Kluwer Copyright Blog

# The Opinion of AG Wathelet in GS Media: what's in a "precedent"?

Ana Ramalho (Maastricht University) · Tuesday, April 26th, 2016

On the 7th of April AG Wathelet issued his Opinion in the GS Media case (C-160/15). The case concerned the provision by GS Media of hyperlinks that directed users to Filefactory.com, an Australian data-storage website. Users could then click on the following link, which would open a window that contained the button "DOWNLOAD NOW". By clicking the button, users were able to open a file containing copyright-protected content.

**The Opinion in a nutshell**

The questions referred to the CJEU seek guidance on the scope of the right of communication to the public (Article 3(1) of the InfoSoc Directive), and on whether a situation as the one in the proceedings falls within that scope. As the AG made clear, the case gives an opportunity to determine whether the authorisation by the right holder of the initial communication of the work is material to a finding that there is no communication to the public within the meaning of the InfoSoc Directive (para 43).

In other words, the crux of the matter here is the consent by the right holder (or better put, the lack thereof) to the initial communication of the work, as that hadn't been considered by the CJEU in previous cases. Other questions posed by the referring Court concern whether it is relevant that the hyperlinker is or ought to be aware of the lack of consent by the right holder to the initial communication of the work; whether there is an act of communication to the public where the link greatly facilitates the finding of the work; and whether there are other circumstances that should be taken into account for a finding that there is a communication of the work to the public.

The AG recalled that, for there to be an act of communication to the public, two cumulative criteria must be met: an "act of communication" of a work and the communication of that work to a "public" (para 47).

With regard to the concept of "act of communication", which must be interpreted broadly (para 50), the AG noted that, as per paragraph 19 of the Svensson case, hyperlinking involves a transmission of the work and can therefore amount to an act of communication, given that the mere possibility of access to the work is sufficient (para

52). However, the AG considered that hyperlinks leading to protected works that were already freely accessible on another website merely facilitate the finding of those works, which does not amount to making them available (para 54). In the AG's view, in order to establish an act of communication, the intervention of the hyperlinker must be indispensible for the enjoyment of the work (para 57). According to the AG, since that was not the case here, there was no act of communication within the meaning of the InfoSoc Directive. Therefore, the question of consent of the right holder (or lack thereof), as well as the intention of the hyperlinker and his awareness of such lack of consent, become irrelevant (paras 61 and 63).

The requirement that the intervention of the hyperlinker must be indispensible (para 57) is found already in previous case law (SGAE, Svensson), but in relation to the criterion of new public, and not the act of communication. This means that – if this Opinion is followed – the hyperlink is not necessarily an act of communication, as previous decisions seemed to imply.

In relation to the second criterion, the AG considered that the concept of "new public" as developed by the CJEU in the FAPL and Svensson cases was not applicable to the present situation, since said concept was only applicable where the right holder had authorised the initial communication to the public (paras 66 and 67). Even if the CJEU were to rule that the concept of "new public" is applicable, the AG noted, the intervention of the hyperlinker was not indispensible to the work being made available, thus not fulfilling the requirements for the finding of a "new public" as per paragraph 27 of Svensson (paras 69-70). It is not sufficient that the hyperlink facilitates or simplifies access to the work (para 74).

