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Freedom to link in the light of European copyright law

Abstract

Freedom to link became an issue as early as 2014 when the European Court of Justice issued its first ruling in this regard. Due to the Directive 2001/29/EC doubts arose as to how linking could be understood as an act of public communication. However, the issue is still current and controversial, also due to the way it has been regulated and interpreted under European law. It should be noted that linking is an important activity not only in terms of copyright, but also falls within the scope of protection of freedom of expression. Therefore, it is crucial to discuss this issue from the perspective of these two aspects.

Key words: linking, making available, public, freedom to link, copyright law

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Freedom to link

In the modern world, the Internet is the fundamental element of functioning, and access to it is a crucial requirement for people living in the information society. The foundation for the functioning of the Internet and its first amendment is the freedom of speech. Any restrictions in this space are followed by a number of controversies. Additionally, copyright law, which „regulates a significant part of their everyday online practices"[1], is an extremely important issue in this space. The Internet is a network that consists of links[2], a global forum for discussion, unrestrained and nonstop exchange of information and views. Along its development, the Internet has encountered many legal obstacles, including definitional ones. One of the significant problems with the Internet was the huge area for violations that may occur on it. One of such problematic issues are links, and more specifically, the freedom to link. Posting hyperlinks may constitute a violation of copyright law. This, of course, refers to the right to make a sole decision on making a work available. The problem concerning linking is complicated because links refer to content that has already been published on the Internet.

Links, or hyperlinks, are pointers that appear in various forms. They can be site addresses, text fragments, words or images. Among the links we can distinguish deep links, simple links and framed and embedded links. This is one of the simplest divisions of hyperlinks. Deep links point directly to a given file or subpage, while straight links point to home pages[3]. Embedded and framed links are characterized by the way in which the content is presented. In framed links the content is presented directly on the page where the link is made available but in a frame. This means that no new card is opened. The same is true of embedded links, which are almost part of the page on which the link was posted. They give the misleading impression that they are not links but content published on the page where they are displayed. Of course, apart from the way the link is presented and how it is perceived by the user, the nature of the content to which the link refers is crucial for linking.

1 J. Quintais, *Untangling the hyperlinking web: In search of the online right of communication to the public*, „The Journal of World Intellectual Property" 2018, no. 5–6, p. 385.

2 A. Strowel, N. Ide, *Liability with Regard to Hyperlinks*, „Columbia-VLA Journal of Law & the Arts" 2001, no. 4, p. 403–448.

3 K. Klafkowska-Waśniowska, *Zamieszczanie odesłań internetowych a zakres autorskich praw majątkowych*, „Białostockie Studia Prawnicze" 2015, no. 19.

Posting links is a particularly important and relevant issue in today's information society that produces, collects and exchanges information[4], in a historically unprecedented way. Freedom to link under EU law is an extremely interesting and complex issue. The key to it is, first of all, regulations of the EU copyright law, which to a significant extent impose limitations or requirements for sharing links by users. On the other hand, an important aspect of the freedom to post hyperlinks is the freedom of speech. The main purpose of this article is to show both of these aspects and to answer the question of whether, in view of the existing restrictions, it is possible to reconcile interests within these aspects.

European Union law

European copyright law has been harmonized mostly at the EU level, in the form of directives. The most important of these for linking is Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on harmonization of certain aspects of copyright in the information society. Under this directive, the problem of understanding linking has arisen indirectly for the first time in EU law. It is the key EU regulation that regulates the issue of linking, even though the term linking, hyperlinking or any other related term does not appear even once in its text. Despite the lack of explicit presence of this term, it is regulated by Art. 3(1).

The purpose of Directive 2001/29/EC was to harmonize copyright law in the EU with the needs arising from technological development. It resulted in the creation of common standards of protection. An extremely important feature of EU law – its cross-border character – has been recognized. Earlier attempts were also made on the grounds of international law to create general principles of copyright protection. Directive 2001/29/EC was implemented partially in response to the WIPO Internet Treaties[5], which require signatories to establish „making available" and „communication to the public" rights in their national systems[6].

