

HYPERLINKS ON WEBSITES AS AN INFRINGEMENT OF COPYRIGHT?

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Abstract: *This paper deals with the problematics of hyperlinks placed on websites that enable unauthorized access to copyright and related rights protected subject matters. The European Court of Justice has assessed in case GS Media BV v. Sanoma Media Netherlands BV and Others publishing of such hyperlinks as infringement of copyright if special conditions are met. The Czech Constitutional Court has judged its conclusion in decision-making practice by defining four possible approaches to assessing whether there has or has not been infringed upon authors rights or related rights.*

1. Introduction

Nowadays, the Internet is an indispensable part of our everyday communications. Through the Internet we work, spend our free time, communicate with people around us, but also look for answers to our frequent daily questions and problems. All this is done through today's technologies, specifically the Internet. To be performed this role of Internet effectively, it also works, for example, on the principle of hyperlinks that link the public network and make it much easier for users to find and navigate in this environment. Thus, hyperlinks greatly speed up and streamline the work of users in the website and make their activity more effective, on the other hand they produce appreciable problems, for example in the form of infringement of copyright of third parties. This will be discussed in the following text.

2. The CJEU – Case GS Media BV v. Sanoma Media Netherlands BV¹

2.1. The dispute in the main proceedings

This case concerned a dispute between GS Media BV (hereinafter referred also as «GS Media») and Sanoma Media Netherlands BV, the Playboy publisher in the Netherlands, Playboy Enterprises International Inc. and Ms. Britt Geertruida Dekker (hereinafter referred also to as «Sanoma»). As the operator of the popular website «*GeenStijb*», GS Media was alerted by Sanoma Media company about illegal content on website mentioned above, specifically this was related to photographs of Ms. Dekker, which was taken exclusively for Playboy magazine.

Although GS Media was promptly urged to prevent the further spreading photos, all the warnings and requests by Sanoma Media were completely ignored. On the contrary, GS Media has published a few articles about the photos accompanied by hyperlinks to access the website where relevant photos could be found. However, the operator of this website complied with Sanoma's request to remove these photographs.

¹ The Judgement of The Court of Justice of the European Union from the September 8, 2016, GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc. and Britt Geertruida Dekker, Case C160/15, in: InfoCuria [online], Available from: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=174225#point3> (all websites last accessed on January 23, 2019).

The outcome of this dispute was the action brought by Sanoma. Against the decision of both previous instances, both parties cross-appealed with cassation complaint so, in order to resolve this dispute, The Supreme Court of Netherlands referred several questions for a preliminary ruling to the Court of Justice of the European Union (hereinafter also referred to as «CJEU»). The questions for preliminary ruling were as follows.

2.2. Questions referred for a preliminary ruling

- 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/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 (hereinafter referred also to as «*Directive 2001/29/EC*»)? 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? 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 first part of question 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?
- If the first question is answered in the negative: If the answer to first part of the first question 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? In answering first part of the previous question, 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?
- 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?

2.3. Legal context²

Directive 2001/29/EC in its Recital 31 states: «*A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. [...]*» Moreover and fundamentally its Article 3 (1) states: «*Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*» This fact is justified by the aim of a high level of protection, since such rights are crucial to intellectual creation, as referred in Recital 9 of Directive 2001/29/EC.

2.4. Consideration of the referred questions

The CJEU in the case *GS Media BV v. Sanoma Media Netherlands BV* has considered the whole context and it raises the question of the fact that the photographs have not yet been published in another way with the consent of the rightholder and that providing those hyperlinks makes it much easier to find those works. Another fact relevant for assessment of the CJEU was that person who has posted those links knew or ought

² 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, in: EUR-Lex [online], Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&from=EN>.

to have known both facts mentioned above. The CJEU has followed its previous case-law (Svensson³, Best-Water International⁴ etc.) relating to hyperlinks and, in the light of above, assessed the questions referred for preliminary ruling.

The CJEU admitted it may be difficult to determine whether website to which that links are expected to lead, provides access to works which are protected and whether the copyrights holders of those works have consent of rightholder for this posting on the internet. *«Moreover, the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it»*, has the CJEU concluded in the paragraph 46. The CJEU has also further in the next paragraph said: *«For the purposes of the individualised assessment of the existence of a <communication to the public> within the meaning of Article 3(1) of Directive 2001/29, it is accordingly necessary, when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, to take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder.»*

On the other hand, the CJEU has concluded in the paragraph 49 that *«[...] where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a <communication to the public> within the meaning of Article 3(1) of Directive 2001/29.»* The CJEU holds the same opinion about «communication to the public» in case the person places hyperlinks into a website to gain a profit or acquiring any own benefit, or in order to avoid other obstacles to get the concrete work. *«The same applies in the event that that link allows users of the website on which it is posted to circumvent the restrictions taken by the site where the protected work is posted in order to restrict the public's access to its own subscribers, the posting of such a link then constituting a deliberate intervention without which those users could not benefit from the works broadcast. [...]»* (paragraph 50). *«Furthermore, when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a <communication to the public> within the meaning of Article 3(1) of Directive 2001/29»* (paragraph 51).

