

## HYPERLINKING AND COPYRIGHT

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*This article critically considers the legality of hyperlinking to copyright-protected material on the Internet. It considers the position with respect to standard hyperlinks, and attempts to provide a possible approach in light of the proposed introduction of two new exclusive rights, namely (i) the right of communication to the public; and (ii) the making-available right. These new exclusive rights appear to be an attempt to amend the South African Copyright Act in order to give effect to the 1996 WIPO Copyright Treaty, which sought to 'digitise' copyright law in light of the digital technology that had developed. The WIPO Copyright Treaty supplements, in particular, the rights granted to copyright owners under the Berne Convention, extending the right of communication to the public to include the making-available right. Use will be made of the case law of the Court of Justice of the European Union, which has given effect to the right of communication to the public (including the making-available right), following its inclusion in the WIPO Copyright Treaty of 1996. Through a more focused analysis of these exclusive rights, it is intended that this article can provide some guidance to South African lawyers and our courts when considering the application and scope of these exclusive rights.*

Copyright – hyperlinking – legality

### I INTRODUCTION

This article considers the copyright implications of hyperlinking (or linking) on the Internet. Despite hyperlinking being an integral feature of websites, and navigating the World Wide Web, the copyright issues relating to hyperlinking have not received much academic attention in South Africa. Apart from the cursory treatment of the topic in some student textbooks,<sup>1</sup> a series of articles focusing on the copyright protection of websites and linking was published about eighteen years ago.<sup>2</sup>

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<sup>1</sup> See for example Dana van der Merwe *Computers and the Law* 2 ed (2000); Sylvia Papadopoulos & Sizwe Snail (eds) *Cyberlaw@SA III: The Law of the Internet in South Africa* 3 ed (2012); Owen Henry Dean & Alison Dyer *Dean & Dyer: Introduction to Intellectual Property Law* (2014); Dana van der Merwe, Anneliese Roos, Sieg Eiselen & S Nel *Information and Communications Technology Law* 2 ed (2016) ('Van der Merwe et al').

<sup>2</sup> G Ebersöhn 'Web sites and copyright' (2004) 12 *Juta's Business Law* 89; G Ebersöhn 'Hyperlinking and deep-linking' (2003) 11 *Juta's Business Law* 73 ('Ebersöhn (1) 2003 *JBL*'); G Ebersöhn 'Framing and intellectual property law' (2003) 11 *Juta's Business Law* 49 (Ebersöhn (2) 2003 *JBL*'). To date, this series of articles has, arguably, been the most comprehensive treatment of the topic. Since their publication, they have been repeatedly cited in textbooks, and have formed the template for the treatment of the topic in South Africa.

The aforementioned material is obviously dated, and consequently does not reflect the legal, and technological, developments that have taken place since then. What makes consideration of this topic particularly relevant at this stage is the likely introduction of two new exclusive rights, namely the exclusive right of communication to the public, and the making-available right, into South African copyright law, as proposed by the Copyright Amendment Bill ('the Bill').<sup>3</sup>

Given the fact that the right of communication to the public (and the making-available right) may be of wider scope than the existing exclusive rights of copyright owners, it is appropriate to consider the impact of such protection on hyperlinking. In other words, this article will consider when the provision of hyperlinks may constitute copyright infringement. The analysis will use the case law of the European Union, interpreting the InfoSoc Directive, which embodies the right of communication to the public (including the making-available right).<sup>4</sup> There is a secondary reason for considering the right of communication to the public (and the making-available right): the European case law concerning the right of communication to the public has, to say the least, been inconsistent and 'unclear'.<sup>5</sup> A possible reason for the difficulty in trying to make sense of the right of communication to the public is that the European case law that has considered this exclusive right has involved a wide range of activities, both offline and online. For example, there have been cases involving the transmission of broadcasts in hotel rooms,<sup>6</sup> a rehabilitation centre,<sup>7</sup>

<sup>3</sup> GN 646 GG 39028 of 27 July 2015. Subsequent references to the Bill will be to the latest draft: see Minister of Trade and Industry '13B-2017 – Final Draft 15-11-2018', available at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B13B-2017\\_Copyright.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B13B-2017_Copyright.pdf), accessed on 20 May 2020.

<sup>4</sup> 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 (OJ 2001 L 167, p 10).

<sup>5</sup> João Pedro Quintais 'Untangling the hyperlinking web: In search of the online right of communication to the public' (2018) 21 *Journal of World Intellectual Property* 385 at 386. See also Alexander Tsoutsanis 'Why copyright and linking can tango' (2014) 9 *Journal of Intellectual Property Law & Practice* 495 at 495; Neville Cordell & Beverley Potts 'Communication to the public or accessory liability? Is the CJEU using communication to the public to harmonise accessory liability across the EU?' (2018) 40 *EIPR* 289 at 289.

<sup>6</sup> *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* C-306/05, 7 December 2006.

<sup>7</sup> *Reha Training Gesellschaft für Sport-und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)* C-117/15, 31 May 2016.

a pub,<sup>8</sup> and a dental practice.<sup>9</sup> There have also been cases concerning the live streaming over the Internet of terrestrial television broadcasts,<sup>10</sup> the provision of access to an online peer-to-peer file sharing platform,<sup>11</sup> and the sale of a multimedia player enabling free access to unauthorised films.<sup>12</sup> Similarly, there was a recent United Kingdom ('UK') case that held that an online radio aggregation service (or platform) had unlawfully communicated sound recordings to the public by facilitating the streaming of foreign broadcasts in the UK, where the foreign broadcasts playing those sound recordings had not been licensed for the UK.<sup>13</sup> In order to make sense of the scope of the right of communication to the public, it may be better to focus on its application in a particular context, such as hyperlinking, as different considerations would be applicable in relation to the different types of acts that could constitute a communication to the public. Attempting to provide a general, coherent approach to the right of communication to the public based on the European case law is, perhaps, either too ambitious or not even possible, given the range of activities that could constitute a communication to the public.<sup>14</sup> Through a more focused analysis, this article intends to provide some guidance to South African lawyers and our courts when considering the application and scope of these new exclusive rights.

The legal issues being considered in this article are confined to those concerning copyright law, and will not deal with other areas of law that may also be relevant to hyperlinking, such as the law of defamation, unlawful competition, or accessory liability. Further, this article will only consider copyright infringement, and not possible infringement of moral rights under copyright law.<sup>15</sup>

<sup>8</sup> *Football Association Premier League Ltd & others v QC Leisure & others; Karen Murphy v Media Protection Services Ltd* Joined cases C-403/08 and C-429/08, 4 October 2011.

<sup>9</sup> *Società Consortile Fonografici (SCF) v Marco Del Corso* C-135/10, 15 March 2012.

<sup>10</sup> *ITV Broadcasting Ltd & others v TVCatchup Ltd* C-607/11, 7 March 2013.

<sup>11</sup> *Stichting Brein v Ziggo BV* C-610/15, 14 June 2017.

<sup>12</sup> *Stichting Brein v Jack Frederik Willems* C-527/15, 26 April 2017.

<sup>13</sup> *TuneIn Inc v Warner Music UK Ltd & another* [2021] EWCA Civ 441.

<sup>14</sup> See Sadulla Karjiker & Gretchen Jansen 'The right of communication to the public: An examination of the judgments of the Court of Justice of the European Union to provide a framework for the interpretation in the South African context' 2020 *TSAR* 702.