4 M. Golka, *Czym jest społeczeństwo informacyjne*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, no. 4.

5 WIPO Copyright Treaty (WCT), Official Journal of the European Union 2000, L 89, p. 8–14.

6 D. Leung, *What's All the Hype about Hyperlinking: Connections in Copyright*, „American University Intellectual Property Brief" 2015, no. 1, p. 67.

Besides the previously mentioned goals, an important one is reflected in Art. 3(1), i.e., the harmonization of the aspect of copyright that includes the author's right to make a work available. Communication to the public is defined in Recital 23 as „all communication to the public not present at the place where the communication originates". The key Art. 3(1) has been recalled in most of the important judgments on the freedom to link. It states that „Member States shall provide authors with the exclusive right to authorise or prohibit 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 them from a place and at a time individually chosen by them"[7]. It imposes on the Member States the obligation to protect the exclusive right of the author to make his works available to the public and the right to make available to the public protected subject matter. Making it available to the public in the context of linking occurs through the Internet. The consequence of that act is to enable access to that work by others.

It is necessary, within the context of the concept of communication to the public, to refer to the opinion of the European Court of Justice, which clarifies this concept. According to the Court an act of communication to the public, including communication of a work to the public, involves the fulfilment of two conditions, namely: making a work available and making this work available to the public[8]. This means that making available hyperlinks constitutes an act of communication to the public. It should also be pointed out that making available must be directed to some kind of an audience, this means that it must be directly or indirectly addressed to some group of people. This term has also been developed in the jurisprudence of the European Court of Justice. The public is defined by the Court of Justice as „an indefinite number of potential recipients and it assumes, moreover, a fairly large number of persons"[9]. According to the above, making available links is an act of making a work available to the public.

Another equally important, but not as frequently addressed issue of the freedom to provide links. The concept of linking in Directive 2019/790 appears

7 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, Official Journal of the European Union 2001, L 167, Art. 3(1).

8 Judgment of the Court (Fifth Chamber) of 28 October 2020 in case C-637/19 between BY V CX, ECLI:EU:C:2020:863, Point 22, Point 21.

9 Ibidem, Point 26.

in Art. 15(1). It states that the protection of publishers of press publications „as regards the means of online use of their press publications by information society service providers"[10] does not cover linking activities. This meant that linking is not legally protected for publishers of Justice that have set the criteria under which linking is or is not considered to be communication to the public.

Moreover, in the context of discussing the freedom to link, the Charter of Fundamental Rights[11] and the Convention for the Protection of Human Rights and Fundamental Freedoms[12] will also be relevant. Both the Charter and the Convention are important because linking is on the one hand dealt with by copyright law and on the other is protected by freedom of expression and the right of exchange to information. These rights are protected precisely in these two documents. In Art. 10 of the Convention and Art. 11 of the Charter, freedom of expression is established. Linking can be understood as providing information, access to information, or sources. The provision of linking may constitute the transmission of information. Such an interpretation of the act of linking would mean that it would had to be protected under these documents. This freedom, as every freedom is limited by restrictions that „are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"[13].

Nils Svensson v Retriever Sverige AB

The freedom to link has not been adequately and explicitly regulated under European law. The case law of the European Court of Justice establishes the most important requirements for the scope of the freedom to link. The case law of the European Court of Justice in Nils Svensson and others v. Retriever

10 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, Official Journal of the European Union 2019, L 130/92, Art. 17.
11 Charter of Fundamental Rights of the European Union, ibidem 2012, C 326.
12 The Convention for the Protection of Human Rights and Fundamental Freedom, https://www.echr.coe.int/Documents/Convention_ENG.pdf [access: 20.02.2022].
13 Ibidem, Art. 10.

Sverige AB[14] and Media BV v. Sanoma Media Netherlands BV and others[15] has had a particular impact on linking. It concentrates on Art. 3(1) of Directive 2001/29/EC, in other words, whether linking falls within the meaning of „making available to the public". However, this is a concept that creates some difficulties. Making available to the public is not properly defined, so these issues should be interpreted on a case-by-case basis.

