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Comment

Limitations of the Freedom of Hyperlinking in the Fields of Copyright Law, Trademark Law and Unfair Competition Law: Is Case-by-case Approach Sufficient?

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ABSTRACT

Although there are no legal regulations in the area of hyperlinking, the issue of the freedom of hyperlinking affect jurisprudence among others in the fields of unfair competition law and intellectual property law. Therefore, there is a need to consider if case-by-case approach is sufficient or special legal regulations in the field of hyperlinking should be created.

This work concerns taxonomy of hyperlinks, jurisdictional issues, notion of "making available to new public", circumvention of access restrictions, issue of advertisement of counterfeit goods, copyright and trademark infringements. Matter of defamation of competitors through hyperlinking is also elaborated in this work.

Issues of copyright law, trademark law and unfair competition law are discussed independently in this paper. Therefore, wide range of hyperlinking matters is elaborated in this article. Hence, this is significant source of information and considerations on legal problems in the field of hyperlinking.

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1. Introduction

It is impossible to imagine contemporary world without hyperlinking. Thanks to this technological tool, access to information and virtual content is much more

easier than ever before. Hyperlinking facilitates sharing information, images,¹ files,² online radio station

¹ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) J. Intell. Prop. Info. Tech. & Elec. Com. L. 139, 144; Opinion of Advocate General Wathelet, 7 April 2016, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:221, paras 10-12; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 IIC 524, 526.

² Opinion of Advocate General Wathelet, 7 April 2016, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Oth-

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addresses,³ movies, games and other virtual content.⁴ Hence, hyperlinks are part of the contemporary culture that is based on information flows⁵.

The most significant technological application of hyperlinking, that is crucial for legal analysis, seems to be related to functioning of search engines,⁶ databases⁷ and displaying digital content through framing.⁸

It is clear that issues of hyperlinking are contemporary extremely significant. However, there are no comprehensive researches on these matters. It is astonishing because majority of legal problems in the field of hyperlinking have been recognized yet.⁹ Despite this fact, *ad hoc* approach is applicable

ers, ECLI:EU:C:2016:221, para. 10; Opinion of Advocate General Szpunar, 10 January 2019, Case C-516/17, Spiegel Online GmbH v Volker Beck, para. 44.

³ Yin Harn Lee, 'United Kingdom Copyright Decisions 2019' (2020) 51 IIC 362, 364.

⁴ See Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 IIC 524, 526.

⁵ Opinion of Advocate General Poiares Maduro, 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2009:569, para. 1.

⁶ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) Am. U. Intell. Prop. Brief 59, 71; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153, 172.

⁷ See Judgment of the CJEU, 3 June 2021, Case C-762/19, SIA "CV-Online Latvia" v SIA "Melons", ECLI:EU:C:2021:434; Opinion of Advocate General Szpunar, 14 January 2021, Case C-762/19, SIA "CV-Online Latvia" v SIA "Melons", ECLI:EU:C:2021:22, paras 4, 23; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 98.

⁸ Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) Trademark Rep. 576, 584-586; Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) Am. U. Intell. Prop. Brief 59, 62-63; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153, 155; Julia Lauenders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) King's Student L. Rev. 50, 51; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) J. Intell. Prop. Info. Tech. & Elec. Com. L. 245, 250, 252.

⁹ See Mitchell Drucker, 'Canadian v. American Defamation Law: What Can We Learn from Hyperlinks?' (2013) 38 Can.-U.S. L. J. 141-166; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153-224; P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 IIC 797-816; Jingrong Long, 'Different Solutions for Similar Questions: Hyperlinks and the Right of Communication to the Public in China and the EU' (2018) 49 IIC 413-435; Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4

to resolve them.¹⁰ Therefore, creation of general legal theory of hyperlinking is undoubtedly needed especially in the fields of copyright law, trademark law and unfair competition law. However, it is not obvious if there is a need to create particular legal regulations concerning hyperlinking or *ad hoc* approach is sufficient.

2. The notion of hyperlink

Hyperlinks are of passive¹¹ and indirect nature.¹² In general, they are used to redirect user of one website to content that is displayed on other website.¹³ There are also opinions that hyperlinks and quotes are of similar nature.¹⁴ However, hyperlinks are not used not only to refer to the source of information, but they make it possible to directly display such a source. Hence, they are something more than only digital quotes.¹⁵

The nature of hyperlinks is not homogenous. A few kinds of hyperlinks can be distinguished.¹⁶ There are:

(4) Queen Mary J. Intell. Prop. 322-327; Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) Trademark Rep. 576 – 589.

¹⁰ See Judgment of the CJEU, 23 March 2010, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2010:159; Judgment of the CJEU, 13 February 2014, Case C-466/12, Nils Svensson and Others v Retriever Sverige AB, ECLI:EU:C:2014:76; Judgment of the CJEU, 8 September 2016, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:644; Judgment of the CJEU, 26 April 2017, C-527/15, Stichting Brein v Jack Frederik Wullems, ECLI:EU:C:2017:300; Judgment of the CJEU, 14 June 2017, Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:456; Judgment of the CJEU, 7 August 2018, Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff, ECLI:EU:C:2018:634; Judgment of the CJEU, 3 June 2021, Case C-762/19, SIA "CV-Online Latvia" v SIA "Melons", ECLI:EU:C:2021:434; Judgment of the CJEU, 22 June 2021, Joined Cases C-682/18 and C-683/18, Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando AG, ECLI:EU:C:2021:503; see also Julia Lauenders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) King's Student L. Rev. 50, 53, 62.

¹¹ See Mitchell Drucker 'Canadian v. American Defamation Law: What Can We Learn from Hyperlinks?' (2013) 38 Can.-U.S. L. J. 141, 156-157.

¹² Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153, 158, 162.

¹³ See Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153, 218; Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) Am. U. Intell. Prop. Brief 59, 62-63.

¹⁴ Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) J. Intell. Prop. Info. Tech. & Elec. Com. L. 245, 252.

¹⁵ Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 IIC 524, 538.

¹⁶ See Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) Am. U. Intell. Prop. Brief 59,

- a) simple (surface) links,¹⁷
- b) deep links¹⁸ and
- c) links used for framing purposes.¹⁹

Differences between these groups of hyperlinks are significant.²⁰ Therefore, it is necessary to discuss them separately because legal approaches to each of them can differ in some circumstances.

62; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 155; Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 51; Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) *Trademark Rep.* 576, 584; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

¹⁷ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 62; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, p. 526; Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 537.

¹⁸ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 62; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 155; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 111; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 526; Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 537; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

¹⁹ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 62-63; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 155; Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 51; Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) *Trademark Rep.* 576, 584; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 111; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 526; Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 537.

²⁰ See International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public

In the case of simple links anchor website is replaced by hyperlinked website that is homepage.²¹

Deep links are used to navigate users of hyperlinks to particular URL addresses that are "deeper" than homepage.²² Such links can be explicitly cited or can be of hidden nature.²³ Such hyperlinks are used only for re-communication purposes.²⁴ Therefore, they are of secondary nature.²⁵ It is currently obvious that deep links are legal provided that they are not used to circumvent access restrictions²⁶ or facilitate access to illegal sources.²⁷

In the case of framing, content of exterior website is displayed on the website that contains hyperlink.²⁸ It seems that framing can be illegal in some circumstances. It stems from the fact that exterior content can be displayed in a way that is not predicted by copyright holders. Furthermore, displayed

in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

²¹ Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 51.

