Kluwer Copyright Blog

GS Media in the National Courts: Fresh Issues on the meaning of ‘for profit’

Geert Lokhorst (Institute for Information Law (IViR)) · Tuesday, January 17th, 2017

Lower courts can give fresh insight into the adjudication taking place at the highest national and European courts. This is especially true for the recent GS Media case. The German and Dutch courts have created new food for thought on the meaning of placing a hyperlink ‘for profit’. The exact meaning of this notion is material in defining the scope of the presumption of knowledge when linking to illegal content online, and thereby the scope of ‘communication to the public’. Dr. Targosz argued in an earlier blog post that there is no room for doubt that ‘for profit’ refers to the overall operation of the website owner. However, I believe this subject remains shrouded in mystery. Following the cases of the lower courts in The Netherlands and Germany, I will try to unravel the mystery and provide insight into ‘for profit’ in the context of GS Media.

GS Media – the essentials

The GS Media case added a notion of culpable conduct or negligence to the notion of ‘communication to the public’. According to the Court, there is such a communication if the person posting a hyperlink knew or ought to have known that the work was unlawfully publicised. This knowledge is presumed if the person posting the link does it ‘for profit’. While it was stated in SGAE that profit-making is not a necessary condition for the communication right, the Court stated in FAPL that it is not irrelevant. The Court goes even further in GS Media: a person posting a hyperlink to the work can be expected to check it was not illegally placed on the internet “when the posting of hyperlinks is carried out for profit”.

The Netherlands – reproduction as a commercial party

The first Dutch application of GS Media was, surprisingly, not about ‘communication to the public’, but the reproduction right as provided in Article 4 of Directive 2001/29. Defendant [y] had downloaded a picture and text from an online article in newspaper *De Telegraaf* and subsequently uploaded it on his own website. While the picture was freely accessible on the website of *De Telegraaf*, downloading and uploading constituted an unlawful reproduction. Defendant [y] stated

he did not have the technical means to 'embed' the content and therefore he had to upload it. Referring to GS Media, the court stated that it was still infringement because [y] is a commercial party.

Two things stand out in this case. First, the District Court stated that the legal framework of copyright on the internet has not taken shape and is structurally lagging behind (international) developments. As a result, the court sought support in the legal framework proposed by the parties. Second, the court took a very broad notion of 'for profit'. The court apparently merely found it sufficient that the defendant is a commercial party, without going into the question of whether the website or the placing of the content itself was 'for profit'.

Germany – interpretations of for profit

The first German application of GS Media has already been discussed extensively by Nordemann and Kraetzig in their blog post. In short, the defendant linked to an unlawful adaptation of a work on his website, which sells teaching materials. The Landgericht Hamburg first stated that the CJEU did not define what the scope of 'for profit' entails. However, it could not be understood in the strict sense as relating to the placing of the link itself. The Court argued that the 'for profit' criterion is intended to make commercial parties take reasonable measures to check whether they link to illegal content. Therefore, the 'for profit' character of the website as a whole should be determinative.

Round-up – what is 'carried out for profit'?

Following the German and Dutch decisions, three interpretations of 'for profit' can be distinguished. First, in a strict sense, the link as such should generate profit. Second, the website as a whole is 'for profit'. Third, the fact that the person placing the link is a commercial party is sufficient for the 'for profit' criterion. The last interpretation also stems from the duty of care commercial parties may have when placing a link.

The first interpretation is supported by two statements in GS Media. First, the CJEU stated that there is a presumption of knowledge **if the posting of hyperlinks is carried out for profit**. Second, the CJEU stated that GS Media **provided the hyperlinks** to the files containing the photos **for profit**. This strict interpretation is further supported by the Reha Training case. Here, the CJEU directly related the profit-making nature of the communication to the competitive advantage resulting from the broadcasting of television programs. In GS Media, *Geenstijl* also gained an economic advantage from providing the link: the interest in the link caused an influx of visitors, resulting in higher advertising revenues. Furthermore, the communication right is an economic right. It is unlawful towards the rightholder for a party to profit from infringing acts. Within the strict interpretation, the profit for the commercial party and the unlawful act, the placing of the link, would be directly connected.

The interpretation of 'for profit' as relating to the website as a whole is a mistake. The German court argues that the presumption of knowledge is based on the commercial character of the party. This implies a certain duty of care for commercial parties when placing hyperlinks. Excluding from this duty of care a commercial party that does not have a 'for profit' website would be arbitrary. Furthermore, using the website as the defining criterion could lead to a presumption of knowledge for consumers with a small blog, supported by advertisements. The only solution to these issues would be to interpret a 'for profit' website as all websites owned by a commercial

party, which is the third interpretation.

Concluding remarks

The first national applications of GS Media prove difficult: what is the actual relationship between the posting of a hyperlink to illegal content and the notion of ‘for profit’? While the literal text of GS Media and Reha Training indicates a strict relationship between the placing of the link and the profit, the German court relates the notion of ‘for profit’ to the website as a whole. The Dutch court seems to go even further, indicating a general duty of care for commercial parties to check whether the linked content is lawfully made available. The first and last option both have their merits. But what interpretation should prevail? Is it already time for a new referral to the Court of Justice of the EU?

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