Kluwer Copyright Blog

The Netherlands: preliminary questions regarding hyperlinks in add-ons linking to illegal content

Robert van Schaik (Institute for Information Law (IViR)) · Monday, December 14th, 2015

The case of *Svensson Retriever* has shown that a hyperlink to a work freely available on a website accessible for all internet users is not a new communication to the public in the sense of Article 3(1) of Directive 2001/29/EC. However, the preliminary questions posed to the ECJ by an interlocutory judgment of September 30 2015 from the Dutch district court Midden-Nederland, might entice the Luxembourg court to further clarify its position on hyperlinks.

The questions asked are related to a case pending in the Dutch courts, the facts of which are as follows. X installed add-ons on several types of media player, pieces of hardware that after being plugged into a television set and connected to the internet allow users to stream online content on the TV, in this case by operating an open source based user interface which had been pre-installed by X. The add-ons contain hyperlinks, which when clicked on redirect users to websites controlled by third parties.

The types of content on these websites differ, as X had installed content from both official and unofficial repositories on the media players. On the one hand, some hyperlinks refer to websites where content is shown with permission. On the other hand, fourteen add-ons link to streaming websites on which films, TV-series and live sports matches are made accessible without the permission of the right holders. Some of these TV-series are commonly offered through monthly paid subscriptions. Consequently, the media players with the installed software are being sold by X on his website, accompanied by lengthy advertising statements that although downloading is illegal, streaming is not, thereby implying that the products sold offer users legal access to content that has been placed online without permission.

The BREIN Foundation, a joint anti-piracy program of authors, artists, publishers, producers and distributors, issued summons to several streaming websites requesting that they discontinue the making available of copyright protected content. Furthermore, BREIN filed similar requests to the hosting providers of those websites. BREIN's argument was simple: it wanted to end X's activities because streaming of content from clearly illegal sources infringes copyright law. X argued that BREIN has no grounds to summon X as the summons are solely related to the conduct of internet users, not his own conduct, and that streaming is a temporary act of reproduction as

per Article 5(1) of the Copyright Directive.

The district court referred to *Svensson* and *BestWater*, as well as currently pending preliminary questions in *GeenStijl/Sanoma*. It then considered whether the offering and selling of the media players, on which X installed add-ons which contain hyperlinks to websites on which copyright protected material was made accessible without permission of the right holders, qualifies as a "communication to the public" as per Article 3(1) of Directive 2001/29/EC. The district court decided to stay the proceedings pending a referral to the ECJ on these issues.

The preliminary questions then posed, may be translated as follows:

1. *Must article 3(1) of the Copyright Directive (Directive 2001/29/EC) be interpreted in such a way that "a communication to the public", in the sense of that clause, occurs when someone sells a product (media player) in which add-ons have been installed by him which contain hyperlinks to websites on which copyright protected works such as films, series, and live broadcasts are made accessible directly without the permission of the right holders?*

2. *In this instance, does it matter:*

(a) whether the copyright protected works have never before been made public on the internet, or solely through a subscription with permission of the right holders?

(b) whether the add-ons that contain hyperlinks to websites on which copyright protected works have been made directly accessible without permission of the right holders, are freely available and are also installable by the users themselves in the media player?

(c) whether the websites and therefore the copyright protected works which have been made available without permission of the right holder, are also accessible by the public without the media player?

3. Should Article 5 Copyright Directive be interpreted in such a way that there is no "lawful use" in the sense of the first section sub b of that clause, if a temporary reproduction is made by an end user whilst streaming a copyright protected work from a website of a third party on which this copyright protected work is offered without the permission of the rights holder(s)?

4. *If the answer to question 1 is negative, is the making of a temporary reproduction by an end user during streaming of a copyright protected work from a website on which this copyright protected work is offered without permission of the right holder(s) inconsistent with the "three step test" as set out in article 5 section 5 of the Copyright Directive (Directive 2001/29/EC)?*

An important issue to be addressed is whether or not the media player provides for communication to a *new* public. Is it likely that the publisher who first communicated the works on the internet, also intended to communicate them to those wishing to view such information on a television set? It is questionable as to what extent a media player creates media convergence. The telecommunication infrastructure used to view

the works is largely the same as that used for access via a desktop computer, mobile phone or tablet. The physical setting in which the works are viewed is different however, namely that of a television set. No matter the outcome of the case, a comparison with *SGAE Rafael Hoteles* will provide valuable insights.

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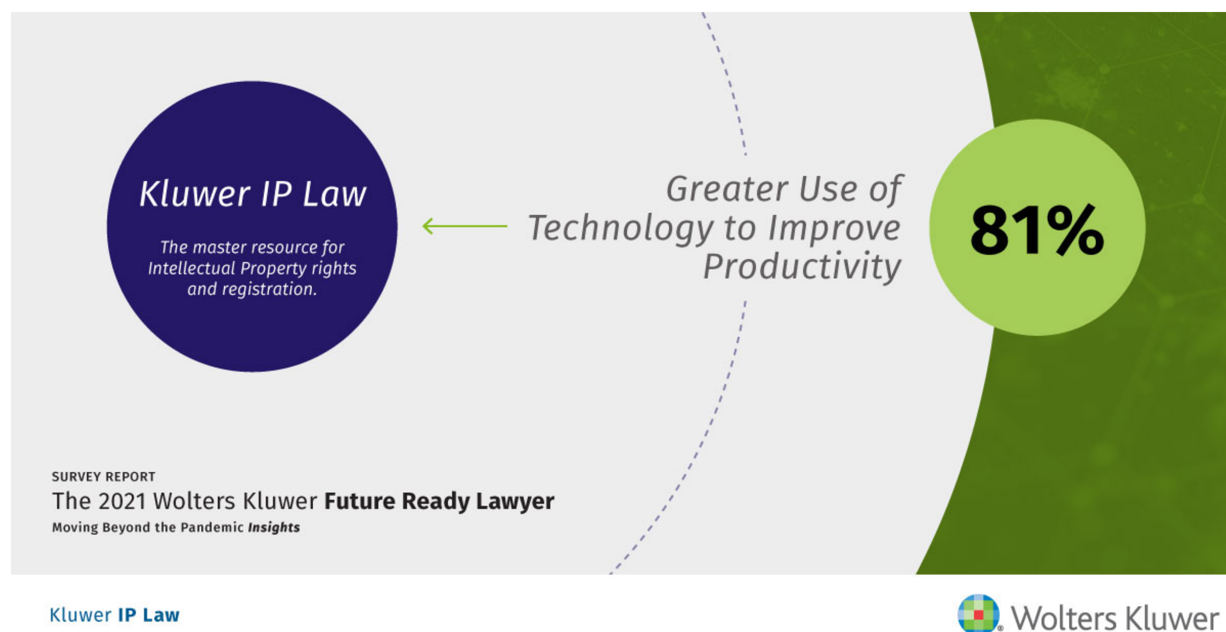

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