



# CAMMINO DIRITTO

Rivista di informazione giuridica



## THE PROBLEMATIC OF LINKING TO CONTENTS PROTECTED BY COPYRIGHT IN THE C-160/15 CGUE SENTENCE.

---

*The Court affirms the communication notion range to the relevant public, revealing the relation with the hypertextual connections that links to contents protected by copyright.*

---

**Debora Colangelo** (redattore Loredana Vega)  
COMMERCIALE - PROPRIETA INTELLETTUALE  
Articolo divulgativo - ISSN 2421-7123

Publicato, Sabato 17 Dicembre 2016

The Court of Justice of the European Union has expressed again its opinion on the **communication notion to the relevant public**, referring to the directive 2001/29/CE, highlighting the problematics, in particular with a special consideration to the relation with the “*linking*”, that is the use of **hypertextual connections remanding to contents protected by copyright**. The thematic has been studied many times in the cases of Svensson and Best Water to which the Court of Justice, with the examination of the verdict, accomplishes progresses, treating a case that is not concretely analysed on a European jurisdictional level. In fact, it has been individuated the **lucrative aim as a *discrimen* to understand if the hypertextual connection linked to a illegitimately published work, represent an “act of communication to the public”**.

The question has seen in contrast, from a side, Mrs Britt Geertruida Dekker, the Sanoma Media Netherlands, editor of the Playboy magazine in Netherlands and the Playboy Enterprises International Inc. and, on the other side the GS Media society, manager of the famous gossip site GennStijl which has a tabloid content on easy topics with joking tones and modalities. The claimant complained about the publication, to the part of the resistant society, of an article and an hypertextual connection, so-called link, remanding the readers to an Australian website whereon had been published, without any authorization, Mrs Dekker’s photographs of which the Sanoma society owned the copyright. The Dutch Supreme Court, in order to obtain a clarification about the range of the communication notion to the public, whereof art.3 sub-clause 1 of the directive 2001/29/CE has addressed to the Court of Justice of the European Union the following preliminary issues:

*<< 1) a) If the circumstance of a different person from the owner of the copyright, thanks to an hypertextual connection on a website managed by this last, remand to a site managed by a third person, accessible to a general web public whereon the work has been made available without the owner authorization, configures as a “communication to the public”, in accordance with the law art.3, paragraph 1, of the directive 2001/29.*

*b) If it is relevant the circumstance that the work was not available to the public neither in another way with the owner authorization.*

*c) If it is relevant the circumstance that this person (hyperlinker) is aware of the lacking*

*of the authorization of the owner for the availability of the work to the public on the site of the third one mentioned above in letter a, and, possibly, the circumstance that the work was not, previously, available to the public in another way with the owner's authorization.*

*2) a) In the case of a negative solution to the first case, letter a): if in this case it can be configured a communication to the public, or if this last one can configure itself, if the site to which the hypertextual connection remand, and therefore the work is reachable for the netizens, but not easily, in this way, the hypertextual connection availability facilitate at most the reperibility of the work.*

*b) If, for the purposes of the second issue, letter a), it is relevant the circumstance that this person (hyperlinker) is aware of the circumstance that the site to whom the connection remand is not easily reachable for the netizens.*

*3) If it is required to consider different circumstances to solve the issue if it can be configured a communication to the public when on a site, it is positioned an hypertextual connection that provide the access to a work which has not been available previously with the authorization of the owner of the copyright».*

Speaking about the prejudicial issues, the Court has confirmed the following fundamental principle rights:

- It must be guaranteed an **elevated protection level of copyright**, regarding the creativity safeguard of the subjects that have realized the work in question;
- It is necessary to accept a **wide notion of the concept of communication to the public**.

The Court clarifies that it is necessary to understand which are the cases where it is possible to talk about “act of communication to the public.” The *leitmotiv* path developed by the Court is **the lucrative nature of the work communication**. For this reason, there is a distinction between two cases:

- if the link to the work has been created with **no-profit purposes** it will be possible to talk about communication to the public **if the author of the hypertextual connection is aware of it, according to a rational principle**: *“The fact that this work had been published on the net without the owner’s authorization.”*

- if the link to the work has been created **to gain a profit**: *“It is legitimate to expect that the author of this connection (hypertextual connections, ndr) act the necessary test to guarantee that the work has not been published illegitimately on the site where these hypertextual connection remand to, therefore it can be assumed that the arrangement might have happened with a full cognition that the work is protected and the owner of the copyright may have not authorized the publication on the net.”*, **considering, only in the second case that the insertion of an hypertextual connection linked to a work illegitimately published on the net constitutes “Communication to the public.”**The plaintiffs will protect their position **acting directly against the first publication of their work on the net, as well as against who creates, for profit, a link to the work illegitimately published and against who creates a no-profit link, if it is aware of the illegitimacy of the link or if it has been created with the purpose of elude restrictive measures placed by the owner’s copyright to limit the access to the work.**