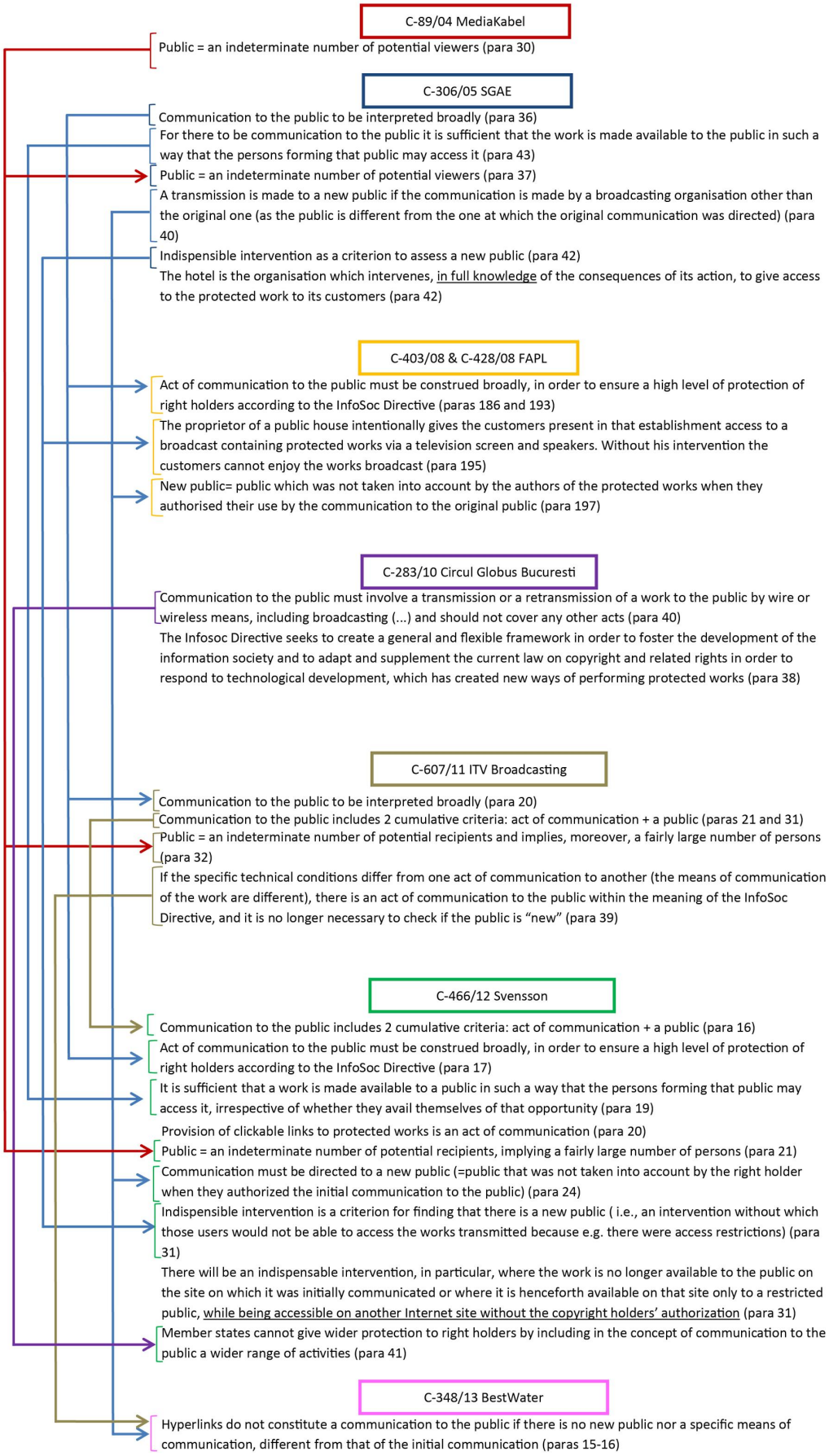
Finally, when assessing the last question – whether there are other circumstances that should be taken into account when deciding if there is a "communication to the public" in cases such as the one in the proceedings – the AG underlined that, as per paragraph 41 of Svensson, Member States are not allowed to include a wider range of activities in the concept of "communication to the public" than the ones referred to in Article 3(1) of the InfoSoc Directive.

**What's in a "precedent"?**

This Opinion contributes to the understanding of the legal regime applicable to hyperlinks within the framework of copyright law, but it also sheds some light on the system of "precedent" (note the air quotes) within the EU. There is no system of binding precedent in the EU judiciary, even though the CJEU tries to be consistent with its previous decisions. This was expressly acknowledged by AG La Pergola in his Opinion in case C-262/96 (Sema Surul), where he stated that, although indeed no system of binding precedent as such has been incorporated in the EU judicial scheme, the Court ensures "continuity" of its case-law and compatibility between its judgments.

