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## 2016 – Study Question (Copyright)

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Linking and making available on the Internet

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### I. Current law and practice

1) Does your Group's current law have any statutory provision that provides for protection of an author's making available right, in line with Article 8 of the WCT?

yes

Please explain.:

Section 2 of the Act (1960:729) on Copyright in Literary and Artistic Works ("Copyright Act") provides the following exclusive right of communication of the work to the public which is intended to implement Article 3 of the InfoSoc Directive and corresponds, in all essence, to Article 8 of the WCT:

*"Subject to the limitations prescribed hereinafter, copyright shall include the exclusive right to exploit the work by (...) making it available to the public, be it in the original or an altered manner, in translation or adaptation, in another literary or artistic form, or in another technical manner.*

(...)

*The work is being made available to the public in the following cases:*

*1. When the work is being communicated to the public. This is deemed to include any making available of the work to the public by wire or by wireless means that occurs from a place other than that where the public may enjoy the work. Communication to the public includes also acts of communication that occur in such a way that members of the public may access the work from a place and at a time individually chosen by them.*

*2. When the work is publicly performed. Such public performance includes only such cases where the*

*work is being made available to the public, with or without the use of a technical device, at the same place as the one where the public may enjoy the work.*

*3. When copies of the work are publicly displayed. Public display includes only such cases where a copy of a work is being made available to the public, without the use of a technical device, at the same place as the one where the public can enjoy the copy. If a technical device is being used, the act is instead a public performance.*

*4. When copies of the work are placed on sale, leased, lent or otherwise distributed to the public.*

*Communication to the public and public performance shall be deemed to include acts of communication and performance to or for a comparatively large closed group of persons for a commercial purpose."*

2) If no, does your Group's current law nevertheless protect the making available right or a right analogous or corresponding thereto? If so, how?

3) Under your Group's current law, if:  
a) a copyrighted work has been uploaded to a website with the authorization of the copyright holder; and  
b) is publicly accessible (i.e. there are no access restrictions),  
would the act of providing a user-activated hyperlink to the starting page of the website to which the work has been uploaded be considered a "communication" of the copyrighted work?

yes

Please explain:

By virtue of the applicability of EU law in Sweden and in accordance with the CJEU's judgment in C-466/12 Svensson, particularly paragraph 20, the act of providing user-activated hyperlinks to a website to which a copyright-protected work has been uploaded would be considered a communication of the work under Swedish law.

As the CJEU makes it clear in Svensson at paragraph 17 that the act of communication must be construed broadly in order to ensure a high level of protection for copyright holders, linking to a starting page of a website to which a copyrighted work has been uploaded will also fall under the scope of 'communication'.

4) If yes, would such an act be considered as communication "to the public"?

no

Please explain:

On a literal reading of the CJEU judgement in Svensson such an act would be considered as a communication to 'a public' in Sweden, because the CJEU made it clear in that case that:

*"So far as concerns the second of the abovementioned criteria, that is, that the protected work must in fact be communicated to a 'public' (...) [the term 'public'] refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (SGAE, paragraphs 37 and 38, and ITV Broadcasting and Others, paragraph 32).*

*An act of communication such as that made by the manager of a website by means of clickable links is aimed at all potential users of the site managed by that person, that is to say, an indeterminate and fairly large number of recipients.*

*In those circumstances, it must be held that the manager is making a communication to a public.”*  
(paragraphs 21-22 )

However, the CJEU further held in Svensson that in order for such an act to be considered a communication to 'the public' within the meaning of Article 3 InfoSoc Directive, the communication must be directed to a 'new' public, which is “a public that was not taken into account by the copyright holders when they authorized the initial communication to the public” (paragraph 24). In a situation such as the one described in question 3) above, the public to which a user-activated hyperlink communicates the work will be the same as the public to which the original communication is directed, to the extent that it can be assumed that the original communication targets all potential visitors of the starting page of the website.

Consequently, such an act would not be considered a communication to '*the public*' under Article 3 InfoSoc Directive, and therefore under Swedish law.

5) If yes, does that constitute direct infringement of the making available right, assuming there are no exceptions or limitations to copyright protection that apply?

6) If the answer to question 5) is no, on what basis would infringement be denied (e.g. by application of the theory of an implied license)?

N/A

7) If the relevant act is deep linking as described in paragraph 11) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

The answers to questions 3) to 6) would not be different because the circumstances in Svensson involved inter alia deep linking.

