[GR] Application of the GS Media criteria by Athens Court of Appeal

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In April 2017, the Athens Court of Appeals, by its Judgment no 1909/2017, upheld the Judgment no. 5249/2014 of the Court of First Instance, in a case concerning the posting of hyperlinks. More specifically, the website www.livemovies.gr, operating as an online inventory for audiovisual works (films, TV programs and TV series), contained hyperlinks leading users to third-party websites (usually, but not always, official TV channels' websites), where those works were available for live streaming without any restrictions, technical measures or payment conditions. A Greek collecting society for musical works (AEPI) notified the plaintiff and sought to conclude a licence agreement for the communication to the public of protected works, but the plaintiff filed an action asking the Court to recognise the absence of any licensing obligation.

In this case, the Athens Court of Appeals applies for the first time the criteria from the Court of Justice of the European Union (CJEU) judgment in GS Media v. Sanoma Media Netherlands (see IRIS 2016-9/3), although in a surprisingly strict way which, in addition, reverses the CJEU methodology.

According to GS Media, in the case where hyperlinks are provided to protected works freely available on another website without the consent of the rightholder for the pursuit of financial gain, the knowledge of the illegal nature of the publication must be presumed unless proven otherwise (fictitious presumption, paragraph 55). Hence, the pursuit of financial gain helps to establish the presumption of knowledge and if such knowledge is proven, the provision of hyperlinks constitutes a "communication to the public" (paragraph 49).

The Athens Court of Appeals, noting the findings of CJEU in both Svensson and BestWater cases (see IRIS 2014-4/3 and IRIS 2015-1/3), affirmed that hyperlinks in question provided access to audiovisual works freely available online with the (assumed) consent of their rightholders and therefore the requirement of a "new public" was not fulfilled. Subsequently, the Court made a distinction between official and unofficial websites (not obvious in GS Media) and ruled about the plaintiff's knowledge before examining the financial gain of its activity, thereby reversing the methodology of the GS Media case.

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Thus, it was firstly established that the plaintiff did not know and could not have known if the hyperlinks posted on his website provided access to audiovisual works illegally placed on third-party official websites owned by TV channels. Secondly, the financial gain criterion was taken into account in comparison to other unofficial websites. Nonetheless, for the assessment of such a purpose either an involvement of the plaintiff in the lucrative activity of the third-party websites or the plaintiff's participation in the profits generated by the unauthorised transmission of protected works should be proven. Since such a purpose was not proven, the Court held that the act of simply posting the hyperlinks could not be considered as a communication to the public.

Εφετείο Αθηνών 1909/2017 (Τμήμα 18ο)

http://www.opi.gr/index.php/politika-dikastiria/efeteio

Athens Court of Appeal no 1909/2017, 26 April 2017

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