[NL] Preliminary reference on the use of media players containing “add-ons” which hyperlink to copyrighted content

IRIS 2015-10:1/26

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On 30 September 2015, the District Court of Midden-Nederland sent a preliminary reference to the Court of Justice of the European Union (CJEU), containing the following question: does “communication to the public”, within the meaning of Article 3(1) of Directive 2001/29/EC, include providing access to copyright-protected material by media players using “add-ons”? Add-ons are software files made by third parties and are freely available on the Internet. They can contain hyperlinks to streaming websites on which access to copyright-protected material has been made available, not necessarily with the consent of the copyright holders.

The defendant in the case provides specific media players which, when connected to the Internet and television, are able to stream audiovisual material from the internet instantly. In these media players fourteen “add-ons” - including the well-known 1Channel add-on - are installed which link to streaming websites providing unauthorised access to copyright-protected works like films and TV-series. Several other installed “add-ons” link to websites that do give authorised access, for example YouTube and Vimeo. As such, users can consider installing other “add-ons” by themselves. The media players are widely promoted under slogans such as “Never again pay for films, TV-series and sports!” and “Netflix is a thing of the past!”

The complainant in the case is Stichting Brein, a joint foundation of several Dutch associations who fight against the illegal exploitation of information and protect the interests of Dutch copyright holders. Brein has made eleven claims against the defendant. For the interpretation of Article 3(1) of Directive 2001/29/EC, it needs to be decided if providing and selling the media players that contain the “add-ons” can be qualified as “a communication to the public”. This raises the question of whether a “new public” is reached that was not taken into account by the copyright holders when they authorised the initial “communication to the public”.

Three important sub questions are also included. First, it is asked whether it matters if the copyrighted material has not been made available on the Internet before or only on the basis of a licence. Second, it is asked whether it matters if

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the “add-ons” that contain hyperlinks to material - for which no consent has been given by the copyright holders - are freely available and might be possible to install by the users of the media players themselves. Finally, it is asked whether it would differ if the websites containing the copyrighted material were also available to the public without using the media players.

Since these questions cannot be answered with regard to the current case law of the CJEU, including the well-known Svensson case (see IRIS 2014-4/3) and the BestWater case (see IRIS 2015-1/3), the Dutch court found it necessary to submit a preliminary reference. In its opinion, the outcome will make the interpretation of the Directive 2001/29/EC on these terms much clearer.

Rechtbank Midden Nederland, 30 september 2015, ECLI:NL:RBMNE:2015:7192

http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2015:7192

District Court of the Mid-Netherlands, 30 September 2015, ECLI:NL:RBMNE:2015:7192

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