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**THE JUDGMENT OF THE COURT OF JUSTICE  
OF THE EUROPEAN UNION (SECOND CHAMBER)  
OF 8 SEPTEMBER 2016 IN CASE C 160/15  
IN THE PROCEEDINGS OF GS MEDIA V. SANOMA  
MEDIA NETHERLANDS BV, PLAYBOY ENTERPRISES  
INTERNATIONAL INC., BRITT GEERTRUID DEKKER**

Keywords

*linking - sharing - GS Media - copyrights - intellectual property on Internet*

**PRELIMINARY REMARKS**

The commented judgment<sup>1</sup> is, for this moment, the most important judgment of the Court of Justice of the European Union (CJEU) relating to the legal aspects of linking. It's the first time the CJEU has put clear limits on the admissibility of placing hyperlinks on the Internet. However, it is not the first time in this matter. The first was the CJEU judgment in

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<sup>1</sup> *GS Media BV v. Sanoma Media Netherlands Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruid Dekker*, Case C 160/15, Judgment of 8.9.2016, E.C.R. 2016, ECLI:EU:C:2016:644.

the Svensson case<sup>2</sup>, in which the freedom of linking was not restricted. A discussion of the essence and practical significance of this decision has already been made in the doctrine of the matter. Chronologically the next ruling was the issue of GS Media. As shown by the passage of time, it was not the last judgment relating to this matter. Two consecutive CJEU rulings have been issued on the liability for posting hyperlinks. In the CJEU judgment on the FilmSpeler case<sup>3</sup> and in the CJEU judgment on The Pirate Bay case<sup>4</sup>, the adjudicating judge merely subscribed to the facts of the case under the principles and factors elaborated in the GS Media judgment. For this reason, it can be said that this last judgment is gaining authority and is therefore commented on in this publication. Nevertheless, many issues still require clarification and explanation, so further judgments by the Court of Justice of the European Union on the legality of linking should be expected. In particular, we should expect the CJEU rulings, that will bring some innovatory standard, as did the CJUE judgment on the GS Media.

The problem lies in the proper interpretation of the exact meaning of the term „communication to the public” used in Article 3 paragraph 1 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society<sup>5</sup> (hereinafter: directive 2001/29). Most important is the answer to the question of whether placing a hyperlink linking to a protected work freely available on another

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<sup>2</sup> *Nils Svensson and Others v. Retriever Sverige AB.*, Case C 466/12, Judgment of 12.2.2014, E.C.R. 2013, ECLI:EU:C:2014:76.

<sup>3</sup> *Stichting Brein v. Jack Frederik Wullems*, Case C 466/12, Judgment of 26.5.2017, E.C.R. 2017, ECLI:EU:C:2017:300.

<sup>4</sup> *Stichting Brein v. Ziggo BV, XS4ALL Internet BV*, Case C 466/12, Judgment of 14.6.2017, E.C.R. 2017, ECLI:EU:C:2017:456.

<sup>5</sup> Official Journal UE L 167, 22/06/2001 P. 0010 – 0019; cf. generally: J. Hörnle, *Internet service provider liability – let’s (not) play piggy in the middle*, “Communications Law”, Issue 3, 2002; G. Smith, *Internet Law and Regulation*, Thomas Sweet & Maxwell, London 2007; K. Freeling, J. Levi, *Frame Liability Clouds the Internet’s Future*, “The New York Law Journal 1997”; E. Madoff, *Freedom to Link Under Attack*, “The New York Law Journal 1997”; J. Barta, R. Markiewicz, A. Matlak, *Prawo mediów [Media law]*, LexisNexis, Warszawa 2005; P. Stevens, *A hyperlink can be both a permissible and an infringing act at the same time*, “Journal of Intellectual Property Law & Practice”, Issue 8, 2014; C. Reed, *Internet Law, Text and Materials*, Cambridge University Press, Cambridge 2004.

website without the copyright holder's permission is "communication to the public" within the meaning of the provision. The answer to the question will allow us to reconstruct the legal model of admissibility or inadmissibility of linking on the Internet. In this context, the CJEU's judgment on *GS Media* and the principles and factors elaborated in it are of particular relevance, as they are consistently applied in the latest CJEU judgments in the subject matter.

## II. FACTS

On the one hand, in October 2011, commissioned by the Dutch publisher of *Playboy* magazine, photographer Hermes took photos of Mrs Britt Geertruid Dekker (hereinafter: disputed photos), which were to appear in the December edition of this monthly magazine. Photographer Hermes gave Sanoma rights to his copyright, including granting him the exclusive authority to publish these photographs. On the other hand, the Dutch company *GS Media* runs the *GeenStijl* website, which deals with „news, scandalous revelations and investigative journalism with lighthearted items and wacky nonsense”<sup>6</sup>. This is one of the most popular websites about this topic in the whole of the Netherlands.