²² See Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 62; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 155.

²³ See Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 73.

²⁴ Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 218.

²⁵ See Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 110.

²⁶ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 67; see also Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, pp. 250-252.

²⁷ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 63-64; see also International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

²⁸ Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) *Trademark Rep.* 576, 584-586; Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 62; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 155; Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 51; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 250.

content can be manipulated especially in the case of text, images and sound recordings.²⁹

Finally, particular kinds of hyperlinks are related to functioning of some electronic devices that enable to display movies, music and images.³⁰ It seems that the same legal rules should be applicable to framing and hyperlinking through devices. Therefore, these two kinds of hyperlinks should not be distinguished for jurisprudence purposes.

3. Legal issues of hyperlinking

3.1. General remarks

Although majority of main legal issues in the field of hyperlinking have been recognized yet, there are no common principles related to these matters.³¹ International and standardized legal approach in the area of hyperlinking is needed. Therefore, these issues should be systematically discussed below.

3.2. Jurisdictional issues

Main legal problem related to hyperlinking is a jurisdictional issue because it is difficult to determine applicable law in the case of hyperlinking that is borderless.

A few possible conflict-of-laws rules could be created. First rule could lead to jurisdiction of the country in which copyright holder, trademark holder or unfairly treated competitor is located. Second alternative rule could be based on the location of linker. Eventually, it could be applied jurisdiction of the country where effects of infringement happened or where the place of the interests of the party involved in hyperlinking

²⁹ See Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) *Trademark Rep.* 576, 585-586.

³⁰ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 142; Judgment of the CJEU, 26 April 2017, C-527/15, *Stichting Brein v Jack Frederik Wullems*, ECLI:EU:C:2017:300, paras 15-18; Judgment of the CJEU, 14 June 2017, Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, ECLI:EU:C:2017:456, para. 33.

³¹ See Mitchell Drucker 'Canadian v. American Defamation Law: What Can We Learn from Hyperlinks?' (2013) 38 *Can.-U.S. L. J.* 141-166; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153-224; P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797-816; Jingrong Long, 'Different Solutions for Similar Questions: Hyperlinks and the Right of Communication to the Public in China and the EU' (2018) 49 *IIC* 413-435; Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4 (4) *Queen Mary J. Intell. Prop.* 322-327; Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) *Trademark Rep.* 576-589; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 248-249.

is.³² Next rule of jurisdiction, that should be subsidiary, could be based on the location of Internet service providers. It could be a good idea to unify this matter on international level.

Generally, all above-mentioned jurisdictional rules seem reasonable. However, it would be a good idea to enter into force regulations according to which jurisdiction on the base of location of the copyright holder, trademark holder or unfairly treated competitor could be applicable. However, subjects mentioned in last sentence should be entitled to choose jurisdiction of the country where linker is located. Other jurisdictional rules could be applied in the case of probable ineffectiveness of two rules mentioned in this paragraph.

3.3. The right to re-communicate

Hyperlinks are used to re-communicate users of websites.³³ It is obvious that re-communication based on surface or deep links is legal until discussed process facilitates access to illegal sources³⁴ or is used to circumvent access restrictions.³⁵

It stems from the fact that hyperlinks and Internet are inseparable. Therefore, in principle, hyperlinking must be compatible with legal regulations and legal principles.³⁶ However, such a rule cannot be exceptionless. It is important to create legal and technical countermeasures against hyperlinking leading to:

- a) circumvention of access restrictions,³⁷

³² Sylwia Żyrek, 'Jurysdykcja krajowa w sprawach zobowiązań elektronicznych w prawie Unii Europejskiej' (C. H. Beck 2019), 279-281.

³³ Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 218.

³⁴ Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 166-167; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

³⁵ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 67; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 141; see also Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 112; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 530; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

³⁶ See Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4 (4) *Queen Mary J. Intell. Prop.* 322, 324; Opinion of Advocate General Wathelet, 7 April 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:221, para. 77.

³⁷ See Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief*

- b) access to illegal sources,³⁸
- c) advertisement of counterfeit goods³⁹ and
- d) defamation.⁴⁰

Hence, there are some areas in which freedom of hyperlinking should be limited. It stems from the fact that the freedom of hyperlinking is a virtual form of the freedoms of speech,⁴¹ information⁴² and expression⁴³ that are also limited.

Limitations of the right to re-communicate through hyperlinking should be considered among others through the prism of significant principles of copyright law, trademark law and unfair competition law. However, all these exceptions to gen-

59, 64, 67; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) J. Intell. Prop. Info. Tech. & Elec. Com. L. 139, 141; Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) King's Student L. Rev. 50, 56-57; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) J. Intell. Prop. Info. Tech. & Elec. Com. L. 245, 250, 252; Judgment of the CJEU, 8 September 2016, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:644, paras 20, 49, 50; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 112; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 IIC 524, 530; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

³⁸ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) Am. U. Intell. Prop. Brief 59, 63-64; see Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 IIC 524, 528; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

³⁹ Opinion of Advocate General Poiares Maduro, 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2009:569, para. 4.

⁴⁰ See Mitchell Drucker 'Canadian v. American Defamation Law: What Can We Learn from Hyperlinks?' (2013) 38 Can.-U.S. L. J. 141, 156-159; Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 IIC 536, 558-561.

⁴¹ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) Am. U. Intell. Prop. Brief 59, 60.

⁴² Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) King's Student L. Rev. 50, 58; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) J. Intell. Prop. Info. Tech. & Elec. Com. L. 139, 141.

⁴³ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) J. Intell. Prop. Info. Tech. & Elec. Com. L. 139, 141; Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) King's Student L. Rev. 50, 58; Jingrong Long, 'Different Solutions for Similar Questions: Hyperlinks and the Right of Communication to the Public in China and the EU' (2018) 49 IIC 413, 431.

eral freedom of expression should be extraordinary and application of these exceptions should be carefully considered by judges and lawmakers.

3.4. Issues of copyright law

3.4.1. General remarks

It is known that current regulations in the field of the copyright law should be adapted and developed among others for hyperlinking purposes.⁴⁴ It stems from the fact that some copyright regulations, that are in force, seem to be outdated through the prism of new technologies.⁴⁵

Most of all, applicability of the copyright law to hyperlinking is generally not evident, but is justified in some circumstances.⁴⁶ Hence, in principle, hyperlinking is in line with the copyright law.⁴⁷ However, there are exceptions that are discussed below.

3.4.2. The notion of "making available to new public"

Because of the fact that there are no special copyright regulations for hyperlinking purposes, traditional notions of copyright law are applicable to issues of hyperlinking.

The main example of such notion is a "making available to new public",⁴⁸ that is thought to be the significant right of citizens.⁴⁹

⁴⁴ Recital 5 of 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; see also Judgment of the CJEU, 22 June 2021, Joined Cases C-682/18 and C-683/18, Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando AG, ECLI:EU:C:2021:503, para. 7.

⁴⁵ Opinion of Advocate General Szpunar, 8 February 2017, Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:99, para. 30 and following paragraphs.

⁴⁶ Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4 (4) Queen Mary J. Intell. Prop. 322; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) J. Intell. Prop. Info. Tech. & Elec. Com. L. 245, 251.