8) If the relevant act is framing as described in paragraph 12) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

The answers to questions 3) to 6) would not be different because the CJEU made it clear in Svensson that the finding that there is no new public (such as in circumstances described in the answer to question 4) above) cannot be called in question where “the work appears in such a way as to give the impression that it is appearing on the site on which [it is shown] (...) whereas in fact that work comes from another site” (paragraph 29).

9) If the relevant act is embedding as described in paragraph 13) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

The answers to questions 3) to 6) would not be different for the same reason as in the answer to

question 8) above. The CJEU has also confirmed that embedding will not amount to a communication of the work to a new public, where the circumstances are such as those described in question 3). See C-348/13 BestWater.

10) If the website displays a statement that prohibits the relevant act of linking or linking generally, would the answers to questions 3) to 9) be different? If yes, how?

no

Please explain:

To our knowledge there is no Swedish case law on the possible effects of a statement published on a website prohibiting linking to works made available on that website.

The statement imposes an obligation on the person/legal person accessing the website not to link to the work. In order for such an obligation to be binding *per se*, Swedish courts will likely look at *inter alia* the clarity and accessibility of the statement as a contractual matter. A mere statement on the bottom of the website, or in Terms of Use which are not visible when the webpage is accessed, is likely to not be sufficient to impose these obligations on the person/legal person. Where a person does not have an opportunity to see such a statement, such as were a person copies a link from another page and places it on their own page without actually accessing the location to which the link directs, the statement is likely not to have any effect on such a person, irrespective of whether it can be binding *per se* or not.

Should the statement be deemed binding *per se*, it is still unlikely that this will impact our answers to questions 3) to 9). The work will likely also be considered publicly accessible on the website even though there is a contractual obligation not to link to it. Linking in such circumstances could however constitute a breach of contract.

However, the Swedish Supreme Court has indicated in case B3510-11 (following a request for a preliminary ruling from the CJEU in Case C-279/13 C More Entertainment; albeit on a different matter) that the circumvention of a restriction on a website which is not technological is sufficient for linking to be deemed communication to the public. The question of what a non-technological restriction is or whether a statement prohibiting linking can constitute such a restriction is left unanswered. The Swedish Supreme Court did not however appear to intend to encapsulate such a statement because the case concerned a "payment wall".

11) If the copyrighted work has been uploaded on the website with the authorization of the copyright holder but the access to the work has been restricted in some way (e.g. a subscription is required in order to access the copyrighted work), would the answers to questions 3) to 9) be different? If yes, how?

yes

Please explain:

Where a link is provided to a work that has been uploaded to a website with the rightholder's consent but where access to the work has been restricted, and where that link provides nevertheless access to the work, that link will be deemed to communicate the work to the public. Following the decision in Svensson, infringement of the communication right will be deemed to have occurred in such a case. This was expressly confirmed by the Swedish Supreme Court by judgement of 29 December 2015 in case B3510-11 (see also C More Entertainment) in which the Court held that "...a link that makes it possible to circumvent such a restriction [payment wall] constitutes communication to the public" and continued "This is also the case where the restriction is not a technological hindrance" (paragraph 15 of the judgement).

The facts of the case were that in order to gain access to the work, visitors had to register themselves

on the webpage, accept the terms of use and pay for access. Once payment was made, the user would receive “access to a clickable link with the address to the [legal] streaming server” (paragraph 1 of the judgement). It transpired subsequently that the same address was used for the streamed content (live hockey matches), but was later rectified, and that link was made available on the respondent’s website and was deemed by the Court to constitute communication (of subject matter protected by related rights) to the public.

Although the Supreme Court indicated that a restriction does not have to be technological in nature, it is not clear what is applicable if such a link does not in any way *circumvent* an access restriction. Surprisingly this is exactly what happened on the facts because the payment wall protected access to the webpage on which a link to the streaming servers was placed (and not the webpage on which the streamed hockey matches were located), however the Court did not discuss what should be understood by the word *circumvent* or 'a non-technological hindrance', and seems to have assumed that as long as there is some form of access restriction, however (in)effective, making the work available through a link will constitute a communication to the public.

12) If the copyrighted work has been uploaded on the website without the authorization of the copyright holder, would the answers to questions 3) to 9) be different? If yes, how?

yes

Please explain:

Prior to the implementation of the InfoSoc Directive in Sweden such linking would have been deemed as a *public performance* by virtue of the decision of the Swedish Supreme Court in NJA 2000 s. 292 (linking to unlawful mp3 files) and would have been exempted from infringement if the work was a sound recording by virtue of Section 47 of the Copyright Act.

