Kluwer Copyright Blog

GS Media vs. Sanoma (C-160/15) – the Advocate General proposes a deviation from prior CJEU case law: Is he right?

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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 one of the main internet technologies, hyperlinking, is still the subject of hotly debated issues under EU copyright law, which the CJEU has yet to answer.

2. Linking to Legal Content: CJEU *Svensson* (2014)

In 2014, the CJEU ruled that linking to legal content, freely available on the internet, would not be a public communication in the sense of Article 3 (1) Copyright Directive 2001/29. Although linking would constitute a "communication", it lacked the character of being sufficiently "public", as no "new public" was addressed (C-466/12 – *Svensson and others*).

3. Linking to Illegal Content: CJEU *GS Media vs. Sanoma* (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") proposed that linking should in general never be copyright relevant. It lacks the character of a public communication pursuant to Art. 3 (1) Copyright Directive 2001/29. The opinion can be summarised as follows:

- Linking is not an act of "communication" as such. Therefore, linking to illegal content already misses the first requirement of a public communication (see paras 48 et seq.). This is contrary to the prior *Svensson* case law of the CJEU, as the AG freely admits (para 52).
- A link to freely published content would not address a "new public" and would thus not be a public communication, even if the content was published illegally by third parties (para 65 et seq.).
- Exceptionally, links could constitute a public communication, if the link published the work freely for the first time (paras 71 et seq.). This would, however, not be the case if freely available content (i.e. not access protected) was merely difficult to find on the internet.
- The AG argued that accepting links to illegal content freely available on the internet as copyright infringing would "significantly impair the functioning of the internet" and could "distort the fair balance of rights and interests between the different categories of rightholders, as well as

between the different categories of rightholders and users of protective subject-matter" (para 77). If users were at risk of proceedings for infringement of copyright, whenever they post a hyperlink to works freely accessible on another website, "they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the internet society" (para 78).

4. Discussion

These are strong words. That is why it seems necessary to take a closer look.

First, it seems correct that the AG recognises that there is a public communication in the exceptional case that the link leads to illegal content not freely published beforehand, while denying that there is a public communication where the illegal content was already freely available before the link was published. It is a common infringement scenario that 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 a so-called sharehoster (also called a cyberlocker). There is extensive case law of the German BGH on such sharehoster scenarios (see cases BGH, file no. I ZR 18/11, July 12, 2012 – *Alone in the Dark*; BGH, file no. I ZR 80/12, August 15, 2013 – *File-Hosting-Dienst I*; BGH, file no. I ZR 79/12, August 15, 2013 – *File-Hosting-Dienst II*; and BGH file no. I ZR 85/12, August 15, 2013 – *File-Hosting-Dienst III*). Following the AG, not only the first person to publish the link would be infringing, but also all other persons publishing a link to the sharehoster's illegal file would be in violation of copyright.

For all other scenarios, i.e. linking to illegal content already published without access restrictions, the AG proposes that the CJEU deviates from its prior *Svensson* case law. This proposal by the AG seems attractive to the extent that this could be a chance to get a fresh start for the entire concept of "public communication" and in particular for the criterion of a "new public", which indeed seems in conflict with the background of the existing international treaties. This concept has been criticised heavily across the EU and has even provoked an ALAI counter statement. The CJEU concept has brought considerable legal uncertainty to the member states, whose courts are only just starting to understand and implement the CJEU's concept properly. See for example this discussion on the difficulties in Germany.

Whilst it is also true that the CJEU is, in general, free to deviate from its prior case law (see discussion here); in the specific scenario of linking to illegal content, the CJEU concept does seem to lead to a satisfying result. Therefore, for the scenario at issue in *GS Media/Sanoma*, the CJEU would do better to stick to its prior case law which provides a result that will not make the internet go under.