At the end of October 2011, the *GeenStijl* website received an anonymous user message containing a hyperlink to the Australian website *filefactory.com*, where an internet file containing the disputed photo was posted. The day after that, the Dutch editorial board decided to publish an article titled “...! Nude photos of ... [Ms] Dekker”, on the margin, which was part of one of the disputed photographs and ended up with the sentence „And now the link with the pics you've been waiting for”<sup>7</sup>. Under this view, a hyperlink was sent to the above-mentioned page, where Mrs. Dekker's photos were located. They could be downloaded after clicking on the appropriate hyperlink. Sanoma reacted the same day, urging *GS Media* to cease dissemination and the entity managing the website *filefactory.com* to remove the disputed photos. The first of these entities ignored the call, while the second followed it

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<sup>6</sup> <http://www.geenstijl.nl> [last accessed: 10.6.2017].

<sup>7</sup> See: *supra* note 1, point 10.

and removed the file. At the beginning of November Sanoma's legal adviser once again sent a letter to GS Media asking them to remove the published article and the comments of Internet users that were under it. On the same day GeenStijl website editors decided to publish a second article on the dispute which arose between them and Sanoma, which ended with the sentence „ Update: Not yet seen the nude pics of [Ms. Dekker]? They are HERE.”<sup>8</sup>. This article has added a hyperlink to the [imgeshack.us](http://imgeshack.us) website. The entity managing the latter website, like [filefactory.com](http://filefactory.com), complied with Sanoma's call and deleted the disputed photos. Accordingly, GeenStijl published the third and final article titled „Bye-bye, adieu Playboy”<sup>9</sup>, which again contained a hyperlink reference to the disputed photos, under which Internet users put in the form of comments following a hyperlink reference to the various websites with disputed photos. According to Sanoma's plans, the photos were published in December in Playboy magazine.

Finally, on the one hand Sanoma, Playboy, and Ms Britt Geertruid Dekker, and GS Media on the other hand, have fallen into a court case brought before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). Judicial argument has focused on the interpretation of the concept of “communication to the public” used in Article 3 (1) of Directive 2001/29 (hereinafter: Directive). This court, having doubts as to the substance of the case, decided to stay proceedings and under Article 267 of the Treaty on the Functioning of the European Union<sup>10</sup> ask 3 questions<sup>11</sup> for a preliminary ruling from the Court of Justice of the European Union.

### III. OPINION OF THE ADVOCATE GENERAL<sup>12</sup>

The Advocate General has stated that, in his opinion, in the event of linking to content already made public, whether legally or not, the rights

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<sup>8</sup> See: *supra* note 1, point 14.

<sup>9</sup> See: *supra* note 1, point 15.

<sup>10</sup> Official Journal C 326, 26/10/2012 P. 0001-0390.

<sup>11</sup> See: *supra* note 1, point 24.

<sup>12</sup> Opinion of Advocate General Melchior Wathelet delivered on 7 April 2016 in Case C 160/15.

resulting from copyright are not infringed. Interestingly, the Advocate General noted that the present case gives the Court an opportunity to determine whether the authorization by the copyright holder of the making available of the protected work on the other website (“initial” communication) is essential to a finding that there was no communication to the public within the meaning of Article 3(1) of Directive 2001/29. He stressed that the criterion for deciding whether an intervention must be indispensable can be approached only in examining the existence of an act of communication, because it is at that point where “making available” within the meaning of Article 3(1) of Directive 2001/29 is possible. In his opinion, hyperlinks posted on a website which direct to works protected by copyright that are freely accessible on another website cannot be classified as an “act of communication” within the meaning of Article 3(1) of Directive 2001/29 since the intervention of the operator of the website which posts the hyperlink, in this case GS Media, is not indispensable to the making available of the photographs in question to users, including those who visit the *GeenStijl* website<sup>13</sup>. Melchior Wathelet has come to the conclusion, that the condition “communication to the public” from Directive 2001/29 was not fulfilled in this case and in fact that another understanding of this problem could lead to a serious disruption of the proper functioning of the Internet, because the posting of hyperlinks to users is both systematic and necessary for the current internet architecture. He believes that “such interference in the functioning of the internet must be avoided”<sup>14</sup>.

According to Melchior Wathelet, the concept of “communication to the public” in Article 3 (1) of the Directive is to be interpreted as meaning that:

- 1) Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the posting on a website of a hyperlink to another website on which works protected by copyright are freely accessible to the public without the

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<sup>13</sup> Ibid. on point 59-60.

<sup>14</sup> Ibid. on point 79.