To our knowledge there has not been any new case law on this specific situation in Sweden since the implementation of the Infosoc Directive, however after the implementation of the InfoSoc Directive acts such as those in NJA 2000 s.292 will be deemed as a communication to the public instead of public performance. As Section 47 Copyright Act only concerns public performance, such communication will likely be deemed an infringement of the communication right.

However, in light of the applicability of CJEU case law in Sweden, Swedish courts are likely to follow the same type of reasoning as the CJEU will in C-160/15 GS Media. Although the decision has not yet been delivered, it is worth noting that the Advocate General has suggested in their opinion that linking to copyright-protected works that have been uploaded without the authorisation of the rightholder should not be considered as a communication of the work to the public within the meaning of Article 3(1) InfoSoc Directive.<sup>[1]</sup>

#### Footnotes

1. <sup>^</sup> *Case 160/15 GS Media, Opinion of AG Wathelet (delivered on 7 April 2016), paras 62 and 88.*

13) Under your Group's current law, if a copyrighted work is made available on a webpage without any access restrictions, would that work be considered as having been made available to all members of the public (i.e. globally) that have access to the Internet?

yes

Please explain:

In light of the applicability of CJEU case law in Sweden, it is likely that a Swedish court will reach the same decision as the CJEU did in Svensson, i.e. copyrighted-protected works made available on a webpage without any restrictions will be considered as having been made available to all members of

the public that have access to the internet.<sup>11</sup> Such content can be accessed instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its access beyond that person's Member State of establishment and outside of that person's control (see also C-509/09 and C-161/10 eDate Advertising and Martinez, paragraph 45).

#### Footnotes

1. <sup>^</sup> For the sake of completeness it should be noted that the national Svensson case, case no. T 5923-10, was settled out of court after the Svea Court of Appeal received the preliminary ruling from the CJEU in C-466/12.

14) If no, why not? For example, would such communication be considered as directed only to certain members of the public (e.g. people living in a certain country or region, or people who speak a certain language)? If yes, under what circumstances?

N/A

15) If under your Group's current law the circumstances described above do not constitute direct infringement, would any of those circumstances support a finding of indirect or secondary copyright infringement?

no

Please explain:

A finding of indirect or secondary copyright infringement requires that the original communication constitutes a copyright infringement

16) If yes, please identify the circumstance(s) in which indirect or secondary copyright infringement would be applicable.

For indirect or secondary infringement to be applicable, it is necessary that that the infringement be promoted by advice or deed. Furthermore, it is necessary that the promotion, which e.g. may consist of the provision of server space, is not free from liability under the legal theories of so-called 'social adequacy' (sv. "social adekvans"). This means *inter alia* that a service that primarily is a valuable tool in lawful activities and is generally socially useful, i.e. if the legitimate use dominates, it may be allowed even if the unlawful distribution or communication of material, despite precautions, cannot be excluded.

Responsibility for indirect or secondary copyright infringement may also arise in the context of an otherwise socially appropriate activity, e.g. if a service provider continues to provide a user with server space even though the service provider has received concrete indications that the user is using the service in a way that constitutes copyright infringement. A further condition for a finding of indirect or secondary copyright infringement is that the reprehensible act takes place before the infringement is terminated.

## II. Policy considerations and proposals for improvements of the current law

17) How does your Group's current law strike a balance between a copyright owner's ability (or inability) to control the act of linking by others to their copyrighted work and the interests of the copyright owner,

the public and other relevant parties?

Since the communication to the public right is based on Art. 3(1) InfoSoc Directive, which the CJEU has regarded as harmonised, the balances that are struck are based on the InfoSoc Directive.

As noted above, the CJEU stated in Svensson that the "act of communication" must be construed broadly in order to ensure a high level of protection for copyright holders meaning that also mere linking to a starting page of a website where a copyrighted work has been uploaded falls under the scope of 'communication' and not only linking directly to a copyrighted work which has been uploaded to a webpage. Copyright aims to create a technologically neutral set of laws in order to adapt itself to online situations, and the Svensson ruling follows that objective in such a way as to provide a relatively satisfactory balance between the competing interests of rightholders and internet users by using existing rules from the analogue world as a basis to create new ones. It aims to clarify the relationship between copyright linking in a normative sense by establishing that linking does, indeed, constitute a communication to the public while effectively using the 'new public' model as a counterbalance in order to achieve an optimum level of protection.