2.5. Summary of the case

It follows from the conclusion of the CJEU mentioned above that Article 3 (1) of the Directive 2001/29/EC must be interpreted in meaning to find out whether such an action, in order to assess individual case and to answer a question whether the publication of hyperlink to a work, which is freely available on the website of a third party but has been published with the lack of consent of the rightholder, is «communication to the public». It is decisive to determine whether the placement of hyperlink was made by a person for a profit, whether this person has known or ought to presume the unlawful nature of this placement or whether the intention of the person was avoiding to other obstacles when getting to the work. However, the CJEU has also left a large unanswered space, which is likely to be completed by answering further questions referred for preliminary

³ The Judgement of The Court of Justice of the European Union from the February 13, 2014, Nils Svensson, Sten Sjörgen, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB, Case C466/12, in: InfoCuria [online], Available from: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5542238>.

⁴ The Judgement of The Court of Justice of the European Union from the October 21, 2014, BestWater International GmbH v Michael Mebes and Stefan Potsch, Case C348/13, in: InfoCuria [online], Available from: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=159023&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=5542986>.

ruling, and thus to strengthening the legal certainty of the whole issue for practice in individual jurisdictions.⁵ The question also arises in connection with the assessment of liability for copyright offenses. The CJEU admitted the fact, by its judgment in the above-mentioned case, that the exercise of copyright is connected with the subjective knowledge of the hyperlink provider of his offending act. However, liability for infringement of copyright and related rights is generally held to be an objective one, which means the subjective knowledge of the hyperlink provider of his offending act is irrelevant.⁶ Also by many others specialists across European countries, i.e. RENDAS, TITO, *How Playboy Photos Compromised EU Copyright Law: The GS Media Judgment*, *Journal of Internet Law 11online*, 2017, Available from: <https://ssrn.com/abstract=2920677>.

3. Case-law in Germany

However, in the light of the *GS Media v Sanoma* case, the national courts judged rather cautiously and the all the criteria expressed by the CJEU were applied with considerable restraint. An example may be Germany.⁷ In *Vorschaubilder III*.⁸ there was a dispute between the rightholder of copyrights of photographs that have been freely available on the website, and the defendant company, which had provided a Google search engine on its website, that searched photographs freely available on the Internet. Taking into account the fact that the photographs were on the Internet uploaded by individual users with a lack of consent of the rightholder, the Federal Court of Justice of the Germany ruled that it will not be applied the presumption of knowledge of unauthorized publication of protected works in the case of commercial activity, respectively the activity gaining an economic profit, to the search engines and their results. This sentence was reasoned by the purpose and intention of operation of Internet search engines and the principle of how the Internet environment works in general. He found that otherwise it would be a disproportionate burden for the operator of the website what would be strictly against the substance of the Internet. The case of the «communication to the public» appears for example, if this operator would have been warned of his unlawfully action which means he would have a verifiable knowledge of the illegality of his action.⁹

4. The Constitutional Court of Czech Republic – I. ÚS 578/15¹⁰

The case law of the CJEU has also been followed by the Czech Constitutional Court in the above-mentioned case where the complainant, through embedded hyperlinks, has referred to the content that has been unlawfully published, specifically an audiovisual work placed on the website with a lack of consent of its rightholder.

⁵ In a similar sense, HANUS also expresses an instability of current case-law practice, in: HANUZ, BIANCA, *Linking to unauthorized content after the CJEU GS Media decision*, *Journal of Intellectual Property Law & Practice* [online], 2016, Vol. 11, no. 12, p. 879–881, DOI 10.1093/jiplp/jpw166, Available from: <https://academic.oup.com/jiplp/article/11/12/879/2612912>.

⁶ SENFTLEBEN, M. R. F., *Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony? Auteurs-, media- & informatierecht* [online], 2016, Vol. 2016, no. 5, p. 130–133, Available from: <https://research.vu.nl/en/publications/copyright-reform-gs-media-and-innovation-climate-in-the-eu-euphon>. This issue is also reflected by MYŠKA in: MYŠKA, MATĚJ, *Práva k datům a software*, in: Polčák, Radim a kol, *Právo informačních technologií*, Wolters Kluwer, Praha, 2018, 656 s, Právní monografie, ISBN 978-80-7598-045-8, S. 113–213.

