Kluwer Copyright Blog

Geoblocking measures sufficient to prevent a “communication to the public”? The CJEU gets a second chance

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Once again, the Court of Justice of the European Union (CJEU) will be asked to provide clarity on the concept of “communication to the public” as laid down in article 3 of the 2001 Copyright in the Information Society Directive (InfoSoc Directive). On 20 September 2024, the Dutch Supreme Court expressed its intention to refer preliminary questions to the CJEU regarding the legal implications of geoblocking in the context of the right to communication to the public. *

The facts that led to these proposed preliminary questions are as follows. The plaintiff is the ‘Anne Frank Fonds’ (Fonds), which holds copyright on parts of Anne Frank’s diary in the Netherlands. In several other countries, including Belgium, the copyright on the diary has already expired (hereafter: “public domain countries”). The defendants in this case, which include the ‘Anne Frank Stichting’ (Stichting), commissioned the Huygens Instituut voor Nederlandse Geschiedenis (Huygens ING) to conduct scientific research on the works of Anne Frank. The results of the research include copyright relevant reproductions of the Fonds’ relevant works. The Stichting et al published the results on a Belgian website that is not accessible from the Netherlands due to geoblocking measures. However, that website is accessible from the public domain countries.

The central issue for the Dutch Supreme Court is whether the making available of the works by Stichting et al on a Belgian website, even if geoblocked, still constitutes a communication to the public in the Netherlands, given that users can circumvent this geoblocking measure by using a virtual private network (VPN) or similar service.

The preliminary questions on territoriality and geoblocking

The questions proposed in this regard by the Dutch Supreme Court are the following.

First, whether article 3(1) InfoSoc Directive should be interpreted to mean that the making available of a work on the internet can only be regarded as a communication to the public in a particular country if the publication is addressed to the public in that country. If this is the case, the Dutch Supreme Court wants to know what factors should be taken into account in this assessment.

The second intended preliminary question is whether a party publishing a work online is making a communication to the public in a certain country, even if a geographical access blocking measure is employed which in principle prevents access to the website from an IP address in that country so that users can only circumvent the blocking measure with the help of a VPN or similar service. Again, the Dutch Supreme Court additionally asks for the factors that should be taken into account here.

Lastly, the third preliminary question proposed relates to the potential liability of the VPN provider, in the event that it is considered that circumventing the blocking measure amounts to communication to the public in the blocked country. In this regard, the Dutch Supreme Court asks whether the communication is made by the party who published the work on the internet, even though access to that communication requires the intervention of the VPN provider or a similar service.

It is important to note that these questions might still be subject to (minor) changes before being referred to the CJEU, given that the parties on both sides have filed comments on the proposed questions since the Dutch Supreme Court decision.

Previous case law

The focus of this section is preliminary questions one and two. To understand these questions it is necessary to explore related issues of territorial copyright, geoblocking and VPNs. These topics have already been examined by Advocate General (AG) Szpunar in his 2022 Opinion in Case 423/21 – Grand Production v. GO4YU. However, as that case was dismissed, the Court did not have the opportunity to address these questions in a judgment. Therefore, the Dutch Supreme Court's intended referral presents a fresh opportunity for the CJEU to clarify these issues.

As a starting point, article 3 InfoSoc Directive grants authors an exclusive right of communication to the public of their work, including the right to make available e.g. in the online environment. This right is not subject to exhaustion and, as the CJEU has repeatedly emphasised, is of preventive nature.

Over the last few decades, the CJEU has delivered several judgments that clarify how this article should be interpreted, including in regard to posting copyright protected work on the internet. For instance, starting in 2014 with *Svensson*, the CJEU delivered several judgments on hyperlinking as a form of communication to the public. Many of these cases dealt with instances of linking by third parties to content placed on a website by or with the permission of the rightsholder.