Hence, in its rulings in Svensson and BestWater the CJEU decided, subtly striking a balance between proponents and opponents, that linking does not amount to an infringement of copyright when there is no communication to a new public as long as any restrictions are not circumvented. However, acts such as the circumvention of restrictions, the making available of evidently illegal content by linking or the making available of copyright-protected content to which access was subsequently restricted or withdrawn completely by the rightholder still amounts to a copyright infringement and requires consent of the rightholder.

18) Are there any aspects of your Group's current law that can be improved? For example, by strengthening or reducing the copyright owner's control over linking?

yes

Please explain:

The Swedish Group considers the 'new public' model introduced by the CJEU does provide a relatively satisfactory balance between competing interests when adjusting the existing copyright framework to an online context as it strives for technological neutrality.

However, it is the opinion of the Swedish Group that one aspect which can be improved is to further clarify the scope of the model. For example, with reference to the answers to questions 10 and 11 above, under the current law, it is not clear what would qualify as a 'non-technological restriction' for linking to be deemed a communication to the public, if it were to be circumvented (e.g. is it indeed sufficient with a mere statement on the relevant webpage prohibiting linking?). As further elaborated below in the answer to question 26, it is the opinion of the Swedish Group that measures introduced on a website to restrict access to a work should not be regarded as a restriction whose bypassing will amount to a communication of the work to the public in every case because it can potentially disrupt the existing balance to the detriment of the functioning of the internet and legal certainty.

### III. Proposals for harmonisation

19) Does your Group consider that harmonisation in this area is desirable?

yes

Please explain:

If yes, please respond to the following questions without regard to your Group's current law. Even if no, please address the following questions to the extent your Group considers your Group's laws could be improved.

20) Should an act of linking (hyperlinking to the starting page, deep linking, framing and/or embedding) to a website containing a copyrighted work be considered a "communication" of the copyrighted work?

yes

Please explain:

Although content is not technically transmitted to the user from the webpage containing the link, linking aims to give, and to some extent facilitates, access to the work.

21) If yes, should such an act of linking be considered a communication "to the public"?

yes

Please explain:

Provided that the link is directed to an indeterminate, but fairly large, number of potential recipients, linking should be deemed a communication to 'a public'.

22) If yes, should such an act of linking constitute infringement of the making available right, assuming no exceptions or limitations to copyright protection apply?

no

Please explain:

In general no, provided that the public's access to the work that has been uploaded to the website is not restricted. However, if someone charges the user for the receipt of the communication (i.e. for receiving the link), that act should preferably require the consent of the rightholder.

23) Having regard to your answers to questions 20) to 22), should different forms of linking (hyperlinking to the starting page, deep linking, framing or embedding) be treated equally or differently? If yes (in any case), why?

no

Please explain:

It is the opinion of the Swedish Group that different forms of linking should not be treated differently for the purposes of an infringement analysis. As stated in paragraph 14) in the Introduction to the Study Questions, in all three mentioned forms of linking, the content of the webpage containing the copyright-protected work is not transmitted from the server on which the content is stored to the server hosting the webpage containing the link (i.e. there is no technical difference between the methods, which could otherwise motivate a different treatment). Thus, all forms of linking should be treated equally.

24) If yes in any case, in relation to each such case, should the finding be one of direct or indirect infringement? If yes (in either case), why?

25) Do your answers to any of questions 20) to 24) depend on whether the website expressly displays a statement that prohibits the relevant act of linking or linking generally? If yes (in any case), please explain.

no

Please explain:



It is the opinion of the Swedish Group that where a link is provided to a work that has been uploaded to a website which expressly displays a statement that prohibits the relevant act of linking or linking generally, the provision of a link that violates the (potential) contractual obligation not to link should not infringe the right to communicate the work to the public. Even though there may be a contractual obligation not to link to the work, the work is accessible to anyone who enters a website with such contractual obligations. Thus, the work should be treated as having been made available to every potential visitor and therefore that the act of linking should not be treated as communication of the work to the public.

26) Do your answers to any of questions 20) to 24) depend on whether the public's access to the work uploaded on the website is limited in any way? If yes (in any case), please explain, including limitations that should be relevant.

yes

Please explain:

It is the opinion of the Swedish Group that where a link is provided to a work that has been uploaded to a website with the rightholder's consent and to which access has been restricted, the provision of a link that permits others to access the work in spite of a restriction should be deemed to infringe the right to communicate the work to the public, and therefore the making available right, because such linking will make the work available to persons to whom the rightholders did not want to make the work available, especially where fraudulent or deceptive means have been used to circumvent such a restriction and make the work available to others by linking as a result.

