EIP

# Copyright infringement via hyperlinking?

On 7 April 2016 Advocate General Wathelethas delivered his opinion in GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Dekker (Case C□160/15)

The facts in this matter revolve around nude photographs of Dutch celebrity, Britt Dekker, commissioned by Sanoma Media Netherlands BV ("Sanoma") and published in their December 2011 edition of Playboy magazine. Prior to its publication, however, a Dutch website (GeenStijl) operated by GS Media BV ("GSM") published a report incorporating a hyperlink directing users to a foreign third party website which contained the leaked photographs. Though GSM refused to remove the offending hyperlink, the operators of the third party website complied with Sanoma's requests and the photographs were removed from their website. This rendered the GeenStijl hyperlinks inoperable. This fact pattern was repeated twice more with GeenStijl posting an alternative hyperlink to different third party websites, and the third party website on each occasion complying with a request from Sanoma to remove the offending photographs.

**Questions referred to the CJEU**

Sanoma and Others brought a copyright infringement claim against GSM before the Amsterdam District Court. The first instance court found in Sanoma's favour, and GSM appealed. The Amsterdam Court of Appeal set aside the first instance judgment holding that copyright had not been infringed as the hyperlinked photographs had already been communicated to the public by being posted elsewhere. A further appeal was launched and on hearing the parties' arguments, the Supreme Court of the Netherlands stayed proceedings and referred six questions to the CJEU for a preliminary ruling.

The Advocate General ("AG") summarised these questions as follows:

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1."...whetherArticle 3(1) of Directive 2001/29 [the "Directive"] must be interpreted as meaning that the provision on a website of a hyperlink to another website operated by a third party, which is accessible to the general internet public and on which works protected by copyright are made available to the public, without the authorisation of the copyright holder constitutes an act of communication to the public.";

2."...whether the fact that the person who posts the hyperlink to a website is or ought to be aware of the lack of consent by the copyright holder for the initial communication of the works on that website is important for the purpose of [the Directive]."; and

3."... whether, and if so in what circumstances, the fact that a hyperlink has facilitated access to the works in question is relevant in accordance with that provision."

**Advocate General's Opinion**

In addressing the first question the AG relied heavily on the decisions in Svensson (C-466/12) and FAPL (C-403/08 and C-429/08). The AG opined that the term "communication to the public" as found in the Directive was composed of two cumulative criteria - an "act ofcommunication" of the work, and communication of the work to a "public". In his opinion an "act of communication" was broader than a "transmission or retransmission" required by Circul Globus Bucursti (C-283/10) the mere act of making available to a public being sufficient. Further, following SCF (C135/10) in order to establish an "act of communication" the act must be indispensable to the public's enjoyment of the works. The hyperlink therefore did not constitute "communication to the public" as the photographs in question were already freely available to the general internet on another website and thereby readily accessible without GeenStijl's assistance. As the first cumulative criteria was not met, the AG opined that the first question should be answered in the negative. In any event, the criterion of "a new public" (as required by Svensson) is only applicable where the copyright holder has authorised the initial communication (see Svensson, paragraph 24 and 31, and FAPL, paragraph 197), which was not the case in this instance. Even if the initial communication had been authorised, no "new public" was present as the photographs were already freely available to the general internet public via the third party website without GeenStijl's actions.

Addressing the second question, the AG's opinion was that, in the absence of an act of communication, GSM's motives and state of mind was not relevant under the Directive.

Pointing to paragraph 31 of Svensson, the AG found that in order to infringe, the hyperlink in question would need to make it possible for a public to circumvent access restrictions present on the third party website. It follows that it is not sufficient that the hyperlink

merely facilitates or simplifies users' access to the photographs. The third question should therefore also be answered in the negative.

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The AG went on to opine that internet users should not be burdened with the requirement to check the legal status of content found on freely accessible websites before posting related hyperlinks. Such judicial interference would be detrimental to the proper functioning of the internet and the development of the information society which the Directive advocates. An action of this magnitude would therefore require the endorsement of the European legislature.

If followed by the CJEU, such a decision would constitute another in a long line supporting freedom of expression and the free flow of information while conclusively closing down what hitherto appeared to be a promising infringement argument. In doing so the court would deal yet another blow to copyright owners' ability to protect their online works.

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