<sup>15</sup> Professor Dana van der Merwe quotes Professor Julian Hofman, who had suggested that unauthorised hyperlinking may, technically, amount to an infringement of moral rights (see Van der Merwe op cit note 1 at 53–4). To date, there does not appear to be any case that has considered the issue of hyperlinking and moral rights.

## II TECHNICAL BACKGROUND

The Internet is, in essence, simply a network of networks of computers, which allows for a standardised method for transferring digital data (digital bits) within that extended network.<sup>16</sup> Because the terms ‘Internet’ and ‘World Wide Web’ (or simply the ‘Web’) are often used interchangeably (as will also be the case in this article) it is, nonetheless, worthwhile to remember that from a technical perspective they are not the same thing. The Web is the result of a higher-level protocol (Hypertext Transfer Protocol (‘HTTP’)), which uses the Internet’s foundational TCP/IP protocol. The Web is thus a specific application of the network established by the Internet.<sup>17</sup> More importantly for our purposes, the network established by the Internet is indifferent to the content that is encoded in the digital data; it may, for example, be a piece of text, an image, or an audio file.<sup>18</sup>

The building blocks of the Web are webpages, and a number of webpages may be associated with a particular person (or entity) to form a website. Websites contain a wide range of elements (content or resources) which may be protectable as distinct copyright works: text, including compilations of information (protectable as literary works<sup>19</sup>); pictures, logos and images (protectable as artistic works); animated footage (protectable as cinematograph films); audio clips (protectable as musical works or sound recordings); and the source code responsible for their generation (protectable as computer programs).<sup>20</sup> Provided these works satisfy the requirements for copyright protection under the Copyright Act 98 of 1978 — that is, they are original, and produced by a qualified person, or are qualified by virtue of the place of their first publication — they would enjoy copyright protection.<sup>21</sup> The purpose of this article is to consider whether the act of hyperlinking itself may constitute copyright infringement.

Hyperlinking is fundamental to the Web, and is said to form part of its DNA.<sup>22</sup> Apart from typing in the address (the Uniform Resource Location (‘URL’)) of a particular website — which can be time-consuming and

<sup>16</sup> C Gringas *The Laws of the Internet* 2 ed (2003) 1; Andrew Murray *Information Technology Law: The Law & Society* 4 ed (2019) 22.

<sup>17</sup> Murray *ibid* at 4 and 32–3.

<sup>18</sup> John Naughton *What You Really Need to Know About the Internet: From Gutenberg to Zuckerberg* (2012) 305.

<sup>19</sup> In jurisdictions that provide sui generis database protection, the compilations may constitute protectable databases.

<sup>20</sup> Ebersöhn 2004 *JBL* op cit note 2 at 90.

<sup>21</sup> The fact that the content of a website will constitute digital data will satisfy the requirement that it be reduced to a material form (s 2(2) of the Copyright Act). Sometimes another stated requirement is that the work must not amount to improper or scandalous material.

<sup>22</sup> Murray op cit note 16 at 275.

prone to error — hyperlinking is how we tend to navigate to websites, and within websites. What makes the Web the valuable resource it has become is that it employs hypertext: text that contains a selectable link (or hyperlink) — the most common form being a highlighted word or picture — to other resources, which can be accessed by Internet users clicking on such links, icons or text.<sup>23</sup> As indicated, these other resources can be another webpage or some other form of digital content such as an image, video or sound recording. In the interest of simplification, it will be assumed that the other resource being linked is another webpage, which contains content protected by copyright.

For completeness, s 1 of the Electronic Communications and Transactions Act 25 of 2002 ('ECTA') defines a 'hyperlink' in more technical terms as 'a reference or link from some point in one data message directing a browser or other technology or functionality to another data message or point therein or to another place in the same data message'.<sup>24</sup> While the ECTA does not distinguish between different types of hyperlinks, a distinction was drawn between different types of hyperlinks in early copyright disputes concerning hyperlinking. Prior to the InfoSoc Directive, some courts, when determining whether a party had infringed the rights in another party's website, tended to draw a distinction between, for example, a simple (or surface) link, on the one hand, and a deeplink, on the other hand.<sup>25</sup> This distinction was also adopted at the time by legal commentators.<sup>26</sup> While the distinction between the different types of hyperlink no longer appears to be significant, it is still useful to identify the different types of hyperlinks, and from there to illustrate how the law has developed since then.

A simple link is a link to the homepage of the referenced (linked-to, target or destination) website which, when clicked, directs the Internet user to the linked-to website, without retaining an element of the website that links to it. Deeplinking involves the use of a link that takes Internet users directly to an internal webpage of another website, bypassing the homepage of the destination website.<sup>27</sup> There is no fundamental distinction between a simple link and a deeplink as, in essence, they both serve to direct the Internet user to the destination webpage, with the web address (or URL) of the initial webpage (on which the hyperlink appeared) no longer being visible to the Internet user (or the Internet user's browser may

<sup>23</sup> Naughton op cit note 18 at 52; Tsoutsanis op cit note 5 at 496–7.

<sup>24</sup> The relevant provisions in the ECTA impacting on liability for hyperlinking will be referred to later in this article.

<sup>25</sup> *Shetland Times Ltd v Wills & another* [1997] FSR 604; *Danske Dagblades Forening v Newsbooster* [2003] ECDR 5.

<sup>26</sup> See for example *Ebersöhn (1) 2003 JBL* op cit note 2 at 73; *Papadopoulos & Snail* op cit note 1 at 176.

<sup>27</sup> *Ibid* at 73; *Murray* op cit note 16 at 276.

open a new browser for the linked-to webpage).<sup>28</sup> By contrast, ‘framing’ concerns a situation where the content of the linked-to webpage, owned by a third party, is displayed within the webpage that links to, or references, it.<sup>29</sup> Framing seeks to keep the Internet user within the initial webpage (or website), and this is essentially achieved by displaying the content of the referenced webpage to look as though it is part of the linking (or framing) website. Put differently, a simple link or deeplink redirects (or ‘pushes’) the Internet user to the linked-to destination, whereas framing seeks to incorporate (or ‘pull’) the linked-to content into the initial website containing the hyperlink.<sup>30</sup>

For the purposes of this article, it is submitted that it is important to distinguish hyperlinks on another basis, namely whether the hyperlink that is presented to the Internet user itself contains copyright-protected content from the linked-to website. This is a distinction that is not always made explicit in the case law. A distinction should be drawn between ‘technical’ hyperlinks or hyperlinks simpliciter (referred to as ‘basic hyperlinks’); neutral hyperlinks; and what will be referred to as ‘snippet hyperlinks’. A basic hyperlink is one that consists simply of a particular webpage’s web address (or URL). Neutral hyperlinks comprise content (text or an image) that is created by the linking party, or content that is simply of a descriptive nature. For example, X may have a website dedicated to the sport of tennis, which includes reviews of tennis equipment such as tennis racquets. X’s review of a new racquet might include the manufacturer’s name and the specific racquet model, with a hyperlink comprising the manufacturer’s name and which directs the Internet user to the manufacturer’s website. Given the fact that the visual appearance (or representation) of the link, as presented to the Internet user, does not contain any copyright-protected content, there should be no copyright infringement on account of the visible content of the link itself. Any basis for such a link (as is also the case with a basic hyperlink) constituting copyright infringement will, thus, be as a consequence of the content to which such a link directs the Internet user.

Snippet hyperlinks are different. They comprise those hyperlinks that contain copyright content taken from the destination webpage — that is, there is the use of portions of copyright-protected material (or snippets) from the linked-to webpage that form part of the hyperlink itself, as presented visually to the Internet user, which may be a thumbnail

<sup>28</sup> Ebersöhn *ibid* at 76; Tsoutsanis *op cit* note 5 at 497.

