Court of Justice of the European Union: GS Media v. Sanoma Media Netherlands

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On 8 September 2016, the Court of Justice of the European Union (CJEU) delivered its judgment in GS Media v. Sanoma Media Netherlands, on whether posting a hyperlink to a copyright-protected work freely available on another website, but without the copyright holder's consent, is a "communication to the public" within the meaning of the Copyright Directive (2001/29/EC).

The case arose when the publisher of Playboy magazine (Sanoma) brought a copyright action against a popular Dutch website GeenStijl.nl, over a November 2011 article entitled "Nude photos of … Dekker". GeenStijl's article had included a link to a data-storage website where photos Playboy had intended publish in its forthcoming December 2011 edition had been illegally posted. The Amsterdam Court of Appeal (Gerechtshof) held that GeenStijl had acted unlawfully toward Sanoma by including the link, as visitors were encouraged to view photos which were illegally posted on the data-storage website, and without those links the photos would not have been easy to find.

The case reached the Dutch Supreme Court (Hoge Raad), which decided to refer a number of questions to the CJEU, including whether posting a link to a protected work, freely available on another website, but without the consent of the copyright holder, constitutes "communication to the public" within the meaning of Article 3(1) of the Copyright Directive. Under Article 3(1), member states are required to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works.

In its response, first the CJEU considered its previous judgment on hyperlinking in the Svensson case (see IRIS 2014-4/3), stating that it had held that "posting hyperlinks on a website to works freely available on another website does not constitute a 'communication to the public'", a position that was also adopted in its BestWater order (see IRIS 2015-1/3). However, the CJEU then stated that Svensson was "intended to refer only to the posting of hyperlinks to works which have been made freely available on another website with the consent of the rightholder". According to the Court, Svensson and BestWater "confirm the importance of such consent" under Article 3(1).

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However, the Court then noted that “it may be difficult” for individuals who wish to post links “to ascertain whether the website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet”. In this regard, the Court held that when determining the existence of a “communication to the public” under Article 3(1), and the linking to a work freely available on another website “is carried out by a person who, in so doing, does not pursue a profit”, it is necessary to “take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder”. However, if it is established that such a person “knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a ‘communication to the public”.

The Court then considered the situation when the posting of links “is carried out for profit”, and held that “it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder”. Therefore, “and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29”.

Having set out the principles, the Court addressed the main proceedings, noting that it was undisputed that GeenStijl operated its website and provided the links “for profit”, and that Sanoma had not authorised the publication of those photos. Moreover, GeenStijl was aware of this, “and that it cannot therefore rebut the presumption that the posting of those links occurred in full knowledge of the illegal nature of that publication”. Consequently, it appeared to the CJEU that by posting those links, GeenStijl had “effected a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29”.

Arrest van der Hof (Tweede kamer), C-160/15, GS Media BV tegen Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, 8 september 2016

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Judgment of the Court (Second Chamber) in Case C-160/15 GS Media BV v. Sanoma Media Netherlands BV and Others, 8 September 2016

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