Communication to the public: recent developments in EU copyright law and digital media services

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Digital copyright law – recent CJEU decisions

- Hyperlinking to freely available online information, for profit or when you know or ought to know it has been unlawfully uploaded, is a communication to the public
- Selling fully-loaded Kodi boxes is a communication to the public of the content that users later view on it
- Torrent indexing sites directly infringe copyright
- Offering a cloud personal video recorder service infringes the communication to the public right
- Deliberate for-profit facilitation of access to copyrighted works is unlawful
Agenda

- CJEU’s basic approach to copyright
- Recent CJEU decisions on communication to the public and digital media services
  - Linking to unlawful content: GS Media
  - Sale of preloaded Kodi boxes: Filmspeler
  - Torrent indexing service: Pirate Bay
- Role & functioning of CJEU in copyright law
- Legislative initiatives & conclusions

The CJEU’s basic approach to copyright
The CJEU’s basic approach to copyright

- EU © Directive (2001/29/EC) prescribes a high level of protection to authors and rightholders, but also a balance between rights of authors and users
- © is a fundamental right, but just one of many; others include freedom of information, privacy, right to an effective remedy, right to conduct a business
- All fundamental rights deserve equal respect. Where they collide, legislators and courts must achieve a “fair balance”
- “Fair balance” in © can be achieved at 3 stages: scope of exclusive rights, scope of exceptions & limitations, and scope of enforcement powers

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Recent CJEU decisions on communication to the public and digital media services
1. GS Media/Sanoma (Playboy)

GS Media/Sanoma (Playboy)

Gelieve foto's Britt Dekker

Geen Stijl

Tendeaties, Ongelopen
& Modellesnuestraad

HEADLINES

31-30
Weelshaim fraude gaat weer
door!!!
Joost, Yvon Jasper, op eens
acht buur

GS

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GS Media/Sanoma (Playboy)

Fijn uitgelekt! Naaktfotoos Britt Dekker

Ach nee. Hoe KAN dat nou goedverdoemaal tekens waar? Het is
toch niet te geloven! Ne André de Kocke zijn de kroonjuwelen
van het bloedbad weederom op straat komen te liggen. Het is één
grote lektion door bij de Playboy. Ook de blootgestelde van Britt
Dekker zijn nu uitgelekt. Amper drie weken na de nagaanshoot op
een apothedehuis Cannaam Blend (Dope) liggen de fapfotoos
van het Paradijs van Puma deeltuit open en bloot op straat. Je zou toch denken
dat ze daar bij de Sanoma enige maatregelen getroffen hebben na de vorige
iek. Personeel op straat flirteren, tegangaapjes doornemen knippen, logins
voor het CMS on NSK maken, het fotomateriaal 24/7 laten beveiligen door een
homofiele Men's Health-klzer (is dat dubbelop? - ff uizeug). Maar nie. Niets
van dat alles. Het lijkt wel of ze het erom doen? Mensen. Dit is toch geen
Toevallig meer? Emmerweetjes. Venen er een totale onbetrekkelijke
hoofdschuddende Fb-hoofdredacteur Jan Herzmirker - de er ook niks van
zegt - in RTL Boulevard en Shownieuws. En dan nu het linkje met pics waar u
op zat te wachten. Wie het eerste fap, die het eerst komt. HEEIER! De
bloedendige menssaw! Dekker complimenteren met het leugt aangebarte
voortを集je kan door. Pretté smitt.

Update. Voor u dan.

Pretté Stoffel 27-10-11 | 07:59 | 149 | 133 reacts.
GS Media – CJEU reasoning

- Concept of CCTP includes two cumulative criteria:
  - ‘act of communication’ of a work
  - the communication of that work to a ‘public’
- Court must take into account several complementary, non-autonomous, interdependent criteria, to be applied individually and interactively
- Hyperlink to work = ‘communication’ of that work
- CTTP requires communication using specific (other) technical means or, failing that, a new public that was not taken into account by rightholders when they authorized previous CTTP

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GS Media – CJEU reasoning

- Linking to content uploaded with permission of © owner is not a communication to the public, because it doesn’t reach a new public (Svensson and BestWater)
- Those decisions say nothing about linking to unauthorized sources, but rather confirm the importance of consent
- Internet is very important for freedom of expression, hyperlinks are important for working of the internet, and ascertaining legality of online content is difficult
- So “fair balance” requires tailored solution

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GS Media – CJEU decision

- Knowledge of source’s illegality is decisive distinction:
  - If hyperlinker knew or ought to have known they were linking to illegal content, the hyperlink is a CTTP
  - If no knowledge, then no ‘intervention with full knowledge of consequences of conduct’ and no CTTP

- Knowledge can be presumed when user posts hyperlink profit, because he can be expected to carry out the ‘necessary checks’. If presumption cannot be rebutted, posting the hyperlink is a CCTP

- Knowledge can be created by rightholder ‘informing’ user of illegality of source (but exception may apply)

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2. Brein/Wullems (Filmspeler)

Watch everything!
You decide what you want to watch!

Unlimited access to the best films, series and sports without a subscription.
That’s what you want too, right?