<sup>29</sup> Van der Merwe *et al op cit* note 1 at 295; Ebersöhn *ibid* at 75; Ebersöhn (2) 2003 *JBL op cit* note 2 at 49; Tsoutsanis *op cit* note 5 at 497. Inline linking, embedded linking or hotlinking can be regarded as a form of framing, with the referenced content from the referenced website, typically an image, incorporated into the webpage which links to it.

<sup>30</sup> Tsoutsanis *op cit* note 5 at 497.

image or a news article headline. This article will not consider snippet hyperlinks, or hyperlinks where the link itself contains copyright material. The reason for excluding them is that the content of the snippet link may itself constitute copyright infringement, which is rightly the subject of a separate enquiry. In other words, this article will only focus on whether the mere act of hyperlinking to another party's website, or hyperlinking per se, constitutes copyright infringement — that is, linking by way of basic links or neutral links, but not whether there is copyright infringement based on the content of the hyperlink itself.<sup>31</sup> For the purposes of this article, basic links and neutral links will collectively be referred to as 'standard links'. Thus, it is assumed that the webpage being linked by the relevant hyperlink contains a protected copyright work, but that no part of the protected matter forms part of the hyperlink itself. Furthermore, it will be assumed that the owner of the copyright in the material embodied in the linked-to website has not authorised the hyperlinking to the linked-to website.

### III THE LEGAL CONTEXT OF HYPERLINKING

One of the exclusive rights given to copyright owners<sup>32</sup> by the Berne Convention<sup>33</sup> is the right of communication to the public, which is provided for in art 11*bis*:

<sup>31</sup> This article will not consider the impact of the 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 (OJ 2019 L 130, p 92). There are two reasons for this. First, South Africa does not, at present, plan to introduce a similar right to art 15, which gives press publishers stronger rights concerning the use of their press publications when linked by information society service providers, particularly news aggregators. This is regrettable. Secondly, it is more appropriately considered when dealing with snippet links.

<sup>32</sup> The Berne Convention generally refers to the 'author' as the relevant recipient of the various entitlements to the economic and moral rights of copyright, given that its spirit was that the recipient of the rights be a natural person. It is, however, recognised that member states may have different national approaches to copyright authorship and ownership (Mihály Ficsor *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (2004) 32, 89, 268 and 300). In South Africa, author and owner are distinct concepts, although the default position pursuant to s 21 of the Copyright Act is that the author shall be deemed the owner of the economic rights in relation to a copyright work, unless one of exceptions in that section awards those rights to another party — that is, the owner. As a result, in accordance with the provisions of the Copyright Act, references to the 'author' in the context of international and European law must be construed as the copyright owner in the South African context, and when discussing the relevant provisions of international and European law, the references to the 'author' will, similarly, be regarded as the copyright owner.

<sup>33</sup> Berne Convention for the Protection of Literary and Artistic Works (adopted on 9 September 1886, as last revised, at Paris, on 24 July 1971).

- (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
  - (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
  - (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.’

As may be expected given the age of the Berne Convention, the exclusive right of communication to the public as provided for in the Berne Convention is concerned with pre-digital and pre-Internet forms of communications such as terrestrial broadcasts, rebroadcasts, and performances in public. These rights are specifically defined and would not cover the transmission of copyright works via the Internet. Indeed, the Copyright Act continues to be based on giving effect to the rights of communication to the public, as the Berne Convention provides, although it does not do so by explicitly referencing such exclusive right in the broad terms of the Berne Convention. Instead, the Copyright Act provides for specific grants of exclusive rights that would be covered by the more general right of communication to the public. The Copyright Act grants the copyright owner the exclusive right to distribute its work by broadcasting it,<sup>34</sup> to transmit its work in a diffusion service,<sup>35</sup> and to perform its work in public.<sup>36</sup> Even the exclusive right to publish, as provided for in the Copyright Act for literary and musical works,<sup>37</sup> artistic works,<sup>38</sup> and computer programs,<sup>39</sup> is problematic in the context of the Internet.<sup>40</sup> It has an in-built element of exhaustion, as the exclusive right only exists for so long as the work is unpublished.<sup>41</sup> The right can, effectively, only be exercised once. In other words, the right of publication is something of a misnomer, as it is more akin to a right of public disclosure.

<sup>34</sup> Sections 6(d), 8(c), 9(c), 10(b) and 11B(d) of the Copyright Act.

<sup>35</sup> Sections 6(e), 7(d), 8(d), 9(d), 10(c) and 11B(e) of the Copyright Act.

<sup>36</sup> Sections 6(c), 7(c), 8(b), 9(e) and 11B(c) of the Copyright Act.

<sup>37</sup> Section 6(b) of the Copyright Act.

<sup>38</sup> Section 7(b) of the Copyright Act.

<sup>39</sup> Section 11B(b) of the Copyright Act.

<sup>40</sup> Sections 6(b), 7(b) and 11B(b) of the Copyright Act.

<sup>41</sup> This is particularly so under South African law: for example, s 6(b) of the Copyright Act gives the copyright owner of a literary work the right to publish its work ‘if it was hitherto unpublished’. Presumably, a work can only be unpublished for so long as it has not been published. Furthermore, when regard is had to s 1(5) of the Copyright Act, the act of publication is construed with reference to the issuing of physical copies of the copyright work.

It is also doubtful whether an expanded notion of the exclusive right to authorise the performance of a copyright work in public<sup>42</sup> (or to cause it to be shown or heard in public<sup>43</sup>) would be adequate to deal with transmissions of copyright works via the Internet. It is, in any event, not appropriate to stretch concepts to a point where they become meaningless. This is because the right of communication, as contemplated in the Berne Convention, and as transposed into national law such as South African law, was undoubtedly concerned with ‘traditional “push” technologies, where the broadcast or wired transmission is from the transmitting entity to passive recipients. In particular, these rights afforded limited protection to on-demand transmissions.’<sup>44</sup>

Accordingly, since the last revision of the Berne Convention, the challenges posed to copyright owners by the realities of new technologies and the Internet have required the introduction of expanded exclusive rights in order to provide copyright owners with enhanced protection. The digitisation of copyright works and the ability to disseminate such works via the Internet have brought about significant changes in how copyright works could be communicated to the public:

‘In the pre-digital, analogue era, communication was “producer-driven”: the persons to whom the information was communicated were merely passive recipients of such information. A typical example of this is where a copyright work was communicated to the public in a broadcast or publication, which can be categorised as a “one-way,” or non-interactive, mode of communication. With the development of technology, however, the recipients of copyright works are now able to be active participants in the reception of those works: recipients can, at the time of their own choosing, search for, and access, copyright works, and they can even, in turn, communicate those works. In the digital era, online communication is not just one-way, not even just two-way, but multi-directional. One of the fundamental characteristics of the Internet is the interactivity amongst users that it enables.’<sup>45</sup>

In other words, the advent of digital technology and the Internet has blurred the lines between transmission, publishing and broadcasting.<sup>46</sup> Given this challenge, the World Intellectual Property Organization (‘WIPO’) adopted the WIPO Copyright Treaty in 1996,<sup>47</sup> which

<sup>42</sup> Section 6(c) of the Copyright Act.

<sup>43</sup> Section 8(b) of the Copyright Act.

<sup>44</sup> Poorna Mysoor ‘Unpacking the right of communication to the public: A closer look at international and EU copyright law’ (2013) 2 *Intellectual Property Quarterly* 166 at 168.