However, other than the dismissed case of *Grand Production v. GO4YU*, none of these cases dealt

with the impact of digital measures like geoblocking and VPNs on the interpretation of the concept of communication to the public. Article 6 InfoSoc Directive in turn makes it possible to use technological protection measures to restrict access to protected works. This may have legal consequences, including with regard to the definition of the concept of 'communication to the public'. In his Opinion in *Grand Production*, AG Szpunar applied prior hyperlinking case law by analogy to geoblocking, when answering the question whether a communication to the public takes place if copyright protected work is restricted by geoblocking measures (see also Synodinou 2023).

In short, AG Szpunar noted that the intention of the party making the communication determines the circle of persons targeted by the communication to the public (following *Svensson,* paras 27–28). The intention should be inferred from the way in which that party makes the content available. Here, the only indication is the technical measures taken by the party to limit accessibility (see also *VG Bild-Kunst,* para. 40). A publicly accessible website is targeted at all internet users, while a website secured by access restrictions is targeted exclusively at persons who have gained lawful access to it (*Svensson* para. 27 and 31).

The AG then argues that this approach can also be applied in the *Grand Production* case. If the copyright holder (or its licensee) has applied geoblocking measures, the protected content is targeted only at the circle of persons accessing that content from the territory where access is not blocked by the copyright holder. Therefore, the copyright holder does not communicate that content to the public in other territories (para. 36 of the Opinion).

Implications for the present case

It remains to be seen whether the CJEU will apply this reasoning to the present case, since *Grand Production* involved different facts from those at issue here. *Grand Production* concerns geoblocking measures imposed by the copyright holders themselves, in the situation where the communication to the public on a website was by the copyright holders or with their consent. The present case, however, concerns an original communication to the public by a third party without consent of the copyright holder. It is furthermore important to note that in the present case, there is no copyright protection in the territory of the public domain countries where the work is made available. One could therefore argue that no consent is needed in that territory because no copyright subsists there. Of course, consent would be needed in the territory where the work is still protected by copyright (The Netherlands), where access is subject to geoblocking measures. Here, the uncertainty around how that relates to the circumvention of geoblocking comes into focus.

AG Szpunar admits in his Opinion that geoblocking measures can be circumvented and that this can likely never be fully counteracted through technical or other measures (para. 38 of the Opinion). The AG, however, does not want to draw the conclusion from this that there is always a communication to the public of a work in a territory even though access to it is being geoblocked there. That would make managing copyright on the internet on a territorial basis impossible, as in principle any communication of a work to the public on the internet would then be global (para. 39 of the Opinion).

Conclusion

The CJEU has an opportunity (at last) to address the unexplored intersection of geoblocking and communication to the public. The Dutch Supreme Court aims to refer three preliminary questions on this topic. In *Grand Production*, AG Szpunar already expanded on how CJEU case law should be interpreted to answer the first two questions. However, because that case never made it to judgment, it remains unclear whether his views will be followed by the court. The third question raises the interesting issue of whether the party who facilitates the circumvention of the geoblocking measure can also be held liable. The effects of geoblocking on the assessment of the right of communication to the public pose interesting challenges for the CJEU, particularly given their potential implications for the territoriality of copyright in the digital environment.

**Correction notice: A previous version of this post suggested the Dutch Supreme Court had already referred the preliminary questions to the CJEU. The current updated version outlines throughout that it concerns an intention of the Dutch Supreme Court to refer preliminary questions.*

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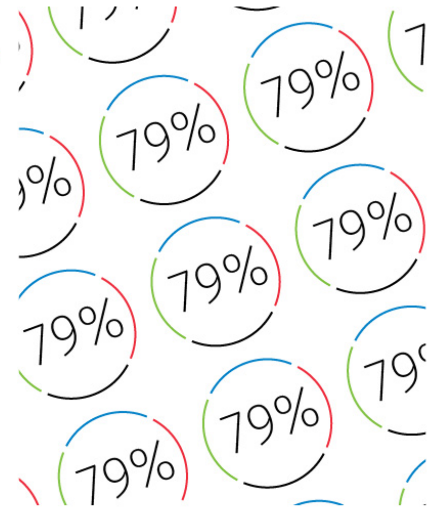

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