1. Introduction

The internet has been a challenge for copyright since its advent two decades ago. Many questions have now been answered. It is surprising, however, that we still have major uncertainties. For example, it is still the subject of highly debated issues under EU copyright law, which the CJEU has yet to answer.

2. Linking to Legal Content: CJEU jurisprudence (2013)

In 2013, the CJEU handed down its landmark legal content decision (C-466/12 – GS Media vs. Sanoma), which came down from the CJEU, the CJEU would have done better to stick to its prior case law: Is he right?

3. Linking to Illegal Content: CJEU jurisprudence (2016)

In GS Media vs. Sanoma (C-160/15), the CJEU will have to decide whether linking to illegal content constitutes copyright infringement. The opinion of the Advocate General (AG) (7) proposed that linking should in general not be copyright relevant. It lacks the distinction of public communication or private use to Art. 3 (1) Copyright Directive 2001/29.

4. Discussions

These are strong words. That is why it seems even more important to take a closer look.

First, it seems certain that the AG recognizes that there is a public communication in the exceptional case that the link to illegal content was not publicly available and, while denying that there is a public communication when illegal content was already available before the link was published. It is a common-sense argument, because illegal content is made public on the internet through the mere publication of links, while the actual file is stored non-publicly on the servers of so-called cyberlockers. There is therefore no link between the German BGH and the CJEU jurisprudence (see case law of the German BGH, August 15, 2013 – File-Hosting-Dienst III BAG 88, February 8, 2012 – File-Hosting-Dienst II BAG 85, August 10, 2010). Following the AG, the CJEU will not be able to decide whether linking to illegal content already published on the internet constitutes copyright infringement.

For all other purposes, i.e., whether linking to illegal content already published without access restrictions, the AG proposes that the CJEU decides from its own case law. This proposal by the AG seems attractive to the extent that it would be able to get to a final and uniform concept of "public communication," and indeed create legal certainty or, at least, more predictability than the current CJEU case law in this respect.

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Instead, it seems that the AG suggests (para 87) – for rightholders to direct themselves to the source of the infringement. Going to the source of the infringement would be the least damages for rightholders on the one hand and users on the other hand. But taking linking out of copyright because illegal content is made publicly available on the internet would create legal uncertainty and diminish the internet as an important communication channel.

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5. Summary and Concluding

Linking is an important internet technology. That is why it should not fall in principle under any copyright derogation. Rather, the CJEU should even in principle consider the link to illegal content as a new public. The current CJEU case law in this regard seems to be rather uncertain and unclear. The CJEU decision is awaited with great interest. It will not be the last on the question of linking to illegal content. Two other Dutch referrals to the CJEU – the "Piratenparty" and "Bestwater" concerning "ThePirateBay" (2014) – are also pending.