<sup>45</sup> Karjiker & Jansen op cit note 14 at 704–5.

<sup>46</sup> Iftikhar Hussian Bhat ‘Right of communication to the public in the digital environment’ (2013) 2 *International Journal of Engineering Science Invention* 7 at 7.

<sup>47</sup> WIPO Copyright Treaty (adopted on 20 December 1996, and which entered into force on 6 March 2002).

‘was basically adopted to digitize copyright law, to avoid that digital technology would oust traditional copyright legislation’.<sup>48</sup> Central to that aim has been the expansion of the exclusive right of communication to the public, pursuant to art 8 of the WIPO Copyright Treaty, so as to include the so-called ‘making available’ right.<sup>49</sup> Article 8 provides:

‘Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(i), 14(1)(i) and 14*bis*(1)(i) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.’

It is clear that the WIPO Copyright Treaty supplements (rather than detracts from) the rights granted to copyright owners under the Berne Convention, as the right of communication to the public now extends also to the making-available right.<sup>50</sup> The making-available right, while cast in technologically neutral language, clearly seeks to address the challenges brought about by the dissemination of works via the Internet — in particular, the characteristically different nature in which copyright works may be accessed via the Internet when compared to communications associated with the pre-digital, analogue era. As indicated, there is now a significant transition brought about by the Internet, namely ‘to interactive and on-demand (as opposed to linear) communications’.<sup>51</sup>

Although South Africa is a signatory to the WIPO Copyright Treaty, it has yet to ratify the treaty.<sup>52</sup> While the Bill has been severely criticised, and its passage to becoming law has been fraught with issues,<sup>53</sup> it does

<sup>48</sup> Tsoutsanis op cit note 5 at 499.

<sup>49</sup> Ibid at 499; Eleonora Rosati ‘Linking and copyright: Easier at last? First national applications of the CJEU GS Media Judgment’ in Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou & Thalia Prastitou (eds) *EU Internet Law in the Digital Era: Regulation and Enforcement* (2020) 62.

<sup>50</sup> Rosati *ibid*.

<sup>51</sup> Quintais op cit note 5 at 387.

<sup>52</sup> South Africa signed the WIPO Copyright Treaty on 12 December 1997: World Intellectual Property Organisation ‘WIPO-administered treaties’ available at [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16), accessed on 20 May 2020.

<sup>53</sup> In a letter to the National Assembly Speaker, dated 16 June 2020, President Cyril Ramaphosa referred the Bill back to the National Assembly. Amongst the reasons cited by the President for doing so were concerns about the constitutionality of the Bill, and the negative effects on the rights of authors and copyright owners. See [https://legalbrief.co.za/media/filestore/2020/06/ramaphosa\\_on\\_copyright\\_amendment\\_bill.pdf](https://legalbrief.co.za/media/filestore/2020/06/ramaphosa_on_copyright_amendment_bill.pdf), accessed on 2 June 2021. Subsequently, the Portfolio Committee on Trade and Industry, on 14 May 2021, agreed that ‘the Bill should have been tagged as a s 76 Bill and resolved that it would request the House to submit the Bill to the Joint Tagging Mechanism for reconsideration

appear that it attempts to amend the Copyright Act in order to give effect to the WIPO Copyright Treaty and, more particularly for the purposes of this article, proposes to introduce a right of communication to the public *and* a making-available right.<sup>54</sup> But the way in which the Bill does so is but one example of the poor quality of the drafting in the Bill. First, unlike the WIPO Copyright Treaty, the Bill regards the making-available right as an exclusive right that is distinct from the right of communication to the public, rather than simply being a particular manner of communication to the public. The WIPO Copyright Treaty introduced the making-available right as part of the right of communication to the public. However, this is not what the Bill proposes. Secondly, despite the fact the proposed amendment to the Copyright Act will include a distinct right of communication to the public, it will still retain the specific exclusive rights that are accepted as falling under that umbrella right, such as the broadcasting right<sup>55</sup> and, of course, the making-available right. This, at best, results in unnecessary duplication and, at worst, may result in a lack of legal (or conceptual) distinction between the different exclusive rights. There is a danger that, in time, a court may consider that a given situation falls between the separately enumerated exclusive rights, or will draw artificial distinctions between the relevant exclusive rights, rather than recognising the umbrella, or overarching, nature of the right of communication to the public.

Given the fact that the making-available right should merely be regarded as an aspect of the right of communication to the public, the concepts of 'right of communication to the public' and 'making-available right' will be used interchangeably in this article, in spite of the Bill's approach.

In the European Union, the right of communication to the public, in line with the WIPO Copyright Treaty, was harmonised by the InfoSoc Directive, specifically in art 3. It is through the case law that has interpreted art 3 that the regulation of hyperlinking will be considered, in order to develop a possible approach for South Africa.

For the avoidance of doubt, this article will not consider the exclusive right of reproduction as such in the context of hyperlinking. The reason why the exclusive right of reproduction is not being considered is two-fold. First, given the nature of standard hyperlinks, no copyright-protected content forms part of the hyperlink itself (in contrast to a snippet link); and, secondly, a hyperlink per se — particularly not a standard link — does not reproduce the protected works forming part of the destination

of its classification and to specifically consider whether the Bill should be dealt with in terms of s 76 of the Constitution, 1996'. See <https://pmg.org.za/tables-committee-report/4595/>, accessed on 3 June 2021.

<sup>54</sup> Clauses 4(a), 6(a), 8(1)(dA), 8(1)(dB) and 10 of the Bill.

<sup>55</sup> Sections 6(d), 8(c), 9(c), 10(b) and 11B(d) of the Copyright Act.

website. A hyperlink is simply a pointer to the destination website or content. It is only when the Internet user clicks on the hyperlink that the content is downloaded to the Internet user's computer from the source where the content is hosted.<sup>56</sup>

#### IV EUROPEAN HYPERLINKING CASE LAW

It should probably be incontrovertible that a copyright owner who makes its works freely available on the Internet — that is, without any technical restrictions to its accessibility — is permitting Internet users to access those copyright works. This would necessarily include permission to make copies of those works, to the extent that those copies are made on the Internet users' devices as part of the technical process while browsing the Internet.<sup>57</sup> However, it cannot be assumed that any reproduction of copyright works incorporated in a website, beyond that needed to browse the particular website, is permitted. What about the hyperlinking to that website by way of standard hyperlinks?

When considering the European case law on hyperlinking, in light of the making-available right, the obvious starting point is the *Svensson* case.<sup>58</sup> The applicants were the authors (journalists) of press articles that were published on the *Göteborgs-Posten* website and were linked by Retriever Sverige. The authors' articles were freely accessible on the *Göteborgs-Posten* newspaper site.<sup>59</sup> They claimed that Retriever Sverige's conduct — providing hyperlinks to the applicants' articles — amounted to copyright infringement pursuant to art 3(1) of the InfoSoc Directive.<sup>60</sup> In essence, the issue was whether the provision on a website of hyperlinks to protected works available on another website constituted an act of communication to the public pursuant to that provision where, on that other site, the works concerned were freely accessible.<sup>61</sup> It should be noted that the judgment does not indicate whether the links to the protected works used any of the copyright content as part of the hyperlink, such as the headlines of those articles. Thus, the court did not concern itself with the content of the link itself, or whether it consisted of, for example, a reproduction of an extract from the relevant articles, as in the *Infopaq* case<sup>62</sup> or the *Shetland Times* case.<sup>63</sup> In other words, the judgment was given on the basis that the hyperlinks were not snippet hyperlinks, but on the basis of an act of linking per se.