The first ruling providing a basis as to how to interpret the freedom to link was the judgement of 13 February 2014 in Nils Svensson and Others v Retriever Sverige AB. It was given based on an application to the European Court of Justice with four preliminary questions. The questions related to the issue of whether linking is covered by the concept of communication to the public, within the meaning of Art. 3(1) of Directive 2001/29/EC, the method by which a link should be posted and the impact of the presentation of the link on the „legality" of the linking.

In the case, the subject matter of the dispute between the parties to the proceedings was a press article published in the newspaper Goteborgs-Posten and made available on their website. The defendant, Retriever Sverige, carried on an economic activity in which he made links available on his website. These links referred to websites where various articles were published, including an article from Goteborgs-Posten. On the Respondent's website, lists of links were created and made available referring to content already published that matched the interest of the website's search users. When the user clicked on a particular link from the list, the article was shown to the user. However, content was presented in a way that might give a misleading illusion that the content from the link was in fact published on the website. The content was presented directly on the website in a frame, not on the new page.

All the claimants considered that their right to prevent communication of the work, which constitutes their exclusive right as authors and is preventive in nature, was infringed. This means that they consider that there has been a communication of the work without the author's prior consent. Retriver Sverige, however, countered these allegations by claiming that the links merely

14 Judgment of the Court (Fourth Chamber) 13 February 2014 in case C-466/12, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, ECLI:EU:C:2014:76.

15 Judgment of the Court (Second Chamber) 8 September 2016 in case C-160/15, GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, ECLI:EU:C:2016:221.

pointed „the way" to content already previously published on the Internet and did not constitute an act of communication to the public. The dispute between the parties led to proceedings before the court, which referred preliminary questions to the European Court of Justice. The three questions concerned, inter alia, whether making a link available constitutes communication to the public within the meaning of Art. 3(1) of Directive 2001/29/EC, access to the site and the manner in which the link is presented. The doubts of the questioning court concerned the scope of copyright protection and the possibility of its extension by a member state.

The new audience criterion turned out to be crucial in this case. There is a connection between both making content available and the audience. The audience is understood as „an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons"[16]. However, in order for there to be an act of communication to the public, there must be a new audience, i.e., an audience that was not taken into account by the right holder during the original communication. In the case of linking, if there is no new public, there is no communication to the public. In this case, the Court based its reasoning on the assumption that if the work was previously published on the Internet and all users had access to it, linking does not constitute an infringement of copyright. It was also expressly stated that consent to linking is not necessary if the author has given prior permission to make his work available on the Internet.

Another concern in the context of linking is the technical solutions used by the website. On the Internet area we have to deal with both public spaces, i.e., spaces to which all users have unlimited access, and private spaces where access is restricted or requires authorization. In certain situations, links may be used to bypass the security measures of a website where work has been published. This would be a situation where a link would bypass, for example, a login or pay-per-view system. Then a new audience would appear because the audience taken under consideration would be only those who have legally accessed the content and not all Internet users. The Court thus set two basic criteria, a new audience and new technology. When these conditions are met, by providing a link, the work is communicated to the public.

16 Judgment of the Court (Fourth Chamber) 13 February 2014 in case C-466/12, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB..., Point 21.

A second important aspect was also the scope of protection and the notion of communication to the public that the Member States could provide, in particular, whether it could be broader. However, it was considered that a maximum level of protection was established for communication to the public[17], which means that the Member States may not provide a broader scope of copyright protection to its holders by broadening the concept of communication to the public. Allowing different levels of protection could lead to significant inequalities and consequent uncertainty of the law.

Media BV v Sanoma Media Netherlands BV

The second most important judgment for linking is Media BV v. Sanoma Media Netherlands BV et al. from September 8, 2016. The subject of the dispute were photos. The photos were taken as part of Sanoma's work assignment for Playboy magazine. A link to the disputed photographs was published on the GeenStijl website, operated by GS Media. A hyperlink referred to another Australian website called Filefactory, where the disputed photographs were made available. On the very day of publication, Sanoma appealed to GS Media to remove the link and stop distributing the photographs. However, GS Media did not remove the hyperlink or the article. Despite the calls, GS Media not only failed to remove the link, but several times published the article with the link. This was an action intended to provoke, which also resulted in responses from Internet users that posted numerous comments with a link to the disputed photographs.

