

Copyright law and the Pandora's Kodi box

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Tatiana Synodinou (University of Cyprus)

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The “*Filmspeler*” ruling is the last stone in the CJEU’s complex construction on the application of the concept of communication to the public in hyperlinking. Starting with the seminal Svensson case in 2014 (C-466/12), the Court has been progressively diving into the deeper waters of hyperlinking and has been called upon to apply the right of communication to the public in a variety of situations: embedding copyright-protected content via framing (C-348/13, BestWater); linking to broadcasts of sporting events and broadcasters’ right of communication to the public on the Internet (C-279/13, C More Entertainment); and posting hyperlinks to protected works freely available on another website without the consent of the copyright holder (C-160/15, GS Media).

In the “*Filmspeler*” dispute, the Court was invited to demystify whether the concept of ‘communication to the public’ should be interpreted as covering the sale of multimedia players (so-called “Kodi boxes”) on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites on which copyright-protected works have been made available to the public without the consent of the rightholders.

The question is tricky, and not paying attention to the details of the case could have resulted in controversial findings. Indeed, generally speaking, in line with recital 27 of Directive 2001/29, the sale of multimedia players could a *priori* be seen as mere provision of physical facilities for enabling or making a communication and, therefore, it would not amount to communication of copyright-protected works.

Nonetheless, the devil is in the detail. As the CJEU highlighted, the defendant did not simply propose the sale of those devices. Rather, with full knowledge of the consequences of his conduct, he had pre-installed add-ons that specifically enable purchasers to have access to protected works published — without the consent of the copyright holders of those works — on streaming servers and enable those purchasers to watch those works. By doing so, he provided with his decisive, although not indispensable, intervention a highly relevant and significant means enabling a direct link to be established between copyright infringing servers and the purchasers of the multimedia player, without which the purchasers would find it difficult to benefit from those copyright-protected works.

As the Court stated, this intervention is an act of communication to a new public which was done in full knowledge of the fact that the add-ons containing hyperlinks pre-installed on the media player gave access to works published illegally on the internet (par. 50) and with a view to making a profit (par. 51). Moreover, this act of communication was aimed at an indeterminate number of potential recipients and involves a large number of persons, specifically the fairly large number of people which purchased the devices and all the persons who could potentially acquire that media player and have an internet connection (par. 45).

By asserting that the acts of the defendant amount to communication to the public, the CJEU opts again for a broad and flexible perception of the economic prerogatives of the copyright holders. It also confirms its previous findings in Svensson, and especially in the GS Media case, in relation to the criteria of a new public, the defendant’s knowledge of the previous unauthorised communication of the work to the public and the profit-making nature of the activity of the defendant. Therefore, the concept of communication to the public in relation to hyperlinking appears to be a labyrinth mosaic of a bundle of interdependent criteria, logical assumptions (see for example par. 27 of Svensson) and rebuttable presumptions (“*when the posting of hyperlinks is carried out for profit, it must be presumed that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder*”). See par. 49 *Filmspeler*, par. 49-51 GS Media).

This line of reasoning of the Court is innovative in the field of copyright law. There is a significant shift towards the knowledge and the intention of the person who offers the hyperlinks, which appears to mutate the absolute character of the rights granted by copyright. Indeed, for the CJEU, the question is no longer simply whether objectively an act of communication to the public occurred, but the assertion of the existence of the act itself is connected to subjective elements, such as the intention and the direct or constructive knowledge of the potential infringer.

This kind of legal thinking, which is familiar in the law of delicts (both civil wrongs and criminal law), enables the Court to enlarge or restrict the scope of application of the right of communication to the public, depending on the circumstances of each case and the technicalities of the act of communication, in order to arrive at reasonable findings. The specialisation of those criteria leads to implicit classification of the linkers. Indeed, the emphasis on the profit-making nature of the activity implies a distinction between nonprofessional linkers who just post a link to freely accessible content, and linking activities intended to generate profit. In the latter case, the linkers are expected to adopt the necessary precautions and to proceed to reasonable checks and evaluations in relation to the lawfulness of the source of the content. This expected objectivised standard of carefulness leads to the rebuttable presumption that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder.

Certainly, those categorisations are not easy to apply. In any case, the deliberate act of advertising the accessibility of copyright-protected works which were made available on the internet without the consent of the copyright holders is an undeniable factor which reverses any argument in favour of the good faith of the person who provides the links (par. 50). As a result, it negates any possible argument that the presumption of knowledge of the linker is rebutted.

The other essential question which was submitted to the Court concerns the application of the temporary copy exception of article 5 par 1 of the Infosoc Directive to the reproductions on multimedia players of works obtained by streaming. The answer of the Court is straightforward. By applying the principle of the strict and narrow interpretation of copyright exceptions, the CJEU firmly rejects the application of the exception, since it is clear that it does not enable a lawful use. On the contrary, the temporary reproductions on the multimedia players are made in the course of an obviously illegal use, since the users of those devices deliberately access a free and unauthorised offering of protected works. Moreover, those reproductions do not pass the three-step test, because they adversely affect the normal exploitation of the works and cause unreasonable prejudice to the legitimate interests of their right holders, since this practice would usually result in a diminution of lawful transactions relating to the protected works (par. 70). Consequently, the users of the devices also infringe copyright law, because no copyright exception can be invoked in their favour in relation to the reproductions made. Indeed, since the ACI Adam case (ACI Adam, C-435/12,) it would be impossible to invoke the private copy exception due to the lack of a lawful source of the copy, while with the *Filmspeler* decision the escape route of the temporary copy exception has also been closed.

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