<sup>56</sup> Ebersöhn (1) 2003 *JBL* op cit note 2 at 75–6; Quintais op cit note 5 at 398.

<sup>57</sup> Murray op cit note 16 at 275–6.

<sup>58</sup> *Svensson & others v Retriever Sverige AB* C-466/12, 13 February 2014.

<sup>59</sup> *Ibid* para 8.

<sup>60</sup> *Ibid* paras 1 and 11.

<sup>61</sup> *Ibid* para 14.

<sup>62</sup> *Infopaq International A/S v Danske Dagblades Forening* C-5/08, 16 July 2009.

<sup>63</sup> *Shetland Times Ltd v Wills & another* supra note 25.

The Court of Justice of the European Union ('CJEU') held that the concept of 'communication to the public' involves two cumulative criteria, namely an 'act of communication' of a work, and the communication of that work to the 'public'.<sup>64</sup> 'Public' means a large, indeterminate number of potential recipients.<sup>65</sup> As clickable links on a website are aimed at all potential users of the website, and therefore an indeterminate and fairly large number of recipients, the publishing of such links will constitute making a communication to the 'public' by the website operator.<sup>66</sup>

The CJEU held that where there has been an authorised communication of a copyright work to the public, a subsequent communication of such work by another party by the same technical means will only be an infringing communication if it is to a 'new public' — that is to say, one different from the public of the initial communication.<sup>67</sup> The initial (authorised) communications of the copyright works by the journalists were not subject to any restrictive measures and, therefore, any Internet user had free access to them.<sup>68</sup> Any person who accessed the works through Retriever Sverige's website was a potential recipient of the initial communication of the copyright works and, therefore, part of the public to whom the initial communication was made.<sup>69</sup> Accordingly, Retriever Sverige's making available the copyright works concerned by means of clickable hyperlinks did not lead to the works being communicated to the public (or, more specifically, to a 'new public'<sup>70</sup>),<sup>71</sup> and did not require authorisation of the copyright holders.<sup>72</sup> Authorisation would have been required if access to the initial communication was restricted, or the work was no longer available on the initial website, because the later communication of the work would then have been to a new public.<sup>73</sup> The case did not draw any distinction based on the type of hyperlink, namely whether the hyperlink was a simple hyperlink, deeplink or constituted framing (a matter which will be further considered below).<sup>74</sup> It should be noted that the *Svensson* case did not consider whether the making available of the hyperlink was the result of intentional or deliberate conduct (or with knowledge of its unlawfulness) when assessing whether it constituted an infringement. This contrasts with some of the other judgments

<sup>64</sup> *Svensson & others v Retriever Sverige AB* supra note 58 para 16.

<sup>65</sup> *Ibid* para 21.

<sup>66</sup> *Ibid* paras 22 and 23.

<sup>67</sup> *Ibid* para 24.

<sup>68</sup> *Ibid* para 26.

<sup>69</sup> *Ibid* para 27.

<sup>70</sup> *Ibid* para 25.

<sup>71</sup> *Ibid* para 32.

<sup>72</sup> *Ibid* para 28.

<sup>73</sup> *Ibid* para 31.

<sup>74</sup> *Ibid* para 29.

of the CJEU relating to other non-hyperlinking activities covered by the right of communication to the public, in which the court has required that the act be accompanied by such fault-related conduct.<sup>75</sup>

The CJEU in the subsequent *Land Nordrhein-Westfalen* case gave reasons why access to a copyright work by means of a hyperlink to another, freely accessible, authorised website should not be considered to be a communication to a new public, and the original communication must be regarded as a communication to all Internet users.<sup>76</sup> First, hyperlinks contribute to the sound operation of the Internet by enabling the dissemination of information.<sup>77</sup> Secondly, in the case of a hyperlink, the owner of the copyright work always has the ability to remove it from the authorised website, rendering the hyperlink obsolete.<sup>78</sup> Thirdly, the court suggested that a hyperlink per se does not amount to the reproduction of a copyright work.<sup>79</sup>

Given the aforesaid, one could be left with the impression that any type of standard hyperlinking is permissible from a copyright perspective. However, this is not the case where the copyright content being linked was not published with the authorisation of the copyright owner. That was the scenario that the CJEU was faced with in the *GS Media* case.<sup>80</sup> Sanoma, the publisher of *Playboy* magazine, had the exclusive rights to publish photographs of Ms Dekker, taken for *Playboy* magazine ('the photographs at issue').<sup>81</sup> GS Media operated the *GeenStijl* website for profit, and provided hyperlinks to files containing the photographs at issue, hosted on third-party websites. Sanoma had not authorised the publication of those photographs on the third-party websites, and their publication on those websites was, thus, unlawful.<sup>82</sup> Sanoma had previously requested that GS Media not publish the photographs at issue on the *GeenStijl* website. These requests were ignored.<sup>83</sup> Sanoma claimed that GS Media's conduct constituted copyright infringement.<sup>84</sup>

At issue was whether the posting of the hyperlinks by *GeenStijl* constituted an unauthorised communication to the public within the

<sup>75</sup> Quintais op cit note 5 at 389. See for example *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)* 2016 C-117/15, 31 May 2016; *Stichting Brein v Jack Frederik Willems* supra note 12.

<sup>76</sup> *Land Nordrhein-Westfalen v Renckhoff* C-161/17, 7 August 2018 para 37.

<sup>77</sup> Ibid para 40.

<sup>78</sup> Ibid para 44.

<sup>79</sup> Ibid para 45.

<sup>80</sup> *GS Media BV v Sanoma Media Netherlands BV* C-160/15, 8 September 2016.

<sup>81</sup> Ibid paras 2 and 6.

<sup>82</sup> Ibid paras 17 and 54.

<sup>83</sup> Ibid paras 7–15.

<sup>84</sup> Ibid para 17.

meaning of art 3(1) of the InfoSoc Directive.<sup>85</sup> The CJEU held that whether an act constitutes a ‘communication to the public’ must be assessed on an individual basis, having regard to the particular facts, and with reference to various criteria.<sup>86</sup> There will be a communication to the public by a person if that person deliberately makes the work available to persons whom he or she knows, without his or her intervention, would not have had access to the work.<sup>87</sup>

The posting of a hyperlink to another website, where that other website is freely available, and where the other website contains a protected work without the consent of the copyright owner, amounts to a communication to the public if the posting of the link was done in pursuit of financial gain, with knowledge (actual or constructive) of the illegal nature of the publication of the work on that other website.<sup>88</sup> If the hyperlink is for financial gain, knowledge of the illegal nature of the publication is presumed, because it can be expected that the person who posted such a link carried out the necessary checks to ensure that the work concerned was not illegally published.<sup>89</sup> Unless that presumption is rebutted, that act of posting a hyperlink to a work that was illegally placed on the internet constitutes a communication to the public within the meaning of art 3(1).<sup>90</sup>

The posting of a hyperlink that is not for financial gain to another website, where that other website is freely available, and where that other website contains a protected work without the consent of the copyright owner, will only amount to a communication to the public if: the person who posted that link knew, or could reasonably have known, that that work had been published on the Internet without the consent of the copyright holder;<sup>91</sup> or the hyperlink circumvented the restrictions implemented by the website, where the protected work was posted in order to restrict the public’s access to subscribers (as that amounts to deliberate conduct to circumvent the restrictions).<sup>92</sup>

Copyright owners are not required to act against the initial unauthorised publication of their works on a website.<sup>93</sup> GS Media was aware of the fact that Sanoma had not authorised the publication of the photographs on the Internet. As a result, it could not rebut the presumption that the posting of those links occurred in full knowledge of the illegal nature

<sup>85</sup> Ibid para 25.