- authorization of the copyright holder does not constitute an act of communication to the public, as referred to in that provision.
- 2) Article 3(1) of Directive 2001/29 must be interpreted as meaning that it is not important whether the person who posts on a website a hyperlink to another website on which works protected by copyright are freely accessible to the public is or ought to be aware that the copyright holder has not authorized the placement of the works in question on that other website or that, in addition, those works had not previously been made available to the public with the copyright holder's consent.
  - 3) Article 3(1) of Directive 2001/29 must be interpreted as meaning that a hyperlink to another website on which works protected by copyright are freely accessible to the public, which facilitates or simplifies users' access to the works in question, does not constitute a 'communication to the public' within the meaning of that provision<sup>15</sup>.

#### IV. THE POSITION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJUE decided that all questions put by the Dutch court should be considered together and understood in such a way as to establish „in essence, 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.”<sup>16</sup>.

The substance of the ruling in *GS Media* is to point out how the notion of “communication to the public” used in the Directive should be understood. The composition of the CJUE proposes to look at it through the prism of the principles and factors indicated in the judgment. This refers to the principle of two conditions and the principle of individual assessment. The first one consists in the fact that the term “communication

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<sup>15</sup> Ibid. on point 88.

<sup>16</sup> See: *supra* note 1, point 25.

to the public” combines two premises that require simultaneous fulfilment: this is the “act of communication” of the work and sharing it with the “public”. While the second one requires a personalized assessment, which can be made after taking into account many complementary factors, the first factor identified by the Court is the essential role of the user and the intended nature of his action. He performs the act of communication when he is fully aware that if it were not for his operation other Internet users would not, in principle, have access to the protected work. The second factor is the very concept of “public”, which assumes unlimited and, at the same time, quite a large number of potential audience. However, it should be borne in mind that the use of the term “publicly available” requires that a protected work be made available through a different technology than that which was previously used. In case of technology identities, we are forced to refer to the concept of “new public”, so as to make a protected work more accessible to a wider audience than it was before. The third factor is the consent of the copyright holder. As the Court pointed out in its earlier rulings<sup>17</sup>, if there’s consent, which has an unrestricted nature then it is to be accepted that such consent includes all Internet users as such. On the other hand, when it is limited in scope, we must appeal to the already mentioned “new public”. Citing the judgment: „Accordingly, it cannot be inferred either from the judgment of 13 February 2014, *Svensson and Others*, (C466/12, EU:C:2014:76) or from the order of 21 October 2014, *BestWater International*, (C348/13, not published, EU:C:2014:2315) that posting, on a website, hyperlinks to protected works which have been made freely available on another website, but without the consent of the copyright holders of those works, would be excluded, as a matter of principle, from the concept of ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29. Rather, those decisions confirm the importance of such consent under that provision, as the latter specifically provides that every act of communication of a work to the public is to be authorized by the copyright holder.”<sup>18</sup>. The fourth and last factor indicated by the CJUE is the profit nature of the communication to the public. It is therefore important if the user publishes protected work

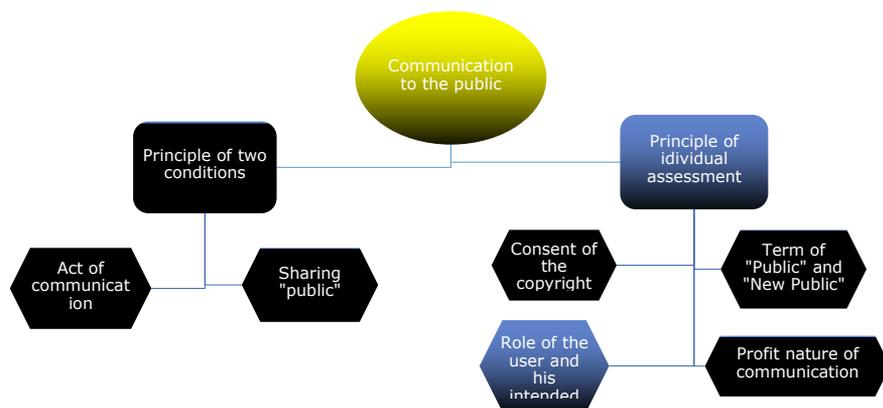
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<sup>17</sup> See: supra note 2, points 24-28; Order of 21 October 2014, *BestWater International*, C-348/13, EU:C:2014:2315, points: 15, 16, 18.

<sup>18</sup> See: supra note 1, point 43.

to increase their assets (professional) or, on the contrary, does it without a profit (nonprofessional). This is a key distinction, because in the first case there is a presumption that the user knows or could reasonably have known that the protected work was published without the permission of the copyright holder. Inversely, in the second case, there is a presumption of an opposing content. In relation to both, there is the possibility of proving the contrary.

Table 1. Scheme of the position of the Court of Justice of the European Union in Case C-160/15.



Source: own elaboration.