Unfortunately, the opinion of the AG does not mention that national supreme courts in the EU have already ruled in favour of links to illegal content being copyright infringing. For example, this is the case in Germany, where the Bundesgerichtshof ("BGH") decided the *Bestwater* case, which came down from the CJEU (C-348/13). This case was about a link to an illegal YouTube video. The AG mentions the *Bestwater* CJEU decision in his opinion, and states that the CJEU came to the conclusion in *Bestwater* that "Article 3(1) of Directive 2001/29 had not been infringed" (para 40). This statement, however, seems quite bold, because none of the BGH questions in its reference were directed at the issue of linking to illegal content. Also, the AG did not mention the fate of the proceedings on the national level. In the proceedings following the CJEU ruling, the German BGH came to the conclusion at trial that linking to illegal content did infringe copyright.

The content and analysis of the decision are discussed in my previous blogpost here. This BGH decision seems to be consistent with the CJEU Svensson decision: linking is a communication, and it is public if it reaches a new public. This must always be the case if the content is not legally available on the internet. The decision was handed down last year. Nevertheless the functioning of the internet has not been significantly impaired in Germany, to use the language of the AG.

As the AG said, copyright protection on the internet needs to achieve a fair balance between the interests of rightholders on the one hand and users on the other hand. But taking linking out of copyright because illegal copies are freely available on the internet would seem one-sided. It is not a satisfying solution – as the AG suggests (para 87) – for rightholders to direct themselves to the source of the infringement. Going to the source is fruitless where the source is out of reach of the rightholder, e.g. in a jurisdiction that does not allow in law, or in practice, for removal of the infringing content. Hosting companies which enjoy letterbox status on the Seychelles or in Panama are examples of this.

The internet will not be significantly impaired if links to illegal content are a copyright violation as such. The system has to be handled in a responsible way though. As a starting point, it may be the case that internet users will be "more reticent" to post links. But why is that so bad *per se*, if the person linking thinks twice about the legality of the content, in particular in cases of clear illegality?

Furthermore, the consequences of a copyright breach in the case of linking to illegal content seem to be sufficiently flexible to allow a fair result:

- If it was not reasonable for the average internet user to identify the content she or he linked to as illegal, only injunction claims seem possible. The same is true if links are generated automatically by neutral business models. But damages claims cannot be awarded where there is a lack of fault, if the link poster takes down the link as soon as they are notified about the illegality.
- In cases where it is obvious that the linked content is illegal, there is no justifiable interest in avoiding damages claims anyway.
- In cases where there was uncertainty as to whether linked content is illegal, damages claims seem to be possible. But here too, there does not seem to be any justifiable interest in users choosing to link anyway without any responsibility. Nevertheless, the standard for fault could be handled in an adequate way, taking into account the difficulties experienced by average internet users in identifying illegal content.
- In certain exceptional cases, the legal regimes will be sufficiently flexible to provide for a fair solution absolving the link poster from copyright liability. For example, if an electronic newspaper in an editorial article discusses the possible illegality of software circumventing technical protection measures and links to the relevant software are displayed, the posting of the link in this editorial article will not be a copyright relevant act according to the case law of the German BGH and the German Constitutional Court (BGH GRUR 2011, 513; BVerfG GRUR 2012, 390 "AnyDVD"). In such cases, press freedom may justify an exceptional approach, without giving up the principle.

5. Summary and Outlook

Linking is an important internet technology. That is why it should not, in principle, be freed of any copyright relevance. Rather, link posters should be incentivised to think twice when linking to

illegal or at least dubious sources. And innocent linkers should be incentivised to take a link to illegal content down after notification. The current CJEU case law in *Svensson* leads to an adequate and fair result to control link posting to illegal content: linking is a communication and it is public if the link goes to illegal content that has not been authorised. The CJEU could stay in line with this prior case law and reject the AG's attempt to put linking law on a different track.

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 – *Filmspeler* (C-527/15) and *Brein/Ziggo* concerning "ThePirateBay" (C-610/15) – are also pending.

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countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.”>CJEU, Communication (right of), Digital Single Market, European Union, Germany, Infringement