<sup>86</sup> Ibid paras 33 and 34.

<sup>87</sup> Ibid para 35.

<sup>88</sup> Ibid para 55.

<sup>89</sup> Ibid paras 51 and 55.

<sup>90</sup> Ibid para 51.

<sup>91</sup> Ibid para 47.

<sup>92</sup> Ibid para 53.

<sup>93</sup> Ibid.

of that publication.<sup>94</sup> There was no overriding right based on freedom of expression and information affecting the copyright holders' right to protection of their intellectual property.<sup>95</sup>

Before proceeding to analyse the implications of these judgments for South African law, it may be useful to also consider the CJEU's position concerning framing. The reason for this is that, as I have already mentioned, in the past a distinction was drawn between, on the one hand, simple links and deeplinks, and, on the other hand, framing.

Although the *Svensson* case did not concern the issue of framing, the court did make some obiter remarks about framing. The court suggested that hyperlinking did not lead to the works being communicated to the public even if, when Internet users clicked on the links at issue, the works appeared in such a way as to give the impression that they appeared on the site that linked to those works, whereas in fact that work came from another website.<sup>96</sup> This position was confirmed by the CJEU in the *BestWater* case.<sup>97</sup> The problem with the *BestWater* case is that the CJEU did not provide a detailed judgment in the case, but merely issued a 'reasoned order', which it is entitled to do 'if the question referred by the national court is "identical to a question on which the court has already ruled"'.<sup>98</sup>

*BestWater* was the copyright owner of a video that had been uploaded on YouTube.<sup>99</sup> The defendants included that video on their own websites by way of framing.<sup>100</sup> The issue that the court had to determine was whether the copyright owner's consent was required to link to its content, when that content was openly available on a third-party website, whether by providing a hyperlink to that content or framing the content — that is, whether it constituted a communication to the public.<sup>101</sup>

The CJEU held, in a finding similar to the *Svensson* case, that the communication was by the same technical means and not to a new public. Accordingly, there was no communication to the public and no copyright infringement.<sup>102</sup> The court, thus, drew no distinction between hyperlinking as such and framing, provided that the copyright content being linked

<sup>94</sup> *Ibid* para 54.

<sup>95</sup> *Ibid* para 44.

<sup>96</sup> *Svensson & others v Retriever Sverige AB* supra note 58 para 29.

<sup>97</sup> *BestWater International GmbH v Michael Mebes & Stefan Potsch* C-348/13 (21 October 2014).

<sup>98</sup> Laura Mazzola 'BestWater practice for linking or framing content: *BestWater International GmbH v Michael Mebes and Stefan Potsch*' (2015) 26 *Entertainment LR* 56 at 57. Furthermore, the full order is not available in English, so the few details of the case are drawn here from commentaries on the case.

<sup>99</sup> It is not clear whether the video was uploaded to YouTube with BestWater's consent (see *ibid* at 57).

<sup>100</sup> *Ibid*.

<sup>101</sup> *Ibid* at 56 and 57.

<sup>102</sup> *BestWater International GmbH v Michael Mebes & Stefan Potsch* supra note 97.

(or framed) was published with the authorisation of the copyright owner.<sup>103</sup> This was again confirmed in a recent CJEU decision in which it was held that the point of departure is that the framing of a protected work, which is freely accessible on the Internet with the authorisation of the copyright holder on a third-party website, does not amount to a communication to the public because it amounts to a communication by the same technical means (namely, the Internet), and is not to a new public.<sup>104</sup> The position is different if the framing circumvents any technical protective measures that seek to prevent framing.<sup>105</sup> This is, of course, no different to any type of linking that circumvents any technical protective measures.

## V ANALYSIS

As previously indicated, the issue of the copyright implications of hyperlinking under South African law has not received serious attention for some time now, and it will now be considered whether the views about it that have previously been expressed are still valid. This will be done by critically analysing not only the previously expressed position concerning hyperlinking, but also whether such position would be consistent with the proposed introduction of the new exclusive rights of communication to the public and the making-available right pursuant to the Bill. In addition, the CJEU case law will be critically evaluated to determine whether it represents a position that is compatible with South African copyright law.

Ebersöhn considered the issue of whether hyperlinking could amount to copyright infringement by way of *reproduction*.<sup>106</sup> This made sense at the time, given the fact the Copyright Act did not (and, at present, still does not) make provision for a right of communication to the public or a making-available right, as the Bill proposes. He suggested that hyperlinking (both simple linking and deeplinking) was analogous to the use of a library card index (catalogue) to locate resources, which simply directs the user to the resource, rather than reproducing that resource.<sup>107</sup> In other words, hyperlinks can be viewed as interactive, or smart, footnote references, which, in the absence of something more, should not raise any copyright issues. Ebersöhn correctly submitted that simple hyperlinking and deeplinking (i.e. standard linking) do not amount to copyright infringement, as a hyperlink per se does not reproduce the linked-to content.

<sup>103</sup> It has been suggested that the content at issue in the *BestWater* case was not posted on YouTube with the authorisation of the copyright owner (see Rosati op cit note 49 at 68).

<sup>104</sup> *VG Bild-Kunst v Stiftung Preussischer Kulturbesitz* C-392/19, 9 March 2021 para 36.

<sup>105</sup> *Ibid* para 55.

<sup>106</sup> Ebersöhn (1) 2003 *JBL* op cit note 2 at 73.

<sup>107</sup> *Ibid* at 74, 75 and 76.

It is the Internet user's computer that reproduces the linked-to content, not the website that hyperlinks to that resource.<sup>108</sup> This, of course, is still a view that remains valid.

However, Ebersöhn also seemed to suggest that, given how important linking is to the functioning of the Internet, the lawfulness of hyperlinking to another website may be based on the consent of the relevant website owner: unless the website owner indicates otherwise, the website owner gives tacit consent to others to link to its website.<sup>109</sup> It is submitted that tacit consent cannot be a sound legal basis for hyperlinking to websites. First, this contradicts Ebersöhn's own stated position that linking per se (standard linking) does not amount to copyright infringement by reproduction. He justified this view on the basis that, since the hyperlink does not reproduce the linked-to content, there is no reason for the relevant website owner to authorise (whether tacitly or explicitly) such hyperlinking. Put differently, unless a website owner has protected its website with technical protective measures to restrict access,<sup>110</sup> whether the website owner consents to linking to its website is irrelevant. Of course, the introduction of a right of communication to the public or a making-available right, as proposed by the Bill, does extend a copyright owner's rights, and the question of the website owner's authorisation (whether tacit or explicit) should be considered again in relation to these new exclusive rights.

Secondly, given how essential hyperlinking is to the functioning of the Internet,<sup>111</sup> in the absence of technical protective measures, making hyperlinking dependent on a website owner's consent (whether in relation to the exclusive right of reproduction, a right of communication to the public, or a making-available right), which can be excluded by a website owner's terms of use, is an unsatisfactory basis for hyperlinking. To expect every hyperlink to a website to be preceded by a check as to whether hyperlinking is permitted (or more likely, not prohibited) under the terms associated with that website, imposes too high a social cost. In fact, Hofman — almost 30 years ago — suggested that 'the rights of the copyholder should give way to the general good' in this regard, and that standard hyperlinking should not amount to copyright infringement.<sup>112</sup>

<sup>108</sup> Ibid at 75 and 76.