The dispute between the parties resulted in a dispute before the national court, which reffered to questions to the European Court of Justice for a preliminary ruling in this case. The first question referred to Art. 3(1) of Directive 2001/29/EC and whether the concept of communication to the public includes the concept of making available hyperlinks to content that was previously made available without the consent of the person entitled to do so. The awareness of the entity making the link that the author's permission was missing was also of utmost importance here. In the second question, the Supreme Court wanted to know whether the understanding of communication to the public is affected by the situation in which the link makes it easier to find the content, and by the awareness of the provider that the link content provided by him is not easy to

17 K. Klafkowska-Waśniowska, op. cit., p. 52.

find on the Internet. The third question was aimed at determining whether any other circumstances should be taken into account in determining that there is public communication by making available a link to content that has been made available without the consent of the right holder.

The Court considered that one of the factors for individual assessment should be the nature of the act of making available. The ruling in the GS Media case upheld the jurisprudence developed in the Svensson case and established ~~a~~ new criteria, i.e., the criteria of fault. In the ruling regarding GS Media, the most important issue was whether the entity providing the link undertakes this action with full awareness of consequences. This means that if the person making the link available is not aware that he or she is providing access to content available without the copyright holder's consent, the act of making the link available to the public does not take place. However, if he or she was aware of this fact, then such action would be an act of public communication. For the first time under these criteria, the importance of freedom of speech for making hyperlinks available was recognized. The restriction concerning the awareness of the linking person was aimed at protecting precisely the freedom of information flow within the framework of freedom of speech on the Internet. Indeed, the specificity of the Internet space and the importance of these freedoms for its functioning was noted.

As greater due diligence is required of professional users in most cases, an additional criterion is whether the provider is linking in a commercial context. These professional users are expected to do their due diligence in advance and check whether the work has been legally published on the referrer's website. The presumption is revocable and may be overturned by proof of lack of knowledge, which may not, however, be due to oversight on the part of the entity. In the case of ordinary users, however, the situation is different because they are presumed not to act with full knowledge and are presumed not to have such verification tools.

However, the Advocate General in the GS Media case questioned the statement that providing links is an act of making them available to the public[18]. He disputed existing case of law and argued that hyperlinks do not make the public available because they are already available on another site. However, he agreed on the fact that they make it easier to find protected

18 Opinion of Advocate General Wathelet delivered on 7 April 2016 (1) Case C-160/15, GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, ECLI:EU:C:2016:221, Point 54.

works. He stressed repeatedly that in his belief making available links, which by definition are available on another site, cannot be qualified as an act of communication to the public. This opinion breaks away from and opposes the existing interpretation. It is very important because it reflects criticisms of the jurisprudence and shows the true nature of links.

It was extremely important for the freedom to link that the Court of Justice recognized the potential impact of jurisprudence on the freedom of expression and information on the Internet. Potentially, it could have a negative impact on its scope. This recognition was made in response to the opinion of the European Commission, the governments of the certain EU Member States and GS Media, which argued that the automatic qualification of links as public communication could lead to restrictions on freedom of speech and information exchange.

Nonetheless, it should be emphasized that the jurisprudence of the Court of Justice regulating the scope of freedom of hyperlinking has raised many objections in legal doctrine, particularly the way links are treated and the criteria. However, the presentation of these two judgments is necessary when considering linking because they determine the scope of freedom to link. The Svensson and GS Media case focused on different aspects of linking. The main focus in the Svensson case was the new audience criterion and in the GS Media case the awareness of the entity providing the link to illegally published content[19]. Taking into account the Court's decisions in the area of linking, under EU law, making a hyperlink constitutes communication to the public if the link results in work being made available to a new public, if such communication circumvents technological limitations, if the work has been made available without the rightsholder's consent and the person making the link should have known or was aware of that fact. Where the linker was acting for profit, the linker is presumed to have known that the work was unlawfully communicated in the absence of the rightsholder's permission.