That’s now possible with the Mediaplayer X9!

Mediaplayer X9 is easily connect to your TV within a few seconds.
After the setup you can immediately enjoy using your own home cinema! Watch films, series, sports and much more! A one-time purchase, lifetime benefits.
Filmspeler – domestic proceedings

- Kodi box is a dual-use device -> US lawyer might expect analysis on secondary liability (*Sony, Grokster*)
- Brein could probably have obtained injunction based on secondary liability, but (also) claimed primary infringement with specific aim of getting a quick CJEU reference, based on useful facts, on two questions:
  - Can the mere sale of viewer hardware, albeit hardware customized & marketed for viewing unauthorized streaming services, constitute a CTTP?
  - Can the mere viewing of an unauthorized stream constitute an unauthorized reproduction, notwithstanding exception for transient copying?

Filmspeler – CJEU decision

- No ‘mere provision of physical facilities’: Wullems deliberately preinstalls links to streaming sites & markets box as ‘free’ way to view premium content
- Deliberate intervention giving buyers direct access to content from illegal streaming websites that would otherwise be difficult to find
- Communication to a public of buyers, which is a new public because rightholders never authorized anything
- But which works is Wullems supposed to have communicated to the public?

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3. Brein/Ziggo (Pirate Bay)

Pirate Bay: domestic proceedings

- Brein sought and obtained injunction against Dutch access providers obliging them to block access to TPB
- Injunction overturned on appeal for not being effective: study showed that total P2P traffic did not decrease after implementation of block, block only targeted TPB. Moreover, no infringement by TPB itself
- Supreme Court: appellate court set too high a bar for effectiveness (per UPCTelekabel, dissuasiveness suffices), but valid question whether 8(3) © Directive applies since not clear whether TPB itself infringes
CJEU decision: an ‘act of communication’

- It follows from GS Media and Filmspeler that, as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works, is liable to constitute an ‘act of communication’: no transmission or display is needed
- Operators of TPB play a deliberate, essential role in providing users with access to protected content
- No ‘mere provision of physical facilities’: TPB provides various search & optimization features to help users
  - TPB’s conduct constitutes a ‘communication’

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CJEU decision: communication ‘to the public’

- Many of the ISP’s customers have accessed TPB, which is used by many people. Indeed TPB claims on its forum to have dozens of millions of peers
  - Protected works are communicated to a ‘public’
- TPB knew its platform was providing access to works published without authorization & encouraged users to copy protected works
  - There is a ‘new public’
  - TPB’s conduct is a ‘communication to the public’

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Role & functioning of CJEU and CJEU proceedings

What the CJEU does

- The CJEU interprets EU law in accordance with treaties & EU Charter, at specific request of national courts (*)
- Lower national courts may refer questions to CJEU, and highest courts must refer to CJEU, if a non-obvious issue of EU law rises in domestic proceedings
- National court decides whether to refer questions, which questions to refer and which facts to include
- CJEU decision is binding on referring court & all other courts. National proceedings then continue where they left off (if there is anything left to argue over)
CJEU preliminary reference proceedings

- National court sends referring decision to CJEU (without national case file)
- Non-contentious procedure designed for high-level debate on abstract legal principles: priority to EC and member states, little room for parties or facts
- Parties, member states & EU institutions may submit written observations, max. 20 pp. (2cm/12pt/1.5ls)
- Parties, member states & EU institutions may speak for max. 15/20 minutes each
- Parties must speak in language of proceedings, MSS in their own language, EC & judges generally in French

CJEU procedure: facts and law

- Time & language rules make for limited & error-prone communication, especially on facts & technology
- Case should be about abstract point of law (Should Directive X be interpreted as meaning Y?), application of answer to facts is prerogative of national court
- In practice, CJEU gives answer that feels appropriate to facts of underlying case & will ensure desired outcome
- EU MSS & institutions debate, and CJEU decides, what appropriate outcome of underlying case is, but have no access to detailed information about the facts
Takeaways

- CJEU is engaged in significant increase in scope and enforcement of ©
- Interested parties are actively encouraging this trend, filing domestic proceedings with the specific aim of triggering a CJEU reference on advantageous facts
- Concept of ‘communication to the public’ is very broad & requires no actual communication.
- Definition is complex and deliberately *ad hoc*: almost every new fact pattern requires a new CJEU reference
EU legislative initiatives

- Digital Single Market © Directive will probably:
  - give news publishers exclusive right of reproduction and communication to the public of press publications, separate from the copyright in constituent works
  - push ‘content sharing service providers’ to implement preventative copyright filtering in order to avoid liability for their users’ infringing uploads
- Modified Audiovisual media services directive orders “video-sharing platform providers” to take measures to protect users from harmful & hateful content
- Terrorism regulation may require takedown of notified content within 24 hours (fine = 4% global turnover)

What’s next?

- Primary liability + copyright filters for content platforms?
- Primary liability for links in social media posts?
- Primary liability for publication of how-to instructions?
- Primary liability for search results?
- Primary liability for access providers?
- Blocking injunctions for providers of video services & player hardware, VPN & proxy services?