However, whereas the Swedish Group recognizes that rightholders must have the means to prevent unauthorised communication of the work to the public, the Swedish Group notes that restrictions that rightholders may implement to restrict access can take various forms, and believes that such restrictions should be of a technological character only (*cf.* answer to question 11 above) for the making available right to be infringed upon circumvention.

Whereas the Swedish Group recognises that such a requirement may be opposed by rightholders since it *inter alia* requires of rightholders some degree of technological awareness and investment to protect their works which are by default protected by copyright law, the Swedish Group is of the opinion that such a requirement will permit rightholders to clearly delineate their intentions and access to the work, both from the perspective of protection of the work as such, visitors of the website and the courts which in the current state of the law (which the Swedish Group, in principle, sees as adequate) must make the assessment of whether the work has been made available to a public different than the one to which the work was made available by the rightholder or with their consent.

Furthermore, the Swedish Group notes that technological restrictions may have a varying degree of efficiency which is attributable to *inter alia* the simplicity of a restriction or a (serious) flaw in its design, and that the provision of a link to the work may nevertheless result in the possibility to receive direct access to the work, the effect of which is that every visitor of the website will receive unrestricted access to the work (see the answer to question 11 for an example), even though the means to obtain that link, or by which linking occurs, cannot be described as fraudulent or deceptive, or are not the result of the use of technological solutions that specifically aim to circumvent the access restriction. Thus, while a restriction has been introduced somewhere on the website, the work will nevertheless be available to anyone who enters the address in their internet browser.

Whereas the Swedish Group recognises that systems can be imperfect and a mere flaw in the design of a restriction should not for that reason prevent rightholders from being able to invoke the making available right, it is the opinion of the Swedish Group that where the work is accessible to anyone who enters the address in their internet browser as a result of circumstances such as those described above, the work should be treated as having been made available to every potential visitor and therefore that the act of linking to the work should not be treated as communicating the work to the

public, alternatively that a person linking to such a work be absolved from liability. The Swedish Group believes that this is a reasonable and fair solution which takes under consideration persons who link to such a work and have no reasonable means to ascertain that they may be communicating the work to the public when they publish the link, while permitting rightholders to invoke the making available right where such access results from the use of fraudulent or deceptive means or the use of technological solutions that specifically aim to circumvent the access restriction.

27) Do your answers to any of questions 20) to 24) depend on whether the copyrighted work has been uploaded on the website without the authorization of the copyright holder? If yes (in any case), please explain.

yes

Please explain:

It is the opinion of the Swedish Group that rightholders have the exclusive right to determine the means by which, and the public to which, a work is communicated. This appears to be straightforward where the work has not been made available by the rightholder on the internet at all, because irrespective of the type of public, it will have been made available by different technical means and therefore be deemed a communication to the public (see C-607/11 TV Catchup).

With reference to question 20, the situation is more problematic where the work has initially been made available on the internet by the rightholder but is subsequently made available on a second webpage or under a different URL on the same platform such as YouTube by someone else. Under such circumstances the work is made available using the same technical means (see Svensson at paragraph 24) and is targeted towards the same public – all users of the internet or visitors of the platform. It is however the opinion of the Swedish Group that in determining whether a communication to the public has occurred in such a case, it must first be assessed whether it is the same digital copy of the work that is communicated. Hence, a link to a copy of the work that has been uploaded without the rightholder's consent should as a matter of law be deemed as a communication to the public because the copy that is communicated is not the specific copy whose communication has been authorised by the rightholder.

However, the Swedish Group recognises that it can be hard, and sometimes impossible, for users to ascertain that the work that they wish to link to is an authorised copy, especially where the unlawful copy has been uploaded to a website which also hosts lawful content and/or actively co-operates with rightholders. Imposing liability for such linking can have far-reaching effects. In view of the fact that the original, unauthorised, communication of the work (resulting from the unlawful upload) will undoubtedly amount to an infringement of the communication right (and likely also the reproduction right) which permits the rightholder to institute proceedings against such an uploader, as well as the fact that rightholders have the legal means to alternatively compel the operator of the website or the hosting service to cease the communication of the work (who are otherwise risking secondary liability by facilitating such communication), it is suggested that linking to copyright-protected works which have been uploaded without the consent of the rightholder be absolved from liability. This takes due account of the inability to verify that the rightholder has given their consent to make the work available in the first place, as well as under the specific URL. Additionally it avoids the potentially difficult legal issue that can arise where a service provider, having been alerted by the rightholder that unlawful content has been uploaded, offers the rightholder to either remove the content or leave the infringing content on the website but place an advert indicating where a copy can be purchased, and the rightholder chooses the latter alternative, as may be the case on e.g. YouTube.