⁴⁷ See Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4 (4) Queen Mary J. Intell. Prop. 322, 323-324; Opinion of Advocate General Wathelet, 7 April 2016, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:221, para. 77.

⁴⁸ See Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) Am. U. Intell. Prop. Brief 59, 66-67; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153, pp. 169-170; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 105; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

⁴⁹ See Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153, 155; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemina-

This notion has particular meaning for hyperlinking purposes,⁵⁰ that is criticized by legal scholars⁵¹. According to some researchers, hyperlinking is a "making available to public" (without adjective "new")⁵². It stems from the fact that potential Internet public should be understood as all users of World Wide Web till access to virtual content is unlimited.⁵³ Therefore, such a potential public, in principle, cannot be changed through hyperlinking.⁵⁴ Similar opinions can be found in judgements of the Court of Justice of the European Union and opinions of advocates general.⁵⁵

tion: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 105; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

⁵⁰ See Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 141-142; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 248; P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797, 798-805.

⁵¹ Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4 (4) *Queen Mary J. Intell. Prop.* 322, 326; Jingrong Long, 'Different Solutions for Similar Questions: Hyperlinks and the Right of Communication to the Public in China and the EU' (2018) 49 *IIC* 413, 431; P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797, 811-815.

⁵² Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 535; see also P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797, 811, 813.

⁵³ See Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 250, 252; Saw Cheng Lim, 'Implications of Reposting Copyright Material Online and Svensson Distinguished in CJEU Judgment' (2018) 30 (2) *Singapore Academy of Law J.* 1126, 1128 and following pages; Judgment of the CJEU, 13 February 2014, Case C-466/12, Nils Svensson and Others v Retriever Sverige AB, ECLI:EU:C:2014:76, paras 25, 26, 27; Judgment of the CJEU, 7 August 2018, Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff, ECLI:EU:C:2018:634, para. 37; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 108; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 534; P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797, 807, 811.

⁵⁴ See P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797, 809.

⁵⁵ Judgment of the CJEU, 7 August 2018, Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff, ECLI:EU:C:2018:634, para. 37; Judgment of the CJEU, 13 February 2014, Case C-466/12, Nils

Such a legal approach seems to be created to reconcile traditional and pre-digital regulations of the copyright law with the structure of Internet network. Although this conception is present in jurisprudence of CJEU,⁵⁶ this is not applicable, for example, in Netherlands.⁵⁷ This conception is also rejected by Swiss courts.⁵⁸

Furthermore, in jurisprudence, the notion of "making available to new public" should be understood in the field of hyperlinking as "initial making available"⁵⁹. It stems from the opinion that "initial making available" can be made only by copyright holder.⁶⁰ However, the notion of "initial making available" seems to be applicable to hyperlinking to content, that has not been published by copyright holders, in a way that enable common access to this content.⁶¹ Hence, it is a good idea to

Svensson and Others v Retriever Sverige AB, ECLI:EU:C:2014:76, paras 25, 26, 27; Judgment of the CJEU, 8 September 2016, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:644, para. 22; Opinion of Advocate General Wathelet, 7 April 2016, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:221, paras 53, 54, 60.

⁵⁶ P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797, 802 and following pages; Judgment of the CJEU, 7 August 2018, Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff, ECLI:EU:C:2018:634, paras 35, 46.

⁵⁷ P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797, 809.

⁵⁸ *Ibid.*

⁵⁹ Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4 (4) *Queen Mary J. Intell. Prop.* 322, 325; see also Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 250, Saw Cheng Lim, 'Implications of Reposting Copyright Material Online and Svensson Distinguished in CJEU Judgment' (2018) 30 (2) *Singapore Academy of Law J.* 1126, 1129; Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 542-544; Judgment of the CJEU, 14 June 2017, Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:45, paras 28, 44; Judgment of the CJEU, 13 February 2014, Case C-466/12, Nils Svensson and Others v Retriever Sverige AB, ECLI:EU:C:2014:76, paras 24, 26, 27, 31; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014) 108.

⁶⁰ Opinion of Advocate General Szpunar, 8 February 2017, Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:99, para. 41; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

⁶¹ Opinion of Advocate General Szpunar, 8 February 2017, Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:99, para. 41; see also P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797, 813.

apply the notion of "making available to new original public" for hyperlinking purposes.⁶² In the case of inability of application of such a notion, hyperlinking should be understood as facilitation of access to published content.⁶³

Furthermore, there are also opinions that definition of "making available to new public" through hyperlinking should be based on linkers' awareness.⁶⁴ However, such opinions should not be accepted because the notion of "publishing to new public" should be of objective nature.

Therefore, hyperlinking is related to making content available to new public:

- a) in the case of content to which access is limited⁶⁵ or
- b) in the case of hyperlinking to illegal sources.⁶⁶

Furthermore, placing copyrighted images or other files on new servers can be understood as "making available to new public".⁶⁷ However, this issue is discussed in subsection of this paper entitled: "The server rule".

⁶² See P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 IIC 797, 808.

⁶³ *Ibid.*, 814.

⁶⁴ See Opinion of Advocate General Wathelet, 7 April 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:221, para. 29.

⁶⁵ See Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 56-57; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 250; Judgment of the CJEU, 8 September 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644, paras 20, 49, 50; P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 IIC 797, 807; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

⁶⁶ See Saw Cheng Lim, 'Implications of Reposting Copyright Material Online and Svensson Distinguished in CJEU Judgment' (2018) 30 (2) *Singapore Academy of Law J.* 1126, 1131; Judgment of the CJEU, 14 June 2017, Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, ECLI:EU:C:2017:456, para. 26 and sentence; Judgment of the CJEU, 8 September 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644, para. 49; Opinion of Advocate General Szpunar, 8 February 2017, Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, ECLI:EU:C:2017:99, para. 41; P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 IIC 797, 807; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

⁶⁷ Judgment of the CJEU, 7 August 2018, Case C-161/17, *Land Nordrhein-Westfalen v Dirk Renckhoff*, ECLI:EU:C:2018:634, paras 35, 46; Opinion of Advocate General Wathelet, 7 April 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:221, para. 23.

Moreover, the notion of "making available to new public" can be used in the case of hyperlinking to content that is unsearchable through using search engines.⁶⁸

However, it would be possible to enter into force new legal regulations concerning hyperlinks that would not be based on the notion of "making available to new public". They could be even based on the list of exceptions to the general freedom of hyperlinking principle. Notwithstanding application of the notion of "making available to new public" would be effective approach.

3.4.3. Facilitation of access to illegal sources

Facilitation of access to illegal sources can be especially related to functioning of sharing platforms,⁶⁹ P2P networks or indexes that contain hyperlinks to illegal content.⁷⁰ However, liability for intentional facilitation of access to illegal sources should exist in the case of any publication of links navigating to such sources.⁷¹

Problems, that are elaborated in this paragraph, seem extremely significant because main boundary of the freedom of hyperlinking should be based on the notion of "unlawful facilitation". Furthermore, illegality of facilitation of access to illegal sources is based on the right of copyright holders to prohibit publication of their works.⁷² Therefore, prohibition of facilitation of access to illegal sources stems from the fundamental copyright principles that existed in pre-virtual era.

Above-mentioned matters are extremely significant in Western legal orders. For instance, in current U.S. and European legal systems, intentional hyperlinking to illegal sources

⁶⁸ Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 249.

