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AG Campos' opinion on Filmspeler: a broader interpretation of 'communication to the public' online?

Emmanuel Vargas Penagos (Institute for Information Law (IViR)) · Wednesday, February 8th, 2017

On December 8th 2016, Advocate General (AG) Campos Sánchez-Bordona delivered his opinion in Case C-527/15- Stichting Brein v Jack Frederik Wullems, acting under the name of Filmspeler (Filmspeler). This opinion may pave the way for a broader interpretation of the concept of 'communication to the public' under Article 3 (1) of the InfoSoc Directive. By doing so, as the Commission indicated, the fair balance between the rights and interests of parties involved in this kind of case may be jeopardised (Para 34).



Filmspeler's case arrived at the Court of Justice of the European Union (CJEU) as a referral from the Rechtbank Midden-Nederland (the Court) on October 2015. The case was initiated by Stichting Brein, who sued Jack Frederik Wullems for allegedly carrying out a 'communication to the public' contrary to Dutch copyright law. Through his website, www.filmspeler.nl, Wullems sold different versions of a multimedia device. Moreover, Wullems installed add-ons on the device's software interface with hyperlinks redirecting the user to streaming webpages with either authorised or unauthorised contents (Paras 16-19).

The first questions raised by the Court refer to whether Article 3(1) of the InfoSoc Directive, which includes the concept of 'communication to the public', covers the selling of a product in which add-ons containing hyperlinks to unauthorised copyright-protected works are installed (Para 24).

Furthermore, the Court also asked whether Article 5(1) (b) of the InfoSoc Directive, when referring to the concept of 'lawful use', includes a temporary reproduction made by an end user who obtains access to streaming of an unauthorised copyright-protected work. In addition, the Court asked whether such a temporary reproduction would be contrary to the "three-step test" of Article 5(5) of InfoSoc Directive (Para 24).

AG Campos uses [Case C-160/15 – GS Media BV v Sanoma Media Netherlands BV & others](#) (GS Media) as a starting point for his opinion. According to AG Campos, the questions referred by the District Court of Central Netherlands are almost the same as the ones in GS Media (Para 3). This

implies that the main grounds forming the basis of the decision should be: 1. The provision of clickable links to protected works is ‘making available’ and an ‘act of communication’; 2. That concept includes any transmission of protected works regardless of means or processes; 3. Posting the hyperlink to a work unlawfully published, when done in pursuit of profit, has a rebuttable presumption of being a ‘communication to the public’ (Para 42).

In addition, AG Campos points out a key difference between the present case and *GS Media*: the facts of that case were related to the provision of hyperlinks, whilst in *Filmspeler* the facts concern the sale of a multimedia player (Para 46). This difference was emphasised by the Commission and by Mr. Wullems. Moreover, both the Commission and Mr. Wullems say that the sale of the multimedia player is ‘neutral’ i.e. it has no direct connection to the transmission of protected works (Para 48).

AG Campos describes the argument made by the Commission and Mr. Wullems as ‘reductionist’. He argues that the device sold by Mr. Wullems provides the hardware and software necessary to enable access to unauthorised copyright-protected works. That immediate access gives an added value to the service provided by Mr. Wullems (Para 50). He also claims that there is no significant difference between posting hyperlinks on a website and installing hyperlinks in a multimedia device designed for online use. Both of those activities, according to AG Campos, are aimed at ensuring enjoyment of protected works (Para 51). Thus, he considers that the media player provided by Mr. Wullems carries out a communication to the public under Article 3 (1) of the InfoSoc Directive.

After establishing the existence of a communication to the public, AG Campos determines the concurrence of a ‘new public’. AG Campos reaches his conclusion by explaining that the service provided by Mr. Wullems gives an undeniable advantage to people unskilled in the use of the internet to find unauthorised content. Moreover, he claims that this specific section of the public would prefer to use the user-friendly menu of *Filmspeler* than search online (Para 58).

Furthermore, AG Campos considers that, given the lack of consent from right holders or licensees, lawfulness of the contents is non-existent in this case. He claims that ignorance or lack of knowledge by the end user may exempt him or her from liability. However, ignorance would not exclude, at least in objective terms, the unlawfulness of the use (para 71).

Finally, AG Campos says that, even in the case where the reproduction made by users of *Filmspeler* was considered as a ‘lawful use’, it would not satisfy the requirements of the “three-step test” in Article 5 (5) of the InfoSoc Directive. Among other things, AG Campos considers that a service like the one provided by Mr. Wullems would allow countless downloads of unauthorised content (71). Moreover, AG Campos says that watching content by streaming is an ‘abnormal act’ with the deliberate aim of accessing content without financial consideration (76).

Will the CJEU give a judgment concurring with AG Campos’ opinion? Or will they take into account considerations such as those identified by the Commission? Similar concerns were raised by that Institution, the German, Portuguese and Slovak Governments and the defendant in *GS Media*. In that case, those parties considered that broadening the scope of ‘communication to the public’ to cover the posting of hyperlinks would have restrictive consequences on freedom of expression (*GS Media*, para 44). However, that argument was almost irrelevant in the final decision.

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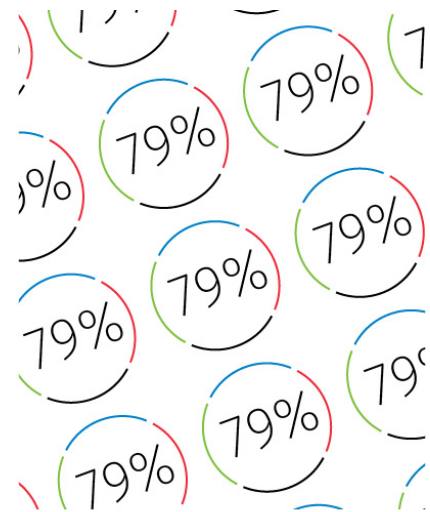
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