The quest for consistency finds its justification in legal certainty and the stability of the legal order, but it also enhances the Court's own legitimacy and authority. This is done through self-citation, and selective references to judgments in previous cases. The image below shows how this plays off in the particular case of hyperlinks and

communication to the public:


C-89/04 MediaKabel
Public = an indeterminate number of potential viewers (para 30)
C-306/05 SGAE
Communication to the public to be interpreted broadly (para 36)
For there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it (para 43)
Public = an indeterminate number of potential viewers (para 37)
A transmission is made to a new public if the communication is made by a broadcasting organisation other than the original one (as the public is different from the one at which the original communication was directed) (para 40)
Indispensible intervention as a criterion to assess a new public (para 42)
The hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers (para 42)
C-403/08 & C-428/08 FAPL
Act of communication to the public must be construed broadly, in order to ensure a high level of protection of right holders according to the InfoSoc Directive (paras 186 and 193)
The proprietor of a public house intentionally gives the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers. Without his intervention the customers cannot enjoy the works broadcast (para 195)
New public= public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public (para 197)
C-283/10 Circul Globus Bucuresti
Communication to the public must involve a transmission or a retransmission of a work to the public by wire or wireless means, including broadcasting (...) and should not cover any other acts (para 40)
The Infosoc Directive seeks to create a general and flexible framework in order to foster the development of the information society and to adapt and supplement the current law on copyright and related rights in order to respond to technological development, which has created new ways of performing protected works (para 38)
C-607/11 ITV Broadcasting
Communication to the public to be interpreted broadly (para 20)
Communication to the public includes 2 cumulative criteria: act of communication + a public (paras 21 and 31)
Public = an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (para 32)
If the specific technical conditions differ from one act of communication to another (the means of communication of the work are different), there is an act of communication to the public within the meaning of the InfoSoc Directive, and it is no longer necessary to check if the public is "new" (para 39)
C-466/12 Svensson
Communication to the public includes 2 cumulative criteria: act of communication + a public (para 16)
Act of communication to the public must be construed broadly, in order to ensure a high level of protection of right holders according to the InfoSoc Directive (para 17)
It is sufficient that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity (para 19)
Provision of clickable links to protected works is an act of communication (para 20)
Public = an indeterminate number of potential recipients, implying a fairly large number of persons (para 21)
Communication must be directed to a new public (=public that was not taken into account by the right holder when they authorized the initial communication to the public) (para 24)
Indispensible intervention is a criterion for finding that there is a new public ( i.e., an intervention without which those users would not be able to access the works transmitted because e.g. there were access restrictions) (para 31)
There will be an indispensable intervention, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorization (para 31)
Member states cannot give wider protection to right holders by including in the concept of communication to the public a wider range of activities (para 41)
C-348/13 BestWater
Hyperlinks do not constitute a communication to the public if there is no new public nor a specific means of communication, different from that of the initial communication (paras 15-16)

*Source: own elaboration based on CJEU decisions*

What is important to stress here is that neither precedents nor "precedents" need to be cast in stone. It is possible for the Court to use distinguishing practices (where the precedent/"precedent" is left untouched, but the Court determines that the situation being assessed is different or at least not sufficiently similar), but also to depart from previous case law, so long as such departure is explained and justified, for the sake of legal certainty.

Several points of the Opinion show that AG Wathelet is well aware of this. For instance, in paragraph 44 of the Opinion the AG admits the possibility of departing from Svensson on the concept of "act of communication"; and in paragraphs 66-67 the AG uses a departing technique by suggesting that the concept of "new public" is not applicable to this case because there is no consent.

