Why this matters

Cookie regulations are an important point on all online compliance checklists in Europe. However, the legal situation in Germany has been quite knotty ever since. Germany appeared to be a blank spot on the map of European cookie laws, but it was clear that this situation could not last forever.

Yet even the new statements of the German government and the European Commission have not shed any light on cookie regulations in Germany. We know that cookie regulations are in force, but we do not yet know their exact scope. Although the German government and the European Commission have come to the mutual conclusion that the ePrivacy Directive has been transposed to German law, their arguments are inconsistent with and contradict other provisions of German data privacy law.

Regulators unable to follow the law

Even data protection authorities do not seem to follow the government's arguments. As a result, the situation is still far from clear, and it is almost impossible to give definite advice on how to comply with German cookie laws. However, there are three potential options for dealing with this uncertain situation:

1. allow users to give their explicit consent. This solution plays safe, but comes at the price of impaired user experience and probably lower conversion rates. This is the most cautious approach and appears 'over-compliant' at the moment;
2. provide immediate and clear information about the use of cookies and the option to object to their use (eg by showing a banner or modal dialogue). This seems to be a reasonable compromise at the moment, although some would say it does not differ significantly from the old cookie regime before the consent requirement was introduced; or
3. wait and see. It is rather unlikely that data protection authorities and courts require immediate action as the situation is completely unclear and the news about the Commission's opinion is still very fresh. A risk remains, but we are not currently registering any hints of impending enforcement action by regulators.

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Landmark judgement on intellectual property and online links

Jonathan Mayner

Journal of Direct, Data and Digital Marketing Practice (2014) **15**, 341–344.
doi:10.1057/dddmp.2014.29

Who: Svensson and others (journalists) v Retreiver Sverige

When: 13 February 2014

Where: European Community
Law stated as at: 13 February 2014

What happened

On 13 February 2014, the Court of Justice of the European Union (CJEU) handed down an important ruling on the question of whether or not linking from one website to copyright content on another amounts to copyright infringement, even where the actual content is not copied.

The case of *Svensson and others v Retriever Sverige* (C-466/12) was referred to the CJEU in 2012 by a Swedish appeal court that asked the CJEU for clarification on a number of issues of EU copyright law. In brief, Mr Svensson and other journalists writing for the Göteborgs-Posten website complained about the activities of Retriever Sverige (Swedish Retriever). It operates a website that provides clickable links to articles published on the Göteborgs-Posten and other websites.

The CJEU ruled that a website providing links to copyright-protected content on another site was not, in and of itself, copyright infringement.

A 'new public'

The questions before the CJEU revolved around the issue of whether or not simply providing a link to someone else's copyright-protected work (such as a news article) constituted a 'communication to the public' that the copyright owner should be allowed to prevent. Communication to the public by electronic means is one of the specific 'restricted acts' that copyright law enables the owner of copyright to prevent third parties from engaging in. As it was introduced as a new restricted act only in 2001, in response to the rise of the internet, there has been limited case law to date defining what will or will not constitute a 'communication to the public'.

The CJEU ruling makes it clear that, while the provision of a link to copyright-protected content is a communication to the public, if the original content is made freely available to the public without restriction (eg there is no paywall or subscription requirement to enable internet users to view the content) then there is no communication to a new public and, therefore, no infringement. The court's view is that this analysis is correct, regardless of whether or not the internet user is aware they have been redirected to a new website or whether they believe that they are still on the same site.

Building on other case law

The emphasis on content reaching a new public, over and above that already authorized (and presumably taken into account in negotiating any contracts for the production and distribution of the content in the first place), echoes the same point being made in several previous cases concerning the transmission of broadcasts over a different channel or through a different technology to that initially intended by the originator.

The ruling also suggests that if a website provides links to cached copies of content that is no longer available on the original website, then there would be a communication to a new public and therefore infringement, although the court did not dwell on the point. The analogy is nevertheless reasonably clear: the audience for a particular item of content on the internet at one point in time is bound to be different from the audience interested in that piece of content at a later date — if only because more people gain access to the internet year on year — and therefore the public

But what about the Meltwater case?

accessing the cache is, collectively, a new public even if a large proportion is made up of the same users.

