

Kluwer Copyright Blog

The Netherlands: a hyperlink to unfindable files

Piter de Weerd (Institute for Information Law (IViR)) · Friday, January 17th, 2014



“In that case, the publication of an hyperlink is, in principle, not an autonomous communication to the public”

It is a common fact that the sex-industry, along with the arms industry, is a driving force behind many new developments. Porn is a major force on the internet and it also shouldn't come as a surprise that important legal questions surface in porn-related cases. One example is the recent commotion in Germany about tens of thousands of cease and desist letters for watching a porn-stream on the internet (see this earlier blog) and another example is a [judgment of the Amsterdam Court of Appeal](#) in a case about playboy-photo's that were leaked to or found by other media and published on the internet before they could be published in Playboy magazine itself.

The case revolved around a photo-shoot with Dutch TV-celebrity Britt Dekker. Dutch web-magazine [GeenStijl.nl](#) (literally 'Nostyle.nl') got an allegedly anonymous 'linktip' that directed to a file with the playboy photos on the Australian website [filefactory.com](#), a content distribution system, where you can upload your documents and, if you want to, share your files with others.

Geenstijl.nl published the link on its website, in a [blogpost](#) with the title *'Fucking leaked! Nude pictures Britt Dekker'*. The blog post also contained cutouts of one or two pictures from the file. Dutch TV-broadcasting organization Powned, related to Geenstijl.nl, also reported about the link and showed several photos. The photos were removed from Filefactory after a request by Sanoma, the publisher of the Dutch Playboy, but were subsequently published on [Imageshack.us](#) and other sites, to which Geenstijl.nl linked in new blogposts about the pictures and about the infringement proceedings initiated by Sanoma.

No infringement

The legal debate in this case mainly focused on the implications of linking to copyrighted material and whether the litigious photos were already righteously published or not. As it was unclear who had placed the photos in the Filefactory file, it was assumed that this 'third person' was not the or a

right holder with regard to the photos and was not licensed to publish them.

In its judgment, the Amsterdam Court of Appeal firstly formulated a general rule with regard to linking. According to the court, in short, the publication of an hyperlink to copyrighted material must, in principle, not be regarded as an autonomous communication to the public, unless the material is unfindable and unreachable for the public and the publication of the link constitutes a new access channel:

2.44. The court regards it as a basic principle that the internet, in its present form, is a free, open communication-network that is accessible for everyone. A person that puts a work on the internet in a way that it is accessible for the public (and therewith communicates it to the public in the meaning of the Copyright Directive), is the one that places it at the disposal of the public and thus communicates the work to the public. Referring with a hyperlink to a work that is communicated in that fashion to the public on a different location on the internet, doesn't really differ from referring in a footnote in book or an article to another work that is already published. In that case, the publication of an hyperlink is, in principle, not an autonomous communication to the public or an intervention therewith."

The court suggests that anyone who puts something on the internet is not directly communicating it to the public, if the location is kept private and the material is unfindable for e.g. search-engines, even if what is put on the internet is, in principle, accessible for everyone who knows the exact location. But when he himself or someone else discloses the access link or the digital key to the material to a broader public, the material can be considered to be communicated to the public. In this case, the private character of the file was not established and the court therefore assumed that the photos were already communicated to the public by the (unauthorized) third person: Geenstijl.nl therefore had not given the public a new access channel by providing them with the link to previously private material.

"(...) 2.4.7. If, as Sanoma c.s. state, but is contested by GS Media [the publisher of Geenstijl.nl], files placed by a user on Filefactory remain perfectly private, the single act of placing the files cannot be regarded as communicating them to the public. That can be different if the user discloses his digital key broadly or if someone else does so. But firstly it must be determined whether the content of the files that are stored on Filefactory is unfindable and unreachable for the public, as Sanoma c.s. state. (...) Sanoma c.s. have not offered to substantiate their statement, let alone to substantiate it specifically, as is requested in appeal. That means that their statement remains unsubstantiated. Therefore, it cannot be concluded that the photos on Filefactory have remained strictly private. Therefore, the court has to conclude that a third person did communicate the photos to the public by placing them on Filefactory and that GS Media, although it has facilitated the access to the Photos to a certain extent, has not given the public a new access channel and therewith has not committed intervention in the meaning of the CJEU jurisprudence."