<sup>109</sup> Ibid at 75.

<sup>110</sup> Examples of technical protective measures are subscription pay-walls, session IDs, current geo-blocking measures, or 'robot.txt' files (see Quintais op cit note 5 at 400).

<sup>111</sup> Ebersöhn (1) 2003 *JBL* op cit note 2 at 75.

<sup>112</sup> The quote appears in Van der Merwe op cit note 1 at 54.

It is submitted that the aforementioned position is also consistent with the *Svensson* case.<sup>113</sup> In other words, even if there is an introduction of the new exclusive right of communication to the public and the making-available right pursuant to the Bill, hyperlinking per se to protected works available on another, freely accessible, website would not amount to copyright infringement. The same would apply, it is submitted, if such linking takes the form of framing.

Ebersöhn drew a distinction between, on the one hand, linking by way of simple hyperlinking and deeplinking, and, on the other hand, by way of framing. It appears that the principal reason for drawing this distinction was the commercial considerations of website owners in a very direct sense. He claimed that framing is problematic because the website owner of the linked-to website lost potential advertising revenue, as the advertising on the relevant website may be removed as part of the framing process. In addition, the linking website benefited from additional Internet traffic (and, presumably, greater advertising revenue itself) as a consequence of the framed content.<sup>114</sup> Accordingly, he submitted that framing may constitute both copyright infringement and unlawful competition.<sup>115</sup>

Ebersöhn claimed that copyright infringement occurs because the operator of the linking website causes the linked-to website to be reproduced within its website.<sup>116</sup> Secondly, and curiously, Ebersöhn suggested that framing also amounts to the public performance of the linked-to content.<sup>117</sup> Furthermore, framing was said to involve an adaptation of the protected content.<sup>118</sup>

It is not clear why Ebersöhn, from a copyright perspective, did not — in line with his previous stated position in respect of simple links and deeplinks<sup>119</sup> — suggest that it is the Internet user's computer that reproduces the framed content, and not the party who framed the content. As indicated above, the *Svensson* case did not draw any distinction based on the type of hyperlink, namely whether the hyperlink was a simple hyperlink,

<sup>113</sup> Probably because of the concern about the introduction of the concept of a 'new public', the subsequent *Soulier* case suggested that hyperlinking may be permissible on the basis of 'implied consent' (*Soulier & Doke v Premier ministre, Ministre de la Culture et de la Communication* C-301/15, 16 November 2016 para 36). However, implied consent as a basis for hyperlinking has, it is submitted, correctly been questioned (see Quintais op cit note 5 at 400). For completeness, it should be noted that the concepts of 'tacit consent' and 'implied consent' are not always used in the technically correct manner, and in other jurisdictions the term 'implied consent' is used as the equivalent of 'tacit consent' in South African law.

<sup>114</sup> Ebersöhn (2) 2003 *JBL* op cit note 2 at 50.

<sup>115</sup> *Ibid* at 52.

<sup>116</sup> *Ibid* at 50.

<sup>117</sup> *Ibid*.

<sup>118</sup> *Ibid* at 51.

<sup>119</sup> Ebersöhn (1) 2003 *JBL* op cit note 2 at 75–6.

deeplink or constituted framing.<sup>120</sup> This position was recently confirmed by the CJEU in the *VG Bild-Kunst* case: the framing of a protected work, which is freely accessible on the Internet with the authorisation of the copyright holder, does not amount to a communication to the public.<sup>121</sup>

As for Ebersöhn's claim that framing may amount to the public performance of the linked-to content, there are two objections. First, he does not provide a reason why framing should amount to the public performance of the linked-to content, but should not in the cases of simple hyperlinking and deeplinking. Secondly, and more importantly, the introduction of the expanded right of communication to the public to include the making-available right by the WIPO Copyright Treaty was considered necessary. This is precisely because the existing public-performance right was inadequate to deal with public performances of a copyright work where the public is not present at the place where the act of communication took place. This is expressly recognised in recital 24 of the InfoSoc Directive. In other words, the public-performance right is concerned with live performances in the presence of the public to whom it is being performed.<sup>122</sup> Thus, it would seriously strain the public-performance right to suggest that that is what constitutes hyperlinking (whether by framing or otherwise).

Lastly, defining framing as an adaptation of the linked-to content can be dismissed if it is accepted that framing per se does not amount to reproducing the linked-to content. This is because it is the Internet user's computer that reproduces the framed content, and not the party who provides the framing link who reproduces the framed content. The definitions of 'reproduction' and 'adaptation' are not only open-ended, but they are also wide in nature.<sup>123</sup> There does not appear to be a clear distinction between what constitutes a reproduction and an adaptation.<sup>124</sup> In fact, our courts have simply equated reproduction, within the meaning of the Copyright Act, with copying.<sup>125</sup> Adaptation may involve more than simply copying, as the definition suggests that the copyright work may have been altered, modified or transformed in some way.<sup>126</sup> Thus, it is

<sup>120</sup> *Svensson & others v Retriever Sverige AB* supra note 58 para 29.

<sup>121</sup> *VG Bild-Kunst v Stiftung Preussischer Kulturbesitz* supra note 104 para 36.

<sup>122</sup> Emanuela Arezzo 'Hyperlinks and making-available right in the European Union — What future for the internet after Svensson?' (2014) 45 *International Review of Industrial Property and Copyright Law* 524 at 531.

<sup>123</sup> Section 1 s v 'reproduction' and 'adaptation' of the Copyright Act.

<sup>124</sup> See generally O H Dean & S Karjiker *Handbook of South African Copyright Law* (2015) 1-73.

<sup>125</sup> *Galago Publishers (Pty) Ltd & another v Erasmus* 1989 (1) SA 276 (A) at 280. Copying is not a term used in the Copyright Act but it is understood that 'reproduction' requires copying (*Dexion Europe Ltd v Universal Storage Systems (Pty) Ltd* 2003 (1) SA 31 (SCA)).

<sup>126</sup> Dean & Karjiker op cit note 124 at 1-73.

submitted that an adaptation will at the very least involve, to some extent, reproduction of the protected work. If there is no reproduction at all, there can be no adaptation.

It is submitted that simple linking, deeplinking and framing should be dealt with consistently, as is the position in the European Union. Interestingly, as I have already indicated, in the early cases concerning hyperlinking, a distinction was even drawn between simple linking and deeplinking. This distinction was drawn at the time principally on the basis of the commercial interests of the owners of the linked-to websites. For example, in the *Shetland Times* case, the court made much of the fact that the applicant would lose potential advertising revenue in the foreseeable future if the conduct complained about did not stop, and that the extent of such loss would be difficult to quantify.<sup>127</sup> There was the concern that if the homepage of a website is bypassed, the advertisements on the website would not be visible to visitors. Besides the fact that since the time of the *Shetland Times* case technical means have been developed for ensuring that advertising is visible on all webpages accessed on a particular website, these concerns are not based on copyright considerations about whether there is a reproduction or an adaptation of the content. It is clear that they do not feature as such in recent case law in the European Union concerning hyperlinking and communications to the public. (The relevance of whether the posting of a hyperlink has a financial motive when linking to a protected work that has not been made available with the consent of the copyright owner will be considered below.)