It is important to distinguish this ruling from the High Court ruling in the Meltwater case (*The Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others* [2010] EWHC 3099 (Ch)). This was upheld by the Court of Appeal, which found that reproducing the original article's headline or a short extract from the original article in the course of providing a link can constitute copyright infringement. If the link that is being provided is in fact embedded in text, such as a headline or other copyright text as a hyperlink, then there may still be infringement.

This is consistent with the CJEU's seminal decision in *Infopaq International A/S v Danske Dagblades Forening* ([2009] EUECJ C-5/08), which ruled that 11 words taken from the middle of an online article could be protected by copyright if those 11 words are original in the sense that they constitute the author's own intellectual creation — a question of fact to be decided by the national court in each case.

Meltwater itself has now been referred to the CJEU by the UK's Supreme Court, which considers that there is no copyright infringement in viewing a linked article as a result of the exemption from copyright infringement for transient copies provided by Article 5(1) of the Copyright in the Information Society Directive — a different question from that considered in *Svensson*.

Other IP issues possible with news aggregation

It is also important to note that the CJEU's decision in *Svensson* relates only to the discrete questions about copyright law referred to it by the Swedish court. There are other circumstances in news aggregation and similar cases that may give rise to other intellectual property issues, which this ruling does not deal with. For example, where the original content is presented as framed on the aggregator's own website, there may be trademark infringement and/or passing off issues (or, outside of the United Kingdom, unfair competition issues) to consider. In addition, where a content aggregator scrapes content from the original content publisher's website, there may be different copyright and/or database infringement issues to consider.

It should also be noted that nothing in this judgement changes the potential liability of the end user for anything that they may do with online content after they have accessed it. Internet users will still require the authorization of the copyright owner to carry out with the original content any of the acts restricted by copyright law, including creating copies of it or communicating it to the (or a new) public.

Why this matters

One consequence of this judgement may be that more news media and other content providers' sites move to subscription-based models for access to their online content. This does not necessarily imply a paywall, of course — merely requiring users to register for access can set up a consideration and a contractual relationship that is sufficient to define the audience to which communication has been authorized.

Alternatively, if less likely, is the possibility that organizations could experiment with removing content regularly and only retaining fresh content on their website. If any news aggregator or similar service provides links that somehow circumvent a subscription arrangement or provides

links to a cached version of content that is no longer available, they would be making a communication to a new public and therefore be liable for copyright infringement.

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New search term marketing case

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Journal of Direct, Data and Digital Marketing Practice (2014) **15**, 344–348.
doi:10.1057/dddmp.2014.30

Who: Lush v Amazon

When: 10 February 2014

Where: High Court of Justice, London, England, UK

Law stated as at: 2 May 2014

What happened

On 10 February 2014, the English High Court ruled that online retailer Amazon had infringed the registered trademark rights of Lush (a retailer of soaps and fizzy bath bombs) as a result of the manner in which it used the word LUSH (which Lush has registered as a trademark in relation to soaps, bath bombs and so on) first in its sponsored advertisements on Google and second on its own website when customers searched for Lush products.

Search advertising: A recap

The Google AdWords advertising system allows advertisers to arrange to have short advertisements (or sponsored links) appear in prominent positions on a search engine results page in return for a payment calculated on a cost-per-click basis. Advertisers effectively bid on keywords via an online portal. When an internet user searches for any given term on Google's search engine, Google's AdWords system runs an algorithm-driven, automated auction process and displays and ranks sponsored links based on the amount bid by the advertiser, as well as an assessment of the relevancy of the advertiser's website to the terms searched for by the internet user.

In practice, most large advertisers, including Amazon, use specialist software to interact with the Google AdWords system to identify and bid on high-performance keywords automatically with a view to maximizing cost-effectiveness and return on investment.

Since May 2008, Google has allowed advertisers to bid on keywords that correspond to trademarks owned by third parties.

Bidding is not in itself infringement

The jurisprudence of the CJEU in *Google France* and other cases has confirmed that Google is not liable for trademark infringement in relation to such activities. The situation with regard to advertisers themselves is less straightforward. The act of bidding on a keyword that corresponds to a third party's trademark is not itself trademark infringement. While such activity does indeed amount to the use of a third-party trademark in the course of trade, it will only be infringement if that use has some adverse