It will also be important to monitor how the U.K. decides to approach this issue as part of its Brexit negotiations with the EU.

The Role of Intermediaries in Tackling Online Infringements

The issues discussed above with respect to hyperlinking and digital exhaustion are both essentially directed at reevaluating the appropriate balance between the rights of copyright owners and the legitimate interests of the public. However, the ease with which digital files can be copied and shared online, coupled with the anonymity afforded by the internet, has also brought new challenges in combating plainly infringing activity. Rather than pursuing every primary infringer, rights holders have increasingly targeted online intermediaries — as gatekeepers — as a more effective way to curb infringing activities.

In the EU, the rules on intermediary liability are enshrined in the E-Commerce Directive 2000/31/EC, the InfoSoc Directive and the IP Enforcement Directive 2004/48/EC. In the landmark case of *L'Oréal v. eBay*, C-324/09, the CJEU held that online market places, such as eBay, cannot rely on the hosting defense under Article 14 of the E-Commerce Directive and thereby avoid liability where (i) they have taken an active role in the transaction (such as optimizing the presentation of the offers for sale or promoting these offers), or (ii) they are aware (often via notification from the rights holder) or ought to have been aware of the illegal conduct and failed to act expeditiously. Importantly, the CJEU also held that under Article 11 of the IP Enforcement Directive an intermediary could be ordered to take measures, not only to bring to an end infringements brought about by users of its services, but also to prevent further infringements of that kind.

Actions against internet intermediaries have gained particular currency in the U.K. where the High Court has repeatedly taken action through its express statutory powers under section 97(A) of the Copyright, Designs and Patents Act 1988. This section, which is borne out of the InfoSoc Directive, enables rights holders to obtain an injunction against intermediaries who are aware that their service is being used to infringe copyright. The provision was first relied upon against ISPs in 2011 in the case of *Twentieth Century Fox v. British Telecommunications PLC* [2011] EWHC 1981. Since then, the U.K. High Court has granted a significant number of similar injunctions resulting in the blocking of many high-profile websites, including *The Pirate Bay*. The test and procedure for granting such 'blocking injunctions' has been so clearly defined and applied by the court on numerous occasions that these applications are rarely opposed by ISPs (although there are still disputes about the scope of the orders).

While there are no equivalent provisions to section 97A in relation to other intellectual property rights under U.K. law, the Court of Appeal confirmed this summer that U.K. courts had similar powers in relation to online trade mark infringements. In its landmark judgment of *Cartier v. BSKyB* [2016], EWCA Civ 658, the Court of Appeal upheld the High Court's judgment of 2014 which recognized for the first time the court's power to grant relief against intermediaries in cases other than copyright infringement.

Conclusion

The growth of the internet as a means for sharing and disseminating information and content is reshaping intellectual property law. The experience in Europe to date suggests that this process will likely take time and involve tradeoffs between rights holders, internet users and online intermediaries. In this context, the following recent developments are instructive:

- The EU case law surrounding sharing of content on the internet has developed in a somewhat ad hoc and complicated way. While the CJEU's recent judgment in *GS Media* has added a degree of clarity, it is worth noting that there still remains a number of unanswered questions, in particular how the knowledge presumption detailed in *GS Media* will operate for persons posting links for profit.
- The European Commission is actively trying to reform copyright law to allow wider and more uniform access to online content across the EU. However, the commission's wide-ranging sector investigations have revealed the very different views that exist between internet users and rights holders. Finding a solution that is workable as well as politically acceptable will not be easy.
- Internet intermediaries are expected to play a greater role in assisting IP owners to curb online infringement. The key challenge for both courts and legislators is to adopt an approach that is both fair and proportionate.

It is important for businesses operating in Europe to closely monitor these developments as it will fundamentally transform the way in which online content is transmitted, licensed and enforced across the EU.

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