This is not to suggest that the case law of the CJEU concerning hyperlinking is beyond criticism, and that its position should simply be accepted as reflecting South African law. Of particular concern is the introduction of a knowledge requirement on the part of the alleged infringer, and whether the hyperlinking was for a profit-making activity. When it comes to primary infringement, these considerations should not play any role in determining whether there is copyright infringement (in the absence of a possible fair-dealing defence).

Depending on the type of copyright work, the Copyright Act gives the copyright owner the exclusive right to perform or authorise specific acts (restricted acts) in relation to the copyright work, such as reproducing it, performing it in public, broadcasting it, or communicating it to the public (in the case of a sound recording).<sup>128</sup> Direct infringement occurs when a person, without the authorisation of the copyright owner, performs (or causes another to do) any of the restricted acts in respect of a copyright work, or any substantial part thereof.<sup>129</sup> Importantly, unlike in the case

<sup>127</sup> *Shetland Times Ltd v Wills & another* supra note 25 at 609.

<sup>128</sup> Sections 6–11B of the Copyright Act.

<sup>129</sup> Sections 23(1) and 1(2A) of the Copyright Act.

of secondary (or indirect) infringement, the state of mind with which these unauthorised restricted acts are performed is irrelevant: the bona fide or innocent performance of an unauthorised restricted act would still amount to copyright infringement.<sup>130</sup> In other words, there is strict liability — there is no requirement to prove fault on the part of the infringer. Although knowledge or wrongdoing on the part of the person performing the infringing conduct is not required for a person to be liable for primary copyright infringement, it is relevant to whether damages can be recovered from the infringer.<sup>131</sup> Also, whether the unauthorised restricted acts have been performed for profit, or not, is irrelevant to the question of primary infringement. This is also the case under EU law.<sup>132</sup> Of course, it may be that, under national law, the unauthorised restricted act may be justified on the basis of a fair-dealing exception, but that is not relevant for present purposes.

Accordingly, it is submitted that the approach of the CJEU in the *GS Media* case cannot be supported, as it blurs the distinction between primary infringement and secondary infringement (or accessory liability).<sup>133</sup> Given the importance of hyperlinking to the functioning of the Internet, it would impose a disproportionate burden on third parties if they need to check whether the content to which they are linking, which is freely accessible, has been published with the authorisation of the copyright owner. To do so would impose 'an ex ante duty of care' if the hyperlinks are considered to have been provided for financial gain.<sup>134</sup> This is particularly problematic if it is not clear what type of financial gain would trigger such a duty of care.<sup>135</sup> Should financial gain be narrowly, or widely, construed? For example, it is not clear whether the hyperlink must directly result in financial gain to the linking party, or whether the linking website can generally be for financial gain (such as, from advertising revenue on it).<sup>136</sup> In fact, the first decision applying the law as expressed in the *GS Media* case to be decided in Germany, albeit in the context of an application for an interim injunction, adopted a wide interpretation of financial gain for purposes of hyperlinking. The Hamburg Regional Court held that the rebuttable presumption of knowledge of the infringing nature of the work being linked applies when the website on which such hyperlink appears is generally for financial gain, rather than the particular hyperlink in question being provided for financial gain.<sup>137</sup>

<sup>130</sup> Dean & Karjiker op cit note 124 at 1-80.

<sup>131</sup> Section 24(2) of the Copyright Act.

<sup>132</sup> Cordell & Potts op cit note 5 at 291.

<sup>133</sup> Quintais op cit note 5 at 394.

<sup>134</sup> Cordell & Potts op cit note 5 at 291.

<sup>135</sup> Quintais op cit note 5 at 395.

<sup>136</sup> Rosati op cit note 49 at 72.

<sup>137</sup> Juliane Althoff 'Site operators linking for profit must check for unauthorised content' (2017) 28 *Entertainment LR* 111.

Since primary infringement involves strict liability, given the importance of hyperlinking to the functioning of the Internet, hyperlinking per se should not amount to copyright infringement. However, copyright owners should enjoy some measure of protection against the harm caused by linking to unauthorised content placed on the Internet. It would be better to regulate the issue of liability for hyperlinking to unauthorised, freely accessible content by way of secondary infringement, which depends on whether the party who hyperlinked the unauthorised content had knowledge (actual or constructive) of the infringing nature of the content to which the party had created a link. For a third party who had no knowledge of the infringing nature of the content, the situation will amount to a notice-and-takedown regime in relation to the linked-to content: in order to escape liability for secondary infringement, the linking party has to remove the hyperlink once it has been notified of the infringing nature of the content it has linked. There should be no rebuttable presumption of knowledge of the infringing nature of the content if the party who provided the hyperlink operates its website for profit, as provided for in the *GS Media* case. As I have already indicated, given the importance of hyperlinking to the functioning of Internet, the burden that a rebuttable presumption would impose on a website owner who merely provides a hyperlink, irrespective of whether its website is for financial gain, is, arguably, disproportionate. The position would be different if the website owner also hosts the infringing content.

The aforementioned approach will be particularly helpful if hyperlinks are automatically generated, particularly if the website providing the hyperlink is not a search engine. Under the ECTA, search engines already receive a form of protection that, in essence, corresponds to the position proposed above. Section 76 of the ECTA provides as follows:

‘A service provider is not liable for damages incurred by a person if the service provider refers or links users to a web page containing an infringing data message or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hyperlink, where the service provider –

- (a) does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of that person;
- (b) is not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message is apparent;
- (c) does not receive a financial benefit directly attributable to the infringing activity; and
- (d) removes, or disables access to, the reference or link to the data message or activity within a reasonable time after being informed that the data message or the activity relating to such data message, infringes the rights of a person.’

## VI CONCLUSION

Given that hyperlinking is an important and ubiquitous activity, there needs to be clarity on its legality from a copyright perspective. As I have indicated in this article, even under the current Copyright Act, it is submitted that the distinctions previously drawn between hyperlinking by way of simple links, deeplinks and framing should not be significant from a copyright perspective. Any of the aforementioned types of hyperlinking to freely accessible content that is placed on the Internet with the authorisation of the copyright owner, does not constitute copyright infringement. It is further submitted that the introduction of the right of communication to the public and the making-available right does not change that position, and that is the position that has been adopted by the CJEU.

However, where hyperlinking directs users to content that has not been made available with the authorisation of the copyright owner (or which circumvents technical protective measures), it is submitted that the approach of the CJEU in the *GS Media* case cannot be supported. Introducing a consideration such as knowledge of the infringing nature of the content to which a link has been created conflicts with the accepted strict-liability basis of primary infringement. In order to balance the importance of facilitating the functioning of the Internet with the interests of copyright owners, it would be appropriate to provide for liability by way of secondary infringement; thus, to base liability for this type of situation on the knowledge (actual or constructive) of the infringing nature of the material being linked.

Another aspect of the European case law that should be treated with circumspection is the concept of the communication to a ‘new’ public.<sup>138</sup> However, in the context of the type of hyperlinking being considered in this article, this concept is, arguably, not a material consideration. Where there has been hyperlinking to unauthorised content placed on the Internet, or which circumvents technical restrictive measures, ‘it is not necessary to determine whether the work is made available to a “new” public’.<sup>139</sup>

Given the fundamental importance of hyperlinking to the functioning of the Internet, it is suggested that the proposed approach to hyperlinking strikes a fair balance between concerns about, on the one hand, freedom of expression and information, and, on the other hand, providing adequate protection to copyright owners. It also ensures that principles of copyright law are not unnecessarily distorted.

<sup>138</sup> Cordell & Potts op cit note 5 at 289.

<sup>139</sup> Tsoutsanis op cit note 5 at 507.