⁶⁹ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 142.

⁷⁰ Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 188, 199; Judgment of the CJEU, 14 June 2017, Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, ECLI:EU:C:2017:45, para. 18; Opinion of Advocate General Szpunar, 8 February 2017, Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, ECLI:EU:C:2017:99, paras 4, 41.

⁷¹ See Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 221-222.

⁷² Art. 3 (1) of 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; Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4 (4) *Queen Mary J. Intell. Prop.* 322; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 247, 249, 253; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 104.

leads to legal liability.⁷³ Similar approach is also recommended by International Literary and Artistic Association.⁷⁴

Furthermore, researchers commonly postulate that professional or commercial nature of linkers should be related to the obligation to check if hyperlink facilitates access to illegal sources.⁷⁵ Similar opinion exists in the case of publishing hyperlinks to illegal content for profits.⁷⁶ It is understandable because professional users of Internet should be aware of legal issues in the field of hyperlinking.⁷⁷

Whereas, unprofessional linkers should be entitled to the wider freedom of hyperlinking.⁷⁸ Such a legal approach can lead to problems concerning indication of differences between professional and unprofessional creators of websites. Perhaps, this distinction could be based on the criterion related to gaining profits.⁷⁹

⁷³ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 77; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 143, 150; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 249; see also Gerald Spindler, 'Responsibility and Liability of Internet Intermediaries: Status Quo in the EU and Potential Reforms' in Tatiana-Eleni Synodinou (ed.), 'EU Internet Law' (Springer International Publishing AG 2017), 309-310.

⁷⁴ See Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 249; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

⁷⁵ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 141, 144, 146-150; Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 547.

⁷⁶ Judgment of the CJEU, 14 June 2017, Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, ECLI:EU:C:2017:456, paras 29, 46, 47; Judgment of the CJEU, 8 September 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644, paras 54, 55; see also P. Bernt Hugenholz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 *IIC* 797, 812, 814; Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 546-547; Jingrong Long, 'Different Solutions for Similar Questions: Hyperlinks and the Right of Communication to the Public in China and the EU' (2018) 49 *IIC* 413, 430-431.

⁷⁷ See Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) *Trademark Rep.* 576, 583; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 145-146; Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 57.

⁷⁸ See Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) *Trademark Rep.* 576, 583; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 150; Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 57.

⁷⁹ See Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 145-146;

According to researchers, unlawful facilitation of access to illegal content should be intentional.⁸⁰ However, common approach to examination of awareness of hyperlinking to illegal content does not exist. Conception of such an awareness could be based among others on:

- a) rule of reason,⁸¹
- b) knowledge,⁸²
- c) credible suspicion of copyright infringement,⁸³
- d) nature of hyperlinked website.⁸⁴
- e) type of content to which hyperlink leads⁸⁵ or
- f) intention of linker.⁸⁶

Furthermore, operators of platforms, that are used to share files, can be liable for enabling publication of hyperlinks leading to illegal sources if such operators do not react on particular claims of copyright holders.⁸⁷

Undoubtedly, facilitation of access to illegal sources could lead to legal liability only under additional circumstances such as awareness of illegality or professional nature of linker. Such liability cannot be automatic. Any other legal approaches to these matters seem too far reaching. Therefore, regulations

Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 57.

⁸⁰ Gerald Spindler, 'Responsibility and Liability of Internet Intermediaries: Status Quo in the EU and Potential Reforms' in Tatiana-Eleni Synodinou (ed.), 'EU Internet Law' (Springer International Publishing AG 2017), 309-310.

⁸¹ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 141; see also Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 192-193, 196.

⁸² Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 161, 204-206; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 147; Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 55 and following pages; Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 546-547; Jingrong Long, 'Different Solutions for Similar Questions: Hyperlinks and the Right of Communication to the Public in China and the EU' (2018) 49 *IIC* 413, 414, 430, 434; Gerald Spindler, 'Responsibility and Liability of Internet Intermediaries: Status Quo in the EU and Potential Reforms' in Tatiana-Eleni Synodinou (ed.), 'EU Internet Law' (Springer International Publishing AG 2017), 309-310.

⁸³ See Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 210.

⁸⁴ *Ibid.*, 223.

⁸⁵ *Ibid.*

⁸⁶ See Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 56, 58, 59; Gerald Spindler, 'Responsibility and Liability of Internet Intermediaries: Status Quo in the EU and Potential Reforms' in Tatiana-Eleni Synodinou (ed.), 'EU Internet Law' (Springer International Publishing AG 2017), 309-310.

⁸⁷ See Judgment of the CJEU, 22 June 2021, *Joined Cases C-682/18 and C-683/18, Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando AG*, ECLI:EU:C:2021:503, sentence.

prohibiting facilitation of access to illegal sources should be well-balanced.

3.4.4. Circumvention of access restrictions

Hyperlinking enabling access to commonly unavailable virtual content is probably illegal.⁸⁸ Such a common unavailability of virtual content can be based on functioning of "paywalls"⁸⁹ and passwords.⁹⁰ Illegality of such an activity stems from the fact that circumvention of access restrictions through direct hyperlinking is obviously against the will of copyright holder.⁹¹

Above considerations are extremely general. Therefore, it is necessary to define access restriction for hyperlinking purposes. This problem can be resolved in two ways.

First of them can be based on technological aspects of access restrictions such as passwords or special tests that make it impossible to access some virtual content by robots.⁹² Such an approach is not technologically neutral. Therefore, this approach should not be recommended.

Second approach is based on the general notion of "common availability of hyperlinked content".⁹³ The test of availability should be based on checking if virtual content can be

⁸⁸ Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 67; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 149.

⁸⁹ Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4 (4) *Queen Mary J. Intell. Prop.* 322, 326-327; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 252; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 108, 112; Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 539.

⁹⁰ Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 539.

⁹¹ International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013; see also Gemma Minero, 'Are Hyperlinks Covered by the Right to Communicate Works to the Public? The Svensson Case' (2014) 4 (4) *Queen Mary J. Intell. Prop.* 322; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 249; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 104-106.

⁹² See Thomas Walter Haug, 'Do News-Compilations on the Internet Like the 'Google News' Infringe Copyright? - An International Approach' (2007) 39 *Bracton L. J.* 83-85.

⁹³ See Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 56-57; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 250-251; Judgment of the CJEU, 8 September 2016,

accessed through the using of search engines or other legal and popular virtual tools that make it possible to easily find websites or files.⁹⁴ Such an approach is reasonable because of its technological neutrality and difficulties in circumvention of it. However, this approach can lead to legal uncertainty. Without regard to this disadvantage, such an approach is recommended because this is not based on particular technological notions that are difficult to be interpreted and changeable over time.

3.4.5. Copyright infringements concerning titles, headlines, parts of text and distortion of content

Significant issue of hyperlinking is related to publishing headlines, titles and other parts of hyperlinked content.⁹⁵ This problem is extremely important in the case of framing and hidden links because such a publishing can turn out to be illegal.⁹⁶ Whereas, publishing of URL addresses, that contain some part of copyrighted content, does not seem to be of infringing nature.

In the case of hidden links and framing, sources of displayed content are exterior. Hence, framed content should be published in a way that let distinguish anchor website and displayed content.