The European Court of Human Rights' approach to linking

The jurisprudence of the European Court of Justice has already noted the important impact of the freedom of expression on the freedom to link. In the GS

19 P. Savola, *Eu copyright liability for internet linking. Journal of Intellectual Property*, „Information Technology and Electronic Commerce Law" 2017, no. 2, p. 139–150.

Media BV case, the Court of Justice of the EU noted that regulation of linking solely through the perspective and consideration of the copyright protection may be extremely harmful to the freedom of expression, communication, and the press, and may lead to self-censorship. Linking is most often understood as an element of the freedom to provide information, which functions as a part of the freedom of speech, which includes, among others, the freedom to express opinions and provide information[20]. This important aspect for the freedom of linking was addressed by the European Court of Human Rights in 2018, ruling on the meaning of freedom of expression in the context of freedom of linking, in the case of Magyar Jeti Zrt v. Hungary.

The Magyar Jeti Zrt company was operating a news website in Hungary, which provided dozens of articles on daily basis. In 2013, the company's website published an article about an incident in which fans in a state of alcoholic intoxication were stopped by an elementary school. During the stop, the fans began threatening students and insulting Gypsies. The article published on the site was followed by a hyperlink referring to a video on YouTube. Despite updating the article a few times, the link appeared with each update. However, YouTube video was not published by the company, but by another user. The company had only used the previously published content. There is a similarity here to cases before the Court of Justice, where content previously published by other users was also linked. Because of the name used in the video by the leader appearing in it, who called the football fans with the term „Jobbik". This is the name of the party that considered the use of this statement and the video itself to be defamatory. It also considered that the sharing of the link constituted the spread of defamatory content.

Nevertheless, Magyar Jeti Zrt pointed out the statement that sharing a link to the content with the video constituted its restriction on freedom of expression. Making the link available constituted an indication of the source. An extremely important element of the opinion of the Court of Human Rights was its understanding of the nature of the links themselves, which are not intended to disseminate, but to enable users to navigate a network whose characteristic feature is access to a vast amount of information, by directing them to other websites[21]. In addition, it pointed out that the provider of the link has no influence on the content of the link and cannot control it. This means

20 W. Benedek, M.C. Kettemann, *Freedom of expression and the Internet*, Strasbourg 2013.
21 Judgment of European Court of Human Rights in the case of Magyar Jeti Zrt v. Hungary, 4.12.2018, 11257/16, Point 73.

that making the link available was not an act of propagation due to the lack of possibility of real impact and control over the content by the linker. If a link is published to content that is not defamatory at the moment of publication, we cannot talk about the dissemination of defamatory content. What is taken into account is the assessment of the material at the moment of publication.

The Court has, however, set out certain factors that must be taken into account when analysing whether the making available of a link constitutes dissemination of defamatory content. First, whether the journalist supported the content of the hyperlink or merely repeated it, i.e., whether the journalist merely posted the link but did not repeat or support the content from it, and whether his or her action was consistent with ethical standards and he or she exercised due diligence. The Court of Human Rights has expressly and similarly to the European Court of Justice emphasized that professional users are required to exercise all due care and professionalism in their actions. Secondly, it is also important whether the journalist knew or had the opportunity to know that the content was defamatory or otherwise violated the law. These limitations and their existence must be considered on a case-by-case basis. They could be extremely detrimental to media freedom and harmful to the public interest.