⁷ «Unauthorized linking to a third-party website where a photograph is available without the copyright owner's consent can be an infringing act of communication to the public, and the act of linking can be considered to be «carried out for profit» when the website on which the link is posted is operated for the purpose of financial gain.» Further examples of German case-law e.g. in: BRÜSS, MIRKO, *Hamburg court applies GS Media for the first time in Germany*, *Journal of Intellectual Property Law & Practice* [online], 2017, Vol. 12, no. 3, p. 164–166. DOI 10.1093/jiplp/jpx009, Available from: <https://academic.oup.com/jiplp/article/12/3/164/2996548>.

⁸ *The Judgement of The Federal Court of Justice of the Germany from the September 21, 2017, Case I ZR 11/16*, in: *Der Bundesgerichtshof* [online], Available from: <https://dejure.org/ext/d949e6c1446ad2c923988651a0ee9e99>.

⁹ MYŠKA, MATĚJ, *Práva k datům a software*, in: Polčák, Radim a kol, *Právo informačních technologií*, Wolters Kluwer, Praha, 2018, 656 s, Právní monografie, ISBN 978-80-7598-045-8, S. 113–213.

¹⁰ *The Resolution of The Czech Constitutional Court from the October 25, 2017, Case I. ÚS 578/15*, in: *Nalus* [online]. Available from: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=99512&pos=1&cnt=2&typ=result>.

Following the conclusions of the CJEU GS Media judgment, the Czech Constitutional Court defined four following possible situations.

In the first case, hyperlink refers to works lawfully published on the web page, which means it is not communication to the public within the meaning of the Directive 2001/29/EC. In the second situation, hyperlink refers to protected works unlawfully published on the concrete website but these works are legitimately published for the same scope of the public on another website; even in this case, it is not about the communication to the public. In the third case, hyperlink refers to unlawfully published protected works what are not even legally published anywhere else on the Internet but hyperlink is made not for the purpose to gain a profit by a person who didn't know about his unlawful conduct or couldn't reasonably presume the unlawful nature of the publication of those works. This is also not about communication to the public. However, if the hyperlink refers to a protected work, which has not been legally published, by a person who knows or could reasonably presume the unlawful nature of the publication of those works, with a lack of consent of the rightholder, this is the case the unlawful communication to the public within the meaning of the Directive 2001/29/EC. If such a hyperlink was placed on the concrete website to generate the profit, knowledge of the unlawful nature of this publication of the work is presumed.

In the above-mentioned criminal-law case, the complainant committed a criminal offense of copyright infringement in accordance with the provisions of Sec. 270 par. 1 of Act No. 40/2009 Coll., The Criminal Code, as amended (hereinafter referred to as the «*Criminal Code*») because he published by number of embedded hyperlinks with a lack of rightholder's consent series, specifically audiovisual works. For this illegal activity, he also gained the financial benefit of running an advertisement on this concrete website in the total amount of CZK 5.571¹¹. He was sentenced to four months» imprisonment, which was postponed for a 20-month probationary period.

In spite of the fact that the CJEU judgment concerns civil matters, I find it interesting that the Czech Constitutional Court has assessed CJEU case as adherent to a criminal case. Although I do not find any mistakes in its procedures, I think that this assessment of the situation, taking into account the criminal law as the «*ultima ratio*» and taking into account the marginal amount of the complainant's gained financial profit, this result is relatively a strict one. This opinion is, in my point of view, even more fostered by the fact that some unnamed Czech political parties express themselves in relation to problematic of hyperlinks in the way they do not find this matter illegal at all.¹² In the Czech Internet environment, therefore, the fact of referring hyperlinks to unlawfully published works with a lack of the rightholder's consent is a common phenomenon, unfortunately. Of course there are those Internet users, who are not aware of the illegality of their actions at all, I mean the action of posting hyperlinks referring to unlawfully published works. Therefore, also in this respect, it is a relatively groundbreaking decision in the above case.

5. Conclusion

The issue of hyperlinks is one of the most recent controversial issues, whose negative impacts have realized until recently very few people. However, due to appearing ever more current disputes on this problematic topic, it would be requisite to find a suitable solution for the hyperlinks and liability relations regarding to this issue as soon as possible. In substantial dimension, the legal certainty of both parties – rightholders and users of the Internet environment – would be strengthened.

¹¹ Approx. €217. Calculated according to Central bank exchange rate fixing valid for January 4, 2019, CZECH NATIONAL BANK © 2003–2019 [online], Available from: https://www.cnb.cz/en/financial_markets/foreign_exchange_market/exchange_rate_fixing/daily.jsp.

¹² Odkaz není zločin! Pirátská strana [online], in: Piráti © 2019, January 6, 2019, Available from: https://wiki.pirati.cz/projekty/odkaz_neni_zlocin.

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