Finally, legitimate framing should not lead to distortion of content. This is crucial statement because content displayed through framing can be distorted in various ways.⁹⁷ Therefore, framing, that distorts content, seems infringing. It stems from the fact that copyright holders should be empowered to decide in which way their works can be published.⁹⁸ Hence, any kind of hyperlinking that leads to heavy and misleading distortion of content should not be legal because this leads to copyright infringements and goes beyond main purpose of hyperlinking, namely facilitation of access.

Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644. paras 20, 50, 25 and sentence.

⁹⁴ Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 249; see also Judgment of the CJEU, 8 September 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644, para. 26; see also International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

⁹⁵ See Luke McDonagh, 'Headlines and Hyperlinks: UK Copyright Law Post-Infopaq' (2011) 1 (2) *Queen Mary J. Intell. Prop.* 184-185; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 527.

⁹⁶ See Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, pp. 526, 527, 530.

⁹⁷ Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) *Trademark Rep.* 576, 585-586.

⁹⁸ See Judgment of the CJEU, 14 June 2017, Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, ECLI:EU:C:2017:456, paras 19-20; art. 3 (1) of 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; Judgment of the CJEU, 8 September 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644, para 28.

3.4.6. The server rule

The server rule was created in U.S. jurisprudence.⁹⁹ This principle let distinguish legal and illegal hyperlinking in a clear way. According to this principle, displaying content from exterior websites is legal until source of this content is directly stored on exterior server.¹⁰⁰ Similar principle is applicable in European countries, where the notion of "unauthorised storage" is used.¹⁰¹ Furthermore, analogous, "server test" is applicable in Chinese jurisprudence.¹⁰²

This principle seems to be related to the general right to delete or change content by its copyright holder.¹⁰³ However, it is probably almost impossible to successfully and completely delete content that was whenever available online.¹⁰⁴ Nonetheless, the server rule seems to efficiently protect copyright holders' rights.

There are exceptions to this rule related to functioning of search engines.¹⁰⁵ For instance, images, audio files and videos can be saved on the servers of search engines' operators in some circumstances¹⁰⁶. Such an activity seems legal and should not lead to the breach of copyright law until:

a) size of images is reduced or

b) videos and audio files are shortened.¹⁰⁷

It would be even a good idea to enter into force principle, according to which saved images should be muzzy and quality of saved videos and audio files should be lowered. However, there are also opinions that storage of changed files is illegal.¹⁰⁸

However, the general server rule should be in line with functioning of search engine because tools, which enable searching images, videos and audio files, are extremely significant in contemporary world. Hence, server rule should be applicable only to content that is deleted from the original website or is planned to be deleted from such a website by its copyright holder.

3.4.7. Partial conclusions

Undoubtedly, limitations of the freedom of hyperlinking in the field of copyright law should be extraordinary. Limitations should exist in some situations that are described above. Such exceptions concern especially circumvention of access restrictions,¹⁰⁹ distortion of content and intentional copyright infringements through hyperlinking.¹¹⁰

However, it is not obvious if such limitations should be explicitly imposed on linkers through binding legal regulations. Currently, freedom of hyperlinking is limited in a case-by-case manner on the base of general copyright regulations. Such an approach can lead to legal uncertainty. However, this is in line with the fact that freedom of hyperlinking should be limited only in extraordinary situations.

⁹⁹ Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 177; see also Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 74.

¹⁰⁰ Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 177 and following pages.

¹⁰¹ Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 545, 551.

¹⁰² Jingrong Long, 'Different Solutions for Similar Questions: Hyperlinks and the Right of Communication to the Public in China and the EU' (2018) 49 *IIC* 413, 417 and following pages.

¹⁰³ See Opinion of Advocate General Szpunar, 10 January 2019, Case C-516/17, *Spiegel Online GmbH v Volker Beck*, paras 79, 81; see also Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 *IIC* 536, 551; Judgment of the CJEU, 14 June 2017, Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, ECLI:EU:C:2017:456, paras 19-20; art. 3 (1) of 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; Judgment of the CJEU, 8 September 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644, para. 28.

¹⁰⁴ Akriti Gupta and Mahima Sharma, 'Data Privacy in Digital World: Right to Be Forgotten' (2018) 8 *Nirma University L. J.* 97, 98; Edward L. Carter, 'Argentina's Right to Be Forgotten' (2013) 27 *Emory Int'l L. Rev.* 23, 30.

¹⁰⁵ Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 177-179.

¹⁰⁶ Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 177-178; see also Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 550-551.

¹⁰⁷ See Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) *Colum. J.L. & Arts* 153, 177-178; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 541, 542.

¹⁰⁸ Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 527.

¹⁰⁹ See Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) *Am. U. Intell. Prop. Brief* 59, 64, 67; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 139, 141; Julia Lauanders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) *King's Student L. Rev.* 50, 56-57; Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 245, 250, 252; Judgment of the CJEU, 8 September 2016, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644, paras 20, 49, 50; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 112; Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?' (2014) 45 *IIC* 524, 530; International Literary and Artistic Association, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet, 16 September 2013.

¹¹⁰ See Gerald Spindler, 'Responsibility and Liability of Internet Intermediaries: Status Quo in the EU and Potential Reforms' in Tatiana-Eleni Synodinou (ed.), 'EU Internet Law' (Springer International Publishing AG 2017), 309-310.

Nonetheless, it would be a good idea to enter into force binding regulations concerning prohibition of circumvention of access restrictions through hyperlinking and heavy distortion of content through framing. The notion of "heavy distortion of content" could be based on the misleading impression criterion.

The notion of "making available to new public" could also be legally defined for hyperlinking purposes. Furthermore, entry into force internationally unified jurisdictional standards in the field of copyright infringements committing through hyperlinking seems needed.

3.5. Issues of trademark law and unfair competition law

3.5.1. General remark

Majority of issues concerning hyperlinking in the field of unfair competition is related to trademark law. However, there are also hyperlinking matters in the area of unfair competition law that do not concern trademark infringements. All these issues are independently elaborated below.

3.5.2. General considerations on issues of trademark law and unfair competition law

The main example of trademark infringement through hyperlinking is a framing of content that contains trademarks. Such an infringement can lead to misunderstandings that can distort competition. This can occur especially in the case of misleading displaying trademarks on websites that contain information on products of other producers than trademarks' holders.¹¹¹ Therefore, issues of framing related to trademarks could be in detail regulated in particular unfair competition law provisions.

Furthermore, search engine results containing trademarks and metatags being trademarks can affect competition in a distortive way in the case of positioning hyperlinks leading to content including information on counterfeit goods.¹¹² Therefore, prohibition of payable advertising services that could distort natural functioning of search engines algorithms in a way contrary to principles of trademark law should be considered.¹¹³ Matters of advertisement of counterfeit goods are in detail discussed below.

¹¹¹ See Opinion of Advocate General Poiares Maduro, 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2009:569, para. 4.

¹¹² See Judgment of the CJEU, 23 March 2010, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2010:159, paras 35-42.