Both in legal doctrine and among Internet users, the way in which the freedom to link and the links themselves have been interpreted has come under criticism. Links are mere referrers to other sites and they can very rarely constitute content in themselves. They occur in various forms and are presented differently, be it as a directly accessible website address, graphics or text constituting a hyperlink. As such, a link can hardly qualify as an expression of personal opinion. However, in appropriate cases it may constitute an important element of expression. This may be the case if the link is shared together with a comment on the opinion about its content. The similarity of links to footnotes, bibliographies or other types of source listings is also often discussed. Thus, a hyperlink is not an author's commentary on an event or information about an event, but a reference to such information, commentary, or source of another statement[22]. On the one hand, they should not be treated as equal to the act of „simply" making content available. On the other hand, however, their making available should be limited in a certain way in order to

22 K. Warecka, *Same hiperlinki w artykule internetowym nie zniesławiają. Omówienie wyroku ETPC z dnia 4 grudnia 2018 r., 11257/16 Magyar Jeti Zrt*, https://www.prawo.pl/prawo/hiperlinki-nie-znieslawiaja-wyrok-etpc,350936.html [access: 20.02.2022].

protect other rights, like copyright law. In addition to content protected by copyright, links can also be used to disseminate content of a terrorist nature, pornography, hate speech and other content, the dissemination of which may result in legal liability[23].

Does linking infringe copyright?

Although the jurisprudence of the Court of Justice has clearly established the permissibility of freedom to link and the criteria under which it is interpreted as public communication, the issue of linking still seems to be problematic today. The debate on the methods, criteria and legality of making available links is still ongoing. Problems arise not only on the grounds of copyright law itself but also in other aspects of linking, such as the question of punishment for making available as a link content that incites violence, materials regarded as terrorist, pornographic or offensive and defamatory. It should be noted that there has been a significant improvement in the understanding of the Internet space by both the legislator and the jurisprudence. It seems, however, that linking is still shrouded in a kind of mystery and lack of understanding and agreement between different groups. First of all, it is necessary to work out a compromise and balance between freedom of speech and protection of copyright.

Ignoring the judgment of the Court of Justice, in particular in the GS Media case[24], is a common solution to avoid disturbances in the functioning of the Internet space, in the absence of other tools and appropriate regulations. Ignoring it is considered the best solution to avoid disturbances in the functioning of the Internet space and irregularities in the sphere of copyright[25]. Linking is a controversial phenomenon and the surrounding discussion is quite heated. There is still a strong need to regulate freedom of linking in an unambiguous, harmonious and multifaceted way. The discussion on this topic should be based on dialogue between authorized institutions and representatives of both professional entities operating in the Internet space and users. However, it is difficult to define and name the direction of the

23 A. Jaliwala, *Hyperlinks: A Study of the Legal Controversies*, „Law Review, Government Law College" 2004, no. 3, p. 1–28.

24 R. Markiewicz, *Ilustrowane prawo autorskie*, Warszawa 2018, p. 202.

25 Z. Pinkalski, *Linkowanie do utworów i jego ocena z punktu widzenia naruszenia praw autorskich. Glosa do wyroku TS z dnia 8 września 2016 r., C-160/15*, LEX no. 301343.

development of the freedom to link, because, on the one hand, the Court of Justice sets two opposing interpretative trends[26]. These trends are narrowing and broadening. On the other hand, the Court of Human Rights strongly defends the freedom of expression in the context of hyperlinking. This means that there is no uniform trend within the European Union and Europe. There is a risk that further cases will result in more doubts.

There are still fresh cases that concern linking, such as case C-460/20 against Google LLC in which the suing party called for the removal from the search results list of certain links that lead to online articles and considered that there was an infringement of the respect for its private life and image. Another case is the dispute between VG Bild-Kunst and the Stiftung Preußischer Kulturbesitz (C-392/19) in the context of which a request was received in 2019. It concerns copyright infringement through framing. In the present case, the Court has upheld the criteria developed so far and, in this case, considered linking to be communication to the public. This means that the way links are presented is still problematic and the aspect of the freedom of expression is still being overlooked in this respect. Thus, these cases are no longer affecting the scope of freedom of linking. It seems, therefore, that the Court of Justice considers the scope of the restrictions to be adequate and sees no need to change it.

The fundamental question in this regard thus remains: does the restriction on linking fall within the boundaries of restrictions on freedom of expression and is it therefore necessary? As I mentioned earlier, restrictions may be necessary for the protection of other rights, in this case, the right of the author and the related act of making available to the public. However, the restrictions in place are inadequate and excessive. They result from a misinterpretation of linking itself and constitute an over-restrictive restriction on the freedom of expression.