Another example is paragraph 57 of the Opinion, where the AG places the indispensability of the intervention of the hyperlinker within the criterion of "act of communication", rather than in relation to that of a "new public (with the consequences of some hyperlinks not being an act of communication, which contradicts previous case law). The justification for this seems to be found further on, in paragraphs 76-77, where the AG pointed out that a finding that hyperlinking such as in the proceedings amounts to an act of communication to the public would impair the functioning of the internet and "undermine one of the main objectives" of the InfoSoc Directive, namely "the development of an information society in Europe". It would also, according to the AG, distort the fair balance between different categories of right holders, and between right holders and users (para 77). In other words, the AG chose to follow the (much less referred to) aim of fostering the development of the information society (as per, e.g., Circul Globus Bucuresti), instead of anchoring its reasoning on the goal of ensuring a high level of protection for right holders (although the latter also shows up along the way – see paragraph 50 of the Opinion).

The aim of fostering the development of the information society is also probably what led the AG to depart from a path that had started to be carved out in previous decisions. In fact, and even though the CJEU is not absolutely clear on these points, knowledge of infringement and lack of consent seem to be more material to a finding that hyperlinking might amount to an act of communication than the AG wants to believe (see the relevant underlined parts of previous decisions in the image above).

All in all, however, it is refreshing to note that the AG follows departing and distinguishing practices in an apparent effort to nudge jurisprudence on this topic in a more sensible direction. It shows that less grounded decisions of the CJEU can be reversed more easily than usually thought and that EU copyright law does not have to be held hostage by a (bad) policy lock-in.

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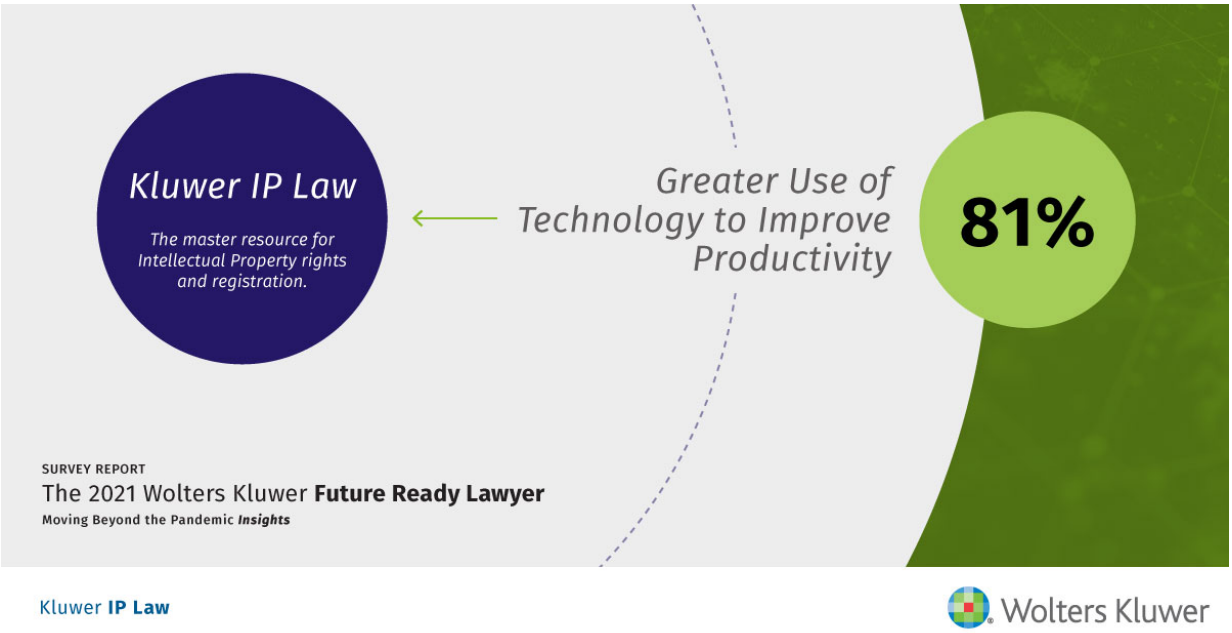


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