¹¹³ Issues of natural results of search algorithms related to trademarks are considered in detail in Opinion of Advocate General Poiares Maduro created for purposes of joined cases C-236/08, C-237/08 and C-238/08 [Opinion of Advocate General Poiares Maduro, 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de

3.5.3. *Particular issue of advertisement of counterfeit goods*
Issues of advertisement of counterfeit goods were analysed among others by the CJEU.¹¹⁴ Furthermore, these matters were also discussed through the prism of U.S. anti-tarnishment regulations.¹¹⁵

These issues are extremely significant because they are related to principles and algorithms on which functioning of search engines is based.¹¹⁶ This is especially clear in the case of trademarks that play the role of metatags.¹¹⁷

According to CJEU, it is, in principle, legal to display hyperlinks that facilitate access to trade information on counterfeit products in the case of searching information on goods that are protected by trademark law, although trademark holders are entitled to prohibit displaying this kind of information provided that such an access misleads consumers.¹¹⁸ There are similar opinions in U.S. jurisprudence.¹¹⁹ These approaches

recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2009:569, paras 2, 3, 4, 9, 10, 46, 55, 69, 72].

¹¹⁴ Opinion of Advocate General Poiares Maduro, 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2009:569, para. 4.

¹¹⁵ Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) Trademark Rep. 576, 586.

¹¹⁶ Opinion of Advocate General Poiares Maduro, 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2009:569, paras 8-12; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 99-100.

¹¹⁷ Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) Trademark Rep. 576, 588; Opinion of Advocate General Poiares Maduro, 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2009:569, para. 5 and conclusions.

¹¹⁸ Judgment of the CJEU, 23 March 2010, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2010:159, sentence; see also Opinion of Advocate General Poiares Maduro, 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2009:569, conclusions.

¹¹⁹ See Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) Trade-

are reasonable because search engine should not be a tool that makes it possible to distort competition. However, users of search engines should be entitled to have an access to information on counterfeit goods if they demand such an information.

It would be a good idea to limit displaying information on counterfeit goods if users of search engines look only for information on genuine products. Such an approach seems balanced because it would not lead to promotion of counterfeit goods. In principle, this would be in line with opinions of trademark holders because they prefer to limit access to this kind of information.¹²⁰ However, such an approach would also not limit the right of Internet users to be informed.

3.5.4. Particular issues of unfair competition law not related to trademark law

3.5.4.1. *Defamation of competitors* Hyperlinking can make defamation easier because linkers can facilitate access to defamatory information on their competitors.¹²¹

Such an activity should be prohibited in the case of obviously false defamatory content. However, some negative information on competitors can be published to protect consumers.

Above considerations are not in line with common opinion, according to which only literal citation can be defamatory in contrary to linking to the same content.¹²² Therefore, it would be a good idea to create new legal regulations that would be countermeasures against defamation through hyperlinking. It would be especially significant in legal orders such as U.S. legal system in which only first publication of defamatory content is currently infringing¹²³.

It would also be a good idea to enter into force regulations that impose obligations of special care in the case of hyperlinking to potentially defamatory content by professional linkers. Such linkers can be understood as digital publishing enterprises.¹²⁴

mark Rep. 576, 586; see Opinion of Advocate General Póitares Maduro, 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v Viaticum SA and Luteciel SARL* (C-237/08) and *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* (C-238/08), ECLI:EU:C:2009:569, para. 117.

¹²⁰ Judgment of the CJEU, 23 March 2010, Joined Cases C-236/08, C-237/08 and C-238/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v Viaticum SA and Luteciel SARL* (C-237/08) and *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* (C-238/08), ECLI:EU:C:2010:159, paras 35, 36, 38-40.

¹²¹ Cheng Lim Saw, 'Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty' (2018) 49 IIC 536, 540, 558-561; General issues of potential defamatory nature of hyperlinking were analysed in 1990s (see Steven M. Weinberg, 'Cyberjinks: Trademark Hijinks in Cyberspace through Hyperlinking and Metatags' (1997) 87 (5) Trademark Rep. 576, 578-579).

¹²² Mitchell Drucker 'Canadian v. American Defamation Law: What Can We Learn from Hyperlinks?' (2013) 38 Can.-U.S. L. J. 141, 156-159.

¹²³ *Ibid.*, 142-143.

¹²⁴ See Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemina-

3.5.4.2. *Issue of the right to be forgotten* Although the right to be forgotten is a digital human right¹²⁵ that limits the freedom of hyperlinking in the field of data privacy law,¹²⁶ similar right can also be applicable in the area of unfair competition law. However, such a similar right would be applied to protect reputation of entrepreneurs, competitors and enterprises.

Perhaps, it would be a good idea to limit the freedom of hyperlinking in the case of hyperlinks that navigate to outdated or illegitimate content that can infringe regulations in the field of unfair competition law.

3.5.5. Partial conclusions

As stated above, there is a wide range of issues concerning the freedom of hyperlinking, trademark law and unfair competition. All these matters could be explicitly regulated in particular legal provisions. However, case-by-case approach seems sufficient except for issue of advertisement of counterfeit goods. Hence, it would be justified to regulate admissibility of navigating to information on counterfeit goods through metatags being trademarks. Such admissibility could be based on demand for information on counterfeit goods criterion. Finally, it would also be a good idea to enter into force clear jurisdictional principles concerning these matters.

4. Is case-by-case approach sufficient or is there a need to create new legal provisions concerning limitations of the freedom of hyperlinking?

4.1. Case-by-case approach

Dominant legal judicial approach concerning limitations of the freedom of hyperlinking is a case-by-case approach.¹²⁷ Undoubtedly, this is not clear legal solution because limitations of the freedom of hyperlinking can be based on many different legal provisions that belong to many different areas of law.

However, case-by-case approach to the freedom of hyperlinking seems currently justified. This is flexible approach that is based on the application of general legal regulations being in force in many areas of law.

tion: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 103.

¹²⁵ Akriti Gupta and Mahima Sharma, 'Data Privacy in Digital World: Right to Be Forgotten' (2018) 8 Nirma University L. J. 97, 106.

¹²⁶ See Judgment of the CJEU, 13 May 2014. Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317, paras 2, 3, 100; see also Akriti Gupta and Mahima Sharma, 'Data Privacy in Digital World: Right to Be Forgotten' (2018) 8 Nirma University L. J. 97-108; John W. Dowdell, 'An American Right to Be Forgotten' (2017) 52 Tulsa L. Rev. 311, 322; Keltie Haley, 'Sharenting and the (Potential) Right to Be Forgotten' (2020) 95 (3) Ind. L. J. 1005, 1018.

¹²⁷ See Edward Lee, 'The Right to Be Forgotten v. Free Speech' (2015) 12 (1) I/S: A Journal of Law and Policy for the Information Society (ISJLP) 85, 97-103.

Nonetheless, such an approach is not in line with legal certainty. Therefore, there is a need to consider if particular regulations concerning the freedom of hyperlinking are needed. Such regulations can be separately created for particular areas of law. Eventually, they can be enacted in general legal act on hyperlinking. Without regard to this considerations, it would be a good idea to enter into force common international jurisdictional standards in the area of hyperlinking. Such an approach would lead to avoidance of unwanted conflict-of-laws.

4.2. Administrative law approach

Administrative law approach could be applied to the freedom of hyperlinking in the case of application of the right to be forgotten.¹²⁸ It stems from the fact that the freedom of hyperlinking is limited through application of data privacy law that is an area of administrative law.¹²⁹ In such a case, administrative data protection institutions are involved in limiting the freedom of hyperlinking.

