



The CJEU's Decision in *GS Media*: Connecting the Dots on Hyperlinking

The Court of Justice of the European Union (“CJEU”) issued on 8 September 2016 a landmark ruling in *GS Media*, C-160/15 on hyperlinks and copyright infringement. In its judgment, the court sought to clarify the law in this area and materially departed from previous case law which was fraught with uncertainty since the CJEU’s earlier decision of *Svensson*, C-466/12 in February 2014.

In *GS Media*, the CJEU ruled:

In order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a “communication to the public”, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which knowledge must be presumed.

Factual Background

The decision arose from a reference for a preliminary ruling by the Dutch Supreme Court in a dispute between Sanoma, which publishes *Playboy* magazine, and GS Media, which runs the popular website “GreenStijl.nl”. Sanoma objected to the publication by that website of hyperlinks to other websites hosting unpublished photographs of media personality Britt Dekker, over which Sanoma had the rights and which it intended to publish in a forthcoming issue of *Playboy*. Despite Sanoma’s demands, GS Media refused to remove the hyperlinks from the website. The dispute was initially heard in the Amsterdam District Court and was subsequently appealed to the Amsterdam Court of Appeal and the Dutch Supreme Court, before being referred to the CJEU.

The Legal Issue

The case’s reference for a preliminary ruling concerned the interpretation of article 3(1) of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (“InfoSoc Directive”), which stipulates that:

Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

In *GS Media*, the CJEU considered whether, and in what circumstances, posting on a website a hyperlink to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a “communication to the public” within the meaning of article 3(1) of the InfoSoc Directive.

The Court’s Approach

In approaching this question, the CJEU first noted the lack of definition of “communication to the public” in the InfoSoc Directive, and the need to provide a fair balance between the interest of copyright holders on the one hand and the protection of the fundamental rights of internet users on the other, in particular their freedom of expression and of information. Considering the earlier case law in this area, in particular *Svensson*, *Reha Training*, C-117/15 and *Bestwater*, C-348/13, the CJEU recalled that the concept of “communication to the public” requires (i) an “act of communication” of a work, and (ii) the communication of the work to a “public”. It also recalled that for the purposes of such an assessment, the court must take account of several complimentary criteria, including (i) the indispensable role played by the user and the deliberate nature of its intervention, (ii) the use of specific technical means to communicate or, failing that, the existence of a new public, and (iii) the profit-making nature of the communication.

Crucially, however, the CJEU sought to downplay in its judgment the earlier decision of *Svensson*—which generally regarded hyperlinks as acts of communication—by holding that the decision merely confirmed the importance of the rights holder’s consent under article 3(1) of the InfoSoc Directive. Thus, the CJEU effectively agreed, at least in part, with some of Attorney General Wathelet’s thinly veiled concerns about of *Svensson* in his earlier opinion of April 2016, and set the ground for a change of law in this area.

In doing so, the CJEU appears to have been convinced that the original approach in *Svensson* could have a highly damaging effect on the sharing of information online and fundamentally undermine the operation of the internet. In particular, the CJEU expressed the view that: (i) the internet is of particular importance to freedom of expression and of information, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information; and (ii) it may be difficult, in particular for individuals who wish to post such links, to ascertain whether the website to which those links lead provides access to works which are protected and, if necessary, whether the copyright holders have consented to their posting on the internet.

Is Hyperlinking Permissible?

As a result, the CJEU held that hyperlinking to a work freely available on another website will not constitute an act of communication to the public (and therefore not be prohibited) where the person doing the linking (i) does not do so for financial gain, and (ii) does not know and cannot reasonably know that the work has been published on the internet without the copyright owner’s consent.

In contrast, the CJEU held that hyperlinking should be prohibited where the person knew or ought to have known that the hyperlink he or she posted provides access to a work illegally placed on the internet, for example if he was so notified by the copyright holder. A hyperlink should also be prohibited where it allows users of the website on which it is posted to circumvent the restrictions taken by the site where the protected work is posted in order to restrict the public’s access to its own subscribers (e.g. via a pay wall).

In addition, the CJEU added a presumption when the posting of hyperlinks is carried out for profit. In such cases:

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 the work and the possible lack of consent to publication on the internet by the copyright holder.

In the facts of the case, GS Media had posted the links for profit and was well aware that the photos has been published without Sanoma's permission. GS Media had therefore effected a communication to the public and infringed the copyright in the photos.

Conclusion

The CJEU's decision in *GS Media* will likely be welcomed by those who disagreed with the CJEU's initial approach in *Svensson* and were concerned that it may have resulted in the sharing of information on the internet being stifled. Copyright holders and internet users alike may also welcome the measure of clarity it brings to an otherwise difficult and uncertain area of law.

However, it is worth noting that the CJEU decision also raises a number of questions and leaves some uncertainty as to how the infringement test it has introduced will be applied. Importantly, it has introduced a "knowledge" requirement in determining whether hyperlinks constitute acts of communication to the public. This appears at odds with the fact that an unauthorised "communication to the public" of a copyrighted work is an act of primary infringement, which should be a matter of strict liability. The CJEU is suggesting that, at least in hyperlinking cases, the defendant's state of mind should be considered, so it remains to be seen how this position will be reconciled with the rest of the law in this area.

The judgment also appears to introduce the possibility of a new notice-and-takedown system by enabling right holders to inform persons who have published hyperlinks of the illegal nature of the publication and to take action against them if they refuse to remove that link. It remains to be seen how this system will operate in practice. Similarly, it will be interesting to determine how the knowledge presumption operates for persons posting hyperlinks for profit and what "necessary checks" such persons will be expected to undertake to protect themselves from liability.

While the law continues to draw the key principles in this area, it may therefore still take some time before these become settled—and before copyright holders, internet users and IP practitioners come to see the full legal picture.

Lawyer Contacts

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