Communication to the public

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Agenda

- “Communication to the public”
  - Context
  - The law
  - The cases
  - The impact

Context

- Copyright & Infringement
- Unlawful content and copyright owners' remedies
- Blocking injunctions
- Hyperlinks
  - Generally
  - Tweets, social feeds, etc
  - Peer to peer file sharing
  - Search engines

The law

- Art 3 InfoSoc Directive - “communication to the public”
- s.20 Copyright, Designs and Patents Act 1988
- CJEU decisions
  - Traditional broadcasting cases involving cafés, hotels, pubs, etc (not covered today)
  - Svensson C-466/12, 13 Feb 2014
  - BestWater C-348/13, 21 Oct 2014
  - GS Media C-160/15, 8 Sep 2016
  - Stichting Brein C-610/15, 14 Jun 2017
  - Renckhoff Case C-161/17, 7 August 2018

GS Media C-160/15, 8 Sep 2016

GS Media BV

v

Sanoma Media Netherlands BV

Playboy Enterprises International Inc.

Britt Geertruida Dekker

"*[expletive deleted] leaked! Nude photos ... Dekker*"

GS Media – the facts

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GS Media – the facts

- Oct 2011 Sanoma, the publisher of *Playboy* magazine, had a photographer, Mr Hermès, take photos of a Playboy bunny, Ms Dekker, for the December edition
- GS Media ran a “spoiler” via its website GeenStijl which contained a cutout of a Ms Dekker photo and a link to an Australian website, filefactory, on which the photos were hosted
- Sanoma requested GS Media remove the article and links
- At the same time Sanoma requested filefactory remove the photos

GS Media – the facts

- GS Media failed to respond to Sanoma's demand
- Filefactory removed the photos
- … but the genie was out of the bottle …
- GS Media – obviously upset at being asked to remove the article published another article on GeenStijl about Sanoma's complaint together with another link to the photos this time on Imageshack.us
- A third article appeared on GeenStijl with another hyperlink to the photos. Forum users of GeenStijl then posted new links to other websites where the photos at issue could be viewed.

GS Media – the court case

- Amsterdam District Court, Sanoma claimed
  - GS Media had infringed Mr Hermès' copyright and acted unlawfully towards Sanoma and Others
  - Claim upheld
- Amsterdam Appeal Court
  - GS Media had not infringed Mr Hermès' copyright, since the photos at issue had already been made public before they were posted on the Filefactory website but …

Amsterdam Appeal Court held that

- by posting those links, GS Media acted unlawfully toward Sanoma and Others, as
  - visitors to that website accordingly were encouraged to view the photos at issue which were illegally posted on the Filefactory website.
  - Without those hyperlinks, those photos would not have been easy to find.
- by posting a cutout of one of the photos at issue on the GeenStijl website, GS Media had infringed Mr Hermès' copyright

A split decision

- GS Media appealed to the Supreme Court of the Netherlands
- Sanoma cross-appealed
  - Based on Svensson there was a “communication to the public” by the provision of the link; and
  - By providing a link, the photos were available to a wider (“new”) public
- Reference required to the CJEU

The reference – question 1

(1) If anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the rightholder, does that constitute a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29?

(b) Does it make any difference if the work was also not previously communicated, with the rightholder’s consent, to the public in some other way?

(c) Is it important whether the ‘hyperlinker’ is or ought to be aware of the lack of consent by the rightholder for the placement of the work on the third party’s website mentioned in 1(a) above and, as the case may be, of the fact that the work has also not previously been communicated, with the rightholder’s consent, to the public in some other way?

The reference – questions 2 & 3

2. (a) If Question 1 is answered in the negative: If the answer to question 1(a) is in the negative: in that case, is there, or could there be deemed to be, a communication to the public if the website to which the hyperlink refers, and thus the work, is indeed findable for the general internet public, but not easily so, with the result that the publication of the hyperlink greatly facilitates the finding of the work?

(b) In answering question 2(a), is it important whether the "hyperlinker" is or ought to be aware of the fact that the website to which the hyperlink refers is not easily findable by the general internet public?

3. Are there other circumstances which should be taken into account when answering the question whether there is deemed to be a communication to the public if, by means of a hyperlink, access is provided to a work which has not previously been communicated to the public with the consent of the rightholder?'

GS Media – the decision

CJEU examined the 3 questions together and summarised the question as

- whether, and in what possible circumstances,
- the fact of posting, on a website, a hyperlink to protected works,
- freely available on another website
- without the consent of the copyright holder,
- constitutes a ‘communication to the public’

within the meaning of Article 3(1) of Directive 2001/29.

GS Media – the decision

Article 3(1) of the InfoSoc Directive must be interpreted as meaning that, in order to establish whether there is a ‘communication to the public’, depends on whether

- those links are provided without the pursuit of financial gain
- by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or
- whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.

The impact – financial gain

- CJEU did not define “financial gain”
  - A news organisation publishing a spoiler = yes
  - All business related links = possibly? *Is a link for profit if it makes that person’s business or establishment more attractive?*
  - A blog = may be (who gets the advertising revenue?)
  - A search engine ?
  - A tweet = social – no financial gain?
- Court of Appeal of Athens -Decision No 1909/2017 “Livemovies.gr case”

The Impact - knowledge

- Knowledge – a subjective test
- Primary infringement of copyright is objective under CDPA (i.e. innocence is not a defence)
- When does someone post a link with(out) knowledge?
  - Is verification required?
  - Pre-publication clearance?
  - Is there a duty to enquire?
  - A news organisation publishing a spoiler = yes
  - Other organisations … ?
- Put on notice by the rightsholder = knowledge

Stichting Brein C-610/15

- Facts – The Pirate Bay
- CJEU held that the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network must be considered to be an act of communication for the purposes of the InfoSoc Directive.
- What does this mean for search engines?

Renckhoff Case C-161/17

- Photo on school website
- CJEU: The concept of "communication to the public', within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that it covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website.

The impact

- What should rightsholders do?
- What should publishers do?
- Will Brexit change this?

Questions

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