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, relating theเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญเสริญestrengthening the deeper waters of hyperlinking and less been called upon to apply the right of communication to the public in a variety of situations: embedding copyright-protected content on treaty (C-506/13, Albrechtsen) linking to broadcasts of sporting events and broadcast’s right of communication to the parish on the internet (C-213/12, More BiMovie), and posting hyperlinks to protected works freely available on another website without the consent of the copyright holder (C-89/13, OnMedia).

In the “Filmspeler” dispute, the Court was invited to clarify whether the concept of communication to the public should be interpreted as covering the case of multimedia players or called “Kodi Boxes” on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites which copyright-protected works have been made available to the public without the consent of the rightholders.

The question is tricky, and not going whether in the details of the case could have resulted in controversial findings, indeed, generally speaking, in line with result of C-160/15, the sale of multimedia players could in fact be seen as mere provision of physical facilities for making or making a communication and, therefore, would not amount to communication of copyright-protected works.

Nonetheless, the deal is a bit trickier, as the CJEU highlighted, the definition did not simply prescribe the sale of those devices. Rather, with knowledge of the circumstances this could lead to the information that specifically enable purchasers to have access to protected works published — without the consent of the copyright holders — an emerging trend and enable these purchasers to watch those works. By doing so, he is provided with the device, although not responsibility — intervened in a highly removed and latent manner enabling a direct link to be established between copyright infringing servers and the purchasers of the multimedia players, without which the purchasers would not have benefited from these 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 devices containing hyperlinks pre-installed on the multimedia player gave access to works published legally on the internet (par 99) and with a view to making a profit (par 100). Moreover, the 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 who purchased the devices and all the persons who could potentially acquire that media player and have an internet connection (par. 40).

By asserting that the act of the defendant amounts to communication to the public, the (EU) Court applies again for a broad and flexible perception of the economic purposes of the copyright holder, it also confines its previous findings in Svensson, and especially in the OnMedia case, to the literal terms of a new public, the defendant’s knowledge of the previous unauthorized 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 broad and flexible one of a broad and flexible perception of the economic purposes of the copyright holder, thus enabling the CJEU to link to works protected by copyright, to “stream” protected works, and to earn money from those links.

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 interest of the person who offers the hyperlinks, which appears to rule out the idea of a general availability of the works, i.e., a broad interpretation of the public, if it were the case of a single individual as the owner of the hyperlinks. This approach is outside the traditional idea of communication to the public, a concept that requires a substantial number of recipients.

This kind of legal thinking, which is familiar in the law of delicts (both civil wrongs and criminal law), enables the CJEU to engage in the scope of application of the right of communication to the public, abandoning the preoccupation of the (EU) Court in the OnMedia case of the profit-making nature of the activity of the defendant. Indeed, the emphasis on the profit-making nature of the activity results in a distinction between nonprofessional linkers (par. 35), 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 the device in an obvious manner, but 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 — an emerging trend and enable these purchasers to watch those works. By doing so, he is provided with the device, although not responsibility — intervened in a highly removed and latent manner enabling a direct link to be established between copyright infringing servers and the purchasers of the multimedia players, without which the purchasers would not have benefited from these copyright-protected works.

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