In the light of the above, the ECJ concludes that: „Article 3(1) of Directive 2001/29 must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of that provision, it is to be determined 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, as a situation in which that knowledge must be presumed.”<sup>19</sup>.

<sup>19</sup> See: supra note 1, point 55.

## V. CONCLUDING REMARKS

In my opinion, the greatest consequence of the CJUE judgment on the GS Media is the fact that this ruling will have to be implemented into national legal systems as Member States are required to interpret their national law in accordance with the content of the directive defined by the case law of the CJEU<sup>20</sup>. I also think that the commented judgment is a restrictive voice of CJUE, but not the last one and therefore we can expect more restrictions. It is about changing the way of arguing (Principles and factors already described), not about changing in the inference's results, as it was the case with FilmSpeler and The Pirate Bay. These rulings are of great academic value, but not in the way of argumentation, which was the same as in GS Media. Implementation of this last judgment into national law may involve the following problems.

### 1. Problem of copyright holder's consent

It is impossible to determine, even with due diligence, that all protected works which a professional entity has made available have been placed on the Internet with the consent of the copyright holder<sup>21</sup>. The consequence of this uncertainty is action of presumption, according to which this person knows or could reasonably have known the illegal nature of the publication of protected works.

### 2. Problem of subjective assessment

A subjective factor can be very difficult to interpret by the national judiciary, because this is a study of the attitude of the perpetrator. It seems to be a reasonable question, how to interpret this subjective factor in the light of objective copyright infringement in accordance with its general principles<sup>22</sup>.

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<sup>20</sup> Barta, Markiewicz, *supra* note 5 at p. 528-531.

<sup>21</sup> P. Polański, *Odpowiedzialność za hiperlinki: pierwsze refleksje [Responsibility for hyperlinks: first reflections]*, [in:] K. Flaga-Gieruszyńska, J. Gołaczyński, D. Szostek (eds.), *E-obywatel E-sprawiedliwość E-usługi [E-citizen E-justice E-service]*, C.H. Beck, Warszawa 2017, p. 387.

<sup>22</sup> Judgment of the Supreme Court in Poland of 21.3.2014, Act IV CSK 407/13, OSNC 2015/3/36.

### 3. Problem of profit factor

In my opinion, profit factor is somewhat pointless. This is because, as a rule, the copyright holder is not interested in whether his rights were violated for profit or not. If the CJUE actually wants to effectively protect the copyright holder's rights, it should apply another, more useful, factor, for example, liability based on the rules of the directive 2000/31/EC<sup>23</sup>.

### 4. Problem of aiding

The system of responsibility proposed by CJEU makes it impossible for EU law to classify the disturber's behaviour as aiding. As we know from the Svensson judgment<sup>24</sup>, Directive 2001/29 is exhaustive. This means that aiding is an "excessive" extension of protection from this directive. In the further consequence, there is a serious problem with the implementation of the judgment in the countries that provide aiding<sup>25</sup>.

### 5. Problem of potential inconsistencies among Member States

Considering all these problems, we are seeing another. Courts in different Member States may apply the principles and factors proposed by the CJU in various ways. This may lead, instead of harmonization, to the deharmonization of the rules of the information society.

### 6. Problem of ancillary copyright

Ideas are beginning to appear on related rights for press publishers (known as: ancillary copyright), commonly referred to as tax of linking. Tax of linking is in fact not a tax. It is about the law constructed in order to allow publishers to charge a fee even for short texts used by search engines or news aggregators. This fee would hit the biggest companies (e.g. Google). The problem is that this solution did not work in some of the countries that introduced it, for example Germany<sup>26</sup>, leading only to reducing the visibility of the content posted on the Internet.

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<sup>23</sup> Official Journal L 178, 17/07/2000 P. 0001–0016.

<sup>24</sup> See: *supra* note 2, point 41.

<sup>25</sup> R. Markiewicz, *Zdezorientowany prawnik o publicznym udostępnianiu utworów* [A confused lawyer about publicly distributing tracks], "Zeszyty Naukowe Uniwersytetu Jagiellońskiego", Issue 4, 2016, p. 15–16.

<sup>26</sup> [http://www.bundestag.de/dokumente/textarchiv/2013/43161664\\_kw09\\_ange](http://www.bundestag.de/dokumente/textarchiv/2013/43161664_kw09_ange)

In the light of the above, in my opinion, the judgment of the Court of Justice of the European Union on the GS Media case should be evaluated negatively. It raises many doubts, especially with regard to the mentioned subjective factor. For these reasons, it is expected that further CJUE rulings will reinterpret the principles and factors of understanding the term of “communication to the public”.

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nommen\_abgelehnt/211120 (last access: 30.10.2017); <https://germany.googleblog.com> (last access: 30.10.2017).