However, the administrative approach can also be applied in other situations. For instance, it would be regulated that administrative approach should be applied to all limitations of the freedom of hyperlinking that are considered in this work. Such an approach would lead to standardization in the area of the freedom of hyperlinking. However, this would lead to creation of special institutions competent in hyperlinking matters. Hence, such an approach could limit the freedom of hyperlinking in an unwanted institutional manner.

4.3. Private law approach

Private law approach to the limitations of the freedom of hyperlinking is also applicable.¹³⁰ Such an approach seems reasonable in the case of hyperlinks that are defamatory, illegitimate or can lead to damages.

Private law disputes related to hyperlinks can occur if hyperlinking leads to infringements of personal rights, revealing of sensitive information and occurrence of damages. In the case of legal issues in the fields of intellectual property law and unfair competition law, private law disputes can concern revealing of sensitive information and causing damages. However, any special legal regulations are not necessary for such purposes.

¹²⁸ See Frederike Zufall, 'Challenging the EU's Right to Be Forgotten: Society's Right to Know in Japan' (2019) 5 European Data Protection Law Review (EDPL) 17, 24; see also Judgment of the CJEU, 13 May 2014. Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECLI:EU:C:2014:317, paras 77-78.

¹²⁹ See Frederike Zufall, 'Challenging the EU's Right to Be Forgotten: Society's Right to Know in Japan' (2019) 5 European Data Protection Law Review (EDPL) 17, 24; see also Judgment of the CJEU, 13 May 2014. Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECLI:EU:C:2014:317. paras 64, 65, 67, 69, 77, 78, 79 and 82.

¹³⁰ See Frederike Zufall, 'Challenging the EU's Right to Be Forgotten: Society's Right to Know in Japan' (2019) 5 European Data Protection Law Review (EDPL) 17, 22.

4.4. Penal law approach

Nowadays, well-established penal law regulations can be applicable in the case of defamatory or illegitimate hyperlinking that infringes also principles of intellectual property law or unfair competition law. Therefore, there are no urgent need to create any special regulations for such purposes. However, particular legal regulations could lead to legal certainty in the field of the freedom of hyperlinking. Undoubtedly, such an approach would limit flexibility that exists in the case of case-by-case approach.

4.5. Comprehensive legal solution

It would be a good idea to consider creation of comprehensive legal regulations in the field of the freedom of hyperlinking. Such an approach would lead to standardization of the hyperlinking issues. Nonetheless, this kind of standardization could lead to unwanted limitations of the freedom of hyperlinking.

It is necessary to indicate that comprehensive approach to hyperlinking can be limited to some areas of law such as intellectual property law or unfair competition law. Whereas, case-by-case approach would be applicable to private law and penal law issues concerning hyperlinking.

4.6. Common jurisdictional standards

Without regard to application of above-mentioned approaches, it would be a good idea to enter into force jurisdictional standards related to issues of hyperlinking. Such standards should be the same in all areas of law. These principles should also be internationally standardized.

Such jurisdictional standards would be based on the place of location of publisher of hyperlinked content or the place of location of subjects that are affected by such a content. Eventually, jurisdiction of region, where hyperlinks or content are exclusively available, would be applied.

4.7. New institutions

It would be a good idea to consider if a new institution competent in the field of the freedom of hyperlinking is needed. Such institution could be created on European or international level. Alternatively, a few separate institutions would be created for national, European and international purposes.

Creation of such an institution or such institutions seems especially needed in the case of application of the administrative approach. However, this is also possible in the case of other approaches.

4.8. Recommended approach

Limitations of the freedom of hyperlinking should be extraordinary. Therefore, well-balanced approach is necessary. Such an approach can be case-by-case or normative. However, there are some legal issues such as jurisdictional principles that should be regulated on international level.¹³¹

¹³¹ These issues are described in subsection of this article entitled: "Recommendations for international community".

Main advantage of normative approach is a legal certainty and an uniformity. Furthermore, comprehensive and general principles in the field of the hyperlinking would lead to entry into force well- theoretically based regulations in this area. It would be a good idea to explicitly regulate issues of circumvention of access restrictions through hyperlinking, distortion of content through framing, intentional copyright infringements through hyperlinking and admissibility of navigating to information on counterfeit goods. Undoubtedly, jurisdictional principles concerning hyperlinking should be internationally standardized.

Case-by-case approach seems to limit the freedom of hyperlinking only in exceptional circumstances. However, such an approach would lead to legal uncertainty. Furthermore, approach based on traditional regulations in the fields of intellectual property law, unfair competition law, private law, administrative law and penal law would be the reason of many interpretative problems.

Finally, general theory of the freedom of hyperlinking should be created without regard to the existence of legally binding regulations in this field. Such a theory could be applied by judicial authorities.

5. Recommendations for international community

Because of the fact that issues of hyperlinking are of global nature, some legal principles in this area should be internationally harmonized¹³².

First of all, it would be a good idea to create standard jurisdictional rules in the field of hyperlinking.

Furthermore, entry into force of the server rule on international level is needed because this principle would ensure the right of copyright holders to delete or change copyrighted content.

It would also be a good idea to regulate secondary liability of Internet service providers in the case of hyperlinking infringements.¹³³ Currently, such a liability appears only in the jurisprudence.¹³⁴ However, multilateral agreements in this

field are needed because Internet service providers should be involved in fighting against copyright infringements.¹³⁵

Eventually, creation of internationally binding countermeasures against significant trademark infringements, that are committed through hyperlinking, could be considered.

However, such legal approaches should be tested on national level before creation of international binding provisions in the area of hyperlinking.¹³⁶

6. Recommendations for the European Union

Although CJEU considered hyperlinking both in the area of copyright law¹³⁷ and in the field of unfair competition law,¹³⁸ there are no European regulations concerning hyperlinking in these areas of law.¹³⁹

Issue of hyperlinking appears only in Directive of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.¹⁴⁰ According to this legal act, copyright protection related to press publications does not exist in the area of hyperlinking.¹⁴¹ Such a protection is understood as the right to prohibit publishing of press publication or the right to give permission for such publication.¹⁴²

Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153, 220-221.

¹³⁵ Natalie E. Curto, 'EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level?' (2020) 11 Case W. Res. J.L. TECH. & INTERNET 84. 86-87.

¹³⁶ See Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) J. Intell. Prop. Info. Tech. & Elec. Com. L. 245.

¹³⁷ Julia Lauenders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) King's Student L. Rev. 50; Judgment of the CJEU, 13 February 2014, Case C-466/12, Nils Svensson and Others v Retriever Sverige AB, ECLI:EU:C:2014:76; Judgment of the CJEU, 7 August 2018, Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff, ECLI:EU:C:2018:634.

¹³⁸ Judgment of the CJEU, 23 March 2010, Joined Cases C-236/08, C-237/08 and C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), ECLI:EU:C:2010:159; Judgment of the CJEU, 14 June 2017, Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:456; Judgment of the CJEU, 8 September 2016, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:644.

¹³⁹ See Opinion of Advocate General Szpunar, 8 February 2017, Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:99, para. 36; Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) J. Intell. Prop. Info. Tech. & Elec. Com. L. 139-140.