A highly facilitating character

Although publication of the link doesn't constitute copyright infringement, the Court of Appeal does consider the publication to be an unlawful act, as it has a highly facilitating character and therewith violates the carefulness which is required in public life.

2.7.3. (...) there is no reason to believe that the Geenstijl-public could have easily found the photos without the assistance and help from GS Media. Therefore, the publication of the hyperlink has a

highly facilitating character and, moreover, the text of the articles in which the hyperlinks were published cannot be understood other than to be encouraging for the GeenStijl-public to look at the photos. Everything taken together, it must be concluded that GS Media has violated the carefulness which is required in public life against Sanoma.

Pictures as ‘teasers’ and citations

Another interesting part of the decision is the court’s considerations with regard to the publication on Geestijl.nl of parts of the pictures. To the detriment of Geenstijl.nl, but possibly to the benefit of other publishers and bloggers, the Court of Appeal decided that the publication might have been considered a non-infringing ‘teaser’ or a legitimate ‘citation’, if the photos had been published legitimately. However, as the photos in this case had been published (placed online) by the unauthorized ‘third person’, the publication of the cutouts on Geenstijl.nl could not be regarded as anything else than an infringement:

2.5.4 The single fact that a third person only reproduces and communicates a small part of a protected work to the public, doesn’t necessarily mean that there’s no copyright infringement. In this case, the cutout was meant as a so called ‘teaser’, i.e. meant to draw the attention of the Geenstijl-public to the entire photo and other photo’s. Therefore, the Appellate Court regards the cut-out as a citation from the entire photo. In [article 15a](#) of the Dutch Copyright Act, conditions are given for legitimate citations. The first condition is that the work from which the citation originates must be communicated legitimately to the public. In this case the work was illegitimately communicated to the public by a third person. GS Media was aware of this, proceeded with the publication anyway. Moreover GS Media failed to comply with another condition of art 15a AW, e.g. It did not clearly indicate the name of the maker with the photos. The communication to the public of the cut-out must therefore be regarded as an infringement.

A final point in the judgment is the decision of the court with regard to the portrait rights of Britt Dekker, the person depicted on the Playboy photos: The publication of a picture of a swim suit clad belly alone doesn’t infringe the portrait rights of the owner of that belly. “Not even in the broad definition of the term ‘portrait’.”

In anticipation of things to come

This isn’t an isolated incident, of course. The questions asked in this case have been asked in many European courts and, fortunately, have reached the European Court of Justice as well:

“If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public? Is the assessment affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way? Should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website? Is it possible for a Member State to give wider protection to authors’ exclusive right by enabling ‘communication to the public’ to cover a greater range of acts than provided for in Article 3(1) of Directive 2001/29/EC”

The answers to these questions, referred to the ECJ in 2012, [C-466/12](#), Svensson e.a., are eagerly awaited. Too put it mildly.

The full summary of this case will be posted on [Kluwer IP Law](#).

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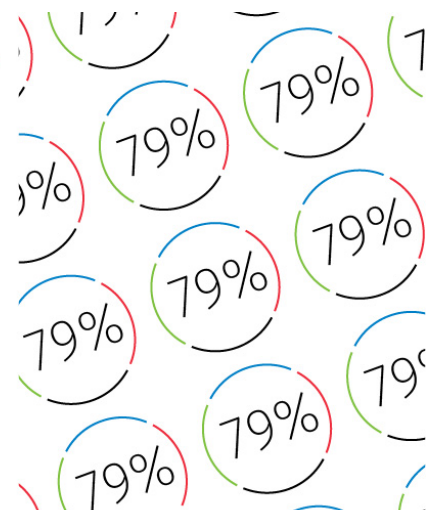
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