28) If there has already been an authorized communication of the copyrighted work directed to certain members of the public, should a finding of infringement of the making available right depend on a subsequent act of unauthorized communication of the said work to a "new public"? If yes, please

propose a suitable definition for a "new public."

yes

Please explain:

It is the opinion of the Swedish Group that the answer depends on how the primary authorized communication is *de facto* conducted. In case the subsequent communication is made in good faith, i.e. the first communication is open without restrictions, although it may have been subjectively intended for certain members of the public, but nevertheless with nothing indicating that the communication is actually restricted, the Swedish Group notes that it is unreasonable to regard the subsequent communication as a communication of the work to a new public. Further, provided that the subsequent communication is conducted by linking to the primary communication, the subsequent communication would disappear if the primary, and authorised, communication is removed or otherwise restricted in a practically effective technical manner.

However, when the primary communication is provided with measures that make it obvious to anyone that it is only intended for a certain group of recipients, the situation would be different. Such measures could be that viewing is by invitation only to the intended certain members of the public in combination with technical measures that protect the work at least in a way that makes the protection practically difficult to circumvent, but not necessarily impossible. Such measures available today are for example 'private' upload on YouTube or any of the non-public selections that can be chosen when uploading works on Vimeo.

A definition of a 'new public' in this situation may be: *a public other than the one objectively and actively considered by the rightholder.*

29) If a copyrighted work is made available on a webpage without any access restrictions, should there be any circumstances under which the work should be considered as not having been made available to all members of the public that have access to the Internet? If yes, under what circumstances?

no

Please explain:

It is the opinion of the Swedish Group that where a work has been made available *with* the consent of the rightholder and without any restrictions, linking to such a work should be considered as having been made available to all members of the public that can access the website.

It is the opinion of the Swedish Group that where a work has been made available *without* the consent of the rightholder, the work should not be considered as having been made available to all of members of the public that have access to the Internet.

30) Please comment on any additional issues concerning linking and the making available right you consider relevant to this Study Question.

Please indicate which industry sector views are included in part "III. Proposals for harmonization" of this form:

Inter alia rightholders (of various copyright-relevant subject matter), service providers and users.

Summary

In Sweden the relevant provision regulating linking and the making available of content on the internet is the right of communication of the work to the public, which is contained in Section 2 of the Copyright Act.

By virtue of Sweden's membership in the EU and the applicability of CJEU case law in Sweden, linking to copyright-protected works is deemed as a communication of the work. Whether such communication will be deemed infringing depends on whether the links make it possible for persons other than those to which the rightholders made their works available to access the work. Consequently, where a work is freely available, linking to such a work will not amount to an infringement because the work has been made available to every visitor of the website to which the work has been uploaded by the rightholder or with their consent. This applies to all forms of linking, such as deep linking, framing and embedding. The Swedish Group generally supports this model.

Where an access restriction has been introduced to narrow down the amount of visitors, but a link circumvents such a restriction, the link will instead be deemed as communicating the work to the public and therefore infringe the rightholder's exclusive right. The Swedish Group recognises however that such restrictions should only be technological in nature, but considers that where a technological solution makes it nevertheless possible to receive access because of for instance a faulty design, linking should in certain cases not amount to an infringement as the person wishing to link to a work may have no reasonable means to ascertain that they may be communicating the work to the public when they publish the link.

Furthermore, although it seems that currently linking to unlawful content falls within the scope of the communication right in Sweden, the Swedish courts will likely follow the reasoning of the CJEU in C-160/15 *GS Media* once the judgement is delivered. Nevertheless, and recognising that rightholders have the legal means to prevent the original unlawful communication (i.e. the unlawful upload and hosting of content) by instituting proceedings against either the person who uploaded the content or the service provider, the Swedish Group suggests that linking to unlawful content fall outside infringement because various users of the internet can likewise find it difficult to ascertain that the content that they wish to link to has been uploaded without the consent of the rightholder.