The key problem of all restrictions, including restrictions on the freedom of linking, introduced in the Internet space is the difficulty in enforcing them. It results not only from the global character of information exchange on the Internet but also from ~~a~~ certain anonymity of users. Searching for users who commit violations would result in disproportionately high costs and effort. Additionally, Internet users cannot be required to have equal skills to check whether they share content available on a given website without the author's

26 R. Markiewicz, op. cit., s. 202.

consent. Mainly because they differ in skills and do not always have such a verification instrument.

In conclusion, it should be emphasized that it is unlikely that criteria similar to those imposed by the European Court of Justice will be imposed on private users, or that a law will be enacted introducing a fee for linking or prohibiting linking. Most probably the new restriction would also lead to loud protests. Such as those that took place with the draft Directive 2019/790, often referred to as ACTA II[27]. A dialogue must be undertaken, at the European level, to protect the freedom of linking. Freedom of linking is fundamental to the functioning of the Internet. Its inadequate limitation may result in censorship and the criteria imposed on it may be abused. Creating a common standard of protection in this area that is adequate and truly necessary will be beneficial to every aspect of linking freedom.

Bibliography

Benedek W., Kettemann M.C., *Freedom of expression and the Internet*, Strasbourg 2013.

Golka M., *Czym jest społeczeństwo informacyjne*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, no. 4.

Jaliwala A., *Hyperlinks: A Study of the Legal Controversies*, „Law Review, Government Law College" 2004, no. 3.

Klafkowska-Waśniowska K., *Zamieszczanie odesłań internetowych a zakres autorskich praw majątkowych*, „Białostockie Studia Prawnicze" 2015, no. 19.

Leung D., *What's All the Hype about Hyperlinking: Connections in Copyright*, „American University Intellectual Property Brief" 2015, no. 1.

Markiewicz R., *Ilustrowane prawo autorskie*, Warszawa 2018.

Pinkalski Z., *Linkowanie do utworów i jego ocena z punktu widzenia naruszenia praw autorskich. Glosa do wyroku TS z dnia 8 września 2016 r., C-160/15*, LEX no. 301343.

Quintais J., *Untangling the hyperlinking web: In search of the online right of communication to the public*, „The Journal of World Intellectual Property" 2018, no. 5–6.

Savola P., *Eu copyright liability for internet linking. Journal of Intellectual Property*, „Information Technology and Electronic Commerce Law" 2017, no. 2.

Strowel A., Ide N., *Liability with Regard to Hyperlinks*, „Columbia-VLA Journal of Law & the Arts" 2001, no. 4.

Warecka K., *Same hiperlinki w artykule internetowym nie zniesławiają. Omówienie wyroku ETPC z dnia 4 grudnia 2018 r., 11257/16 Magyar Jeti Zrt*, https://www.prawo.pl/prawo/hiperlinki--nie-znieslawiaja-wyrok-etpc,350936.html [access: 20.02.2022].

27 Ibidem, p. 293.

Swoboda udostępniania linków na gruncie europejskiego prawa autorskiego

Streszczenie

Swoboda udostępniania linków stała się kwestią problematyczna już w 2014 roku, kiedy to Trybunał Sprawiedliwość Unii Europejskiej wydał w tej sprawie pierwsze orzeczenie. Ze względu na uchwaloną dyrektywę 2001/29/WE powstały wątpliwości co do sposobu rozumienia linkowania jako czynności publicznego udostępniania. Kwestia ta wciąż jest aktualna i wywołuje kontrowersje, m.in. sposób, w jaki została uregulowana i zinterpretowana na gruncie prawa europejskiego. Należy zaznaczyć, że linkowanie jest czynnością ważną nie tylko pod względem prawa autorskiej, ale także jest objęte ochroną wolności słowa i stanowi jej wyraz. Ważne jest omówienie niniejszego zagadnienia z punktu widzenia tych dwóch aspektów.

Słowa kluczowe: linkowanie, publiczne udostępnianie, swoboda linkowania, prawo autorskie