¹⁴⁰ Recital 57 and art. 15 (1) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

¹⁴¹ Recital 57 and art. 15 (1) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

¹⁴² Recital 57 and art. 15 (1) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright

¹³² See Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) J. Intell. Prop. Info. Tech. & Elec. Com. L. 245, 245, 246; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 115.

¹³³ See Dawn Leung, 'What's All the Hype about Hyperlinking?: Connections in Copyright' (2015) 7 (1) Am. U. Intell. Prop. Brief 59, 77-82; Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153, 216; see also Opinion of Advocate General Szpunar, 8 February 2017, Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:99, para. 68; see Opinion of Advocate General Wathelet, 7 April 2016, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:221, paras 82-83.

¹³⁴ Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and

European *de facto* judicial integration exists in the field of hyperlinking.¹⁴³ However, judicial activity of CJEU in the area of hyperlinking is of *ad hoc* nature.¹⁴⁴ Therefore, some legal researchers postulate to create European legal regulations concerning hyperlinking.¹⁴⁵

Lack of the European positive legal integration in the field of copyright and hyperlinking, can lead to differences and incompatibility between legal systems of the Member States of the European Union.¹⁴⁶ Therefore, it is necessary to create at least European jurisdictional standards in the field of hyperlinking. Creation of common European countermeasures against facilitation of illegal access to copyrighted works could also be considered. However, it would be a good idea to guarantee broad competences of Member States in this field.¹⁴⁷

7. Recommendations for national legislators

Although national lawmakers can decide on *ad hoc* approach concerning hyperlinking in the fields of unfair competition law and intellectual property law, they could also create legal regulations in the area of hyperlinking in a way that would be probably compatible with future European and international regulations. Therefore, in the case of normative approach to hyperlinking issues, it is currently recommended to follow future regulations from other countries so as to lead to unofficial harmonization of legal approaches in the field of hyperlinking.

First and foremost, it is necessary to create jurisdictional principles related to hyperlinking so as to ensure legal certainty that is extremely significant for linkers.

and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC; see also art. 2 and art. 3 (2) of 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; Johan Axhamn, 'Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines' in Tanel Kerikmäe (ed.), 'Regulating eTechnologies in the European Union' (Springer International Publishing Switzerland 2014), 104-106.

¹⁴³ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 (2) J. Intell. Prop. Info. Tech. & Elec. Com. L. 139, 140, 143; Opinion of Advocate General Szpunar, 8 February 2017, Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, ECLI:EU:C:2017:99, para. 36.

¹⁴⁴ See Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) King's Student L. Rev. 50, 53, 62, 63; P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 IIC 797, 802-803, 814-815.

¹⁴⁵ See P. Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 IIC 797, 802-803, 814-815.

¹⁴⁶ See Judgment of the CJEU, 13 February 2014, Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*, ECLI:EU:C:2014:76, para. 6; Gerald Spindler, 'Responsibility and Liability of Internet Intermediaries: Status Quo in the EU and Potential Reforms' in Tatiana-Eleni Synodinou (ed.), 'EU Internet Law' (Springer International Publishing AG 2017), 309.

¹⁴⁷ See Judgment of the CJEU, 13 February 2014, Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*, ECLI:EU:C:2014:76, sentence.

Furthermore, regulations related to safe harbours in the area of hyperlinking would be created.¹⁴⁸ Such regulations should be clear. They should cover accepted scope of linkers' activity. Such an approach would lead to legal certainty in this field.

National legal provisions, that regulate liability for trademark and copyright infringements related to hyperlinking, could also be created. Such regulations could be of private, administrative or penal nature. However, only heavy infringements should lead to criminal liability.

Facilitation of illegal access to content, that is under copyright protection, could be prohibited through creation of particular legal regulations. Misleading framing could also be explicitly forbidden. Furthermore, it would be a good idea to consider if prohibition of facilitation of unwanted access to advertisements of counterfeit goods is needed.

Intentional defamation through hyperlinking could also be explicitly forbidden on national level. The same principle could be applicable to circumvention of access restrictions through hyperlinking.

8. Recommendations for the judiciary

The activity of the judiciary in the case of hyperlinking infringements should be well-balanced. It means that judgments should have positive influence on development of virtual world and judges should focus on the rights of users of Internet.¹⁴⁹

The freedom of hyperlinking should not be exceptionless. Hence, judges should consider if there are principles being more important than this freedom. Such principles should be among others settled rules of copyright law and trademark law.

Furthermore, courts should consider all cases in an individual way.¹⁵⁰ However, judges should also focus on international and European legal principles in the process of resolving national legal problems concerning hyperlinking.¹⁵¹

9. Conclusions

Undoubtedly, main principle in the discussed field is the freedom of hyperlinking. However, this liberty is not of exception-

¹⁴⁸ See Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 (2) Colum. J.L. & Arts 153, 200; Natalie E. Curto, 'EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level?' (2020) 11 Case W. Res. J.L. TECH. & INTERNET 84, 87-89.

¹⁴⁹ See Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) J. Intell. Prop. Info. Tech. & Elec. Com. L. 245, 251.

¹⁵⁰ Julia Launders, 'Hyperlinking and Copyright Infringement in the EU' (2020) 10 (2) King's Student L. Rev. 50, 59; see also Saw Cheng Lim, 'Implications of Reposting Copyright Material Online and Svensson Distinguished in CJEU Judgment' (2018) 30 (2) Singapore Academy of Law J. 1126, 1130.

¹⁵¹ See Mira Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' (2014) 5 (3) J. Intell. Prop. Info. Tech. & Elec. Com. L. 245.

less nature. There are situations in which applicability of this principle should be limited. For instance, justifications for limitations of this freedom can be based on fundamental principles of copyright law, trademark law and unfair competition law.

It is necessary to accept that comprehensive legal regulations in the field of hyperlinking do not currently exist. However, national, European and international lawmakers should be aware that it would be a good idea to enter into force at least standardized principles concerning jurisdictional issues.

Except for standardization concerning jurisdiction in the field of hyperlinking, *ad hoc* approach seems acceptable. However, national legislators, that would decide to apply normative approach, could apply administrative law approach as well as private law approach. In some cases, they could also create penal regulations concerning some heavy infringements in the field of hyperlinking.

In the case of normative approach, it would be a good idea to explicitly define the notions of "potential public of hyperlinked content" and "making available to new public". It could also be regulated that professional linkers should be obliged to take special care while hyperlinking. Furthermore, hyperlinking, that could lead to distortion of hyperlinked content, could be explicitly prohibited. Eventually, hyperlinking, that limits copyright holder's right to delete his or her content, could be

forbidden. It would also be a good idea to regulate issues of liability for application of metatags being trademarks in a way that can lead to infringements of the unfair competition law. Prohibition of circumvention of access restriction through hyperlinking could also be explicitly regulated. Entry into force of anti-defamatory regulations in the field of hyperlinking, that would be based on the concept of intention, could also be considered.

However, all recommendations, that are included in previous paragraph, can be applied in jurisprudence in the case of *ad hoc* approach. Therefore, legal theory of hyperlinking can be useful not only for legislative purposes but also for jurisprudence reasons.

Hence, except for jurisdictional issues, it is impossible to explicitly state if normative approach is better than *ad hoc* approach. However, both approaches should be in line with legal theory that is discussed in this article.

Declaration of Competing Interest

None.

Data Availability

No data was used for the research described in the article.