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EU update



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ABSTRACT

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This is the latest edition of the DLA Piper column on developments in EU law relating to IP, IT and telecommunications. This news article summarises recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside web sites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

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1. Trademarks and copyright

1.1. Playboy vs. Geenstijl

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On 3 April 2015, the Dutch Supreme Court has referred preliminary questions to the CJEU regarding the legality of hyperlinking to content that was placed on the Internet without the copyright holders consent.

In October 2011, the Dutch website geenstijl.nl published an article with a link to pictures from a Playboy photo-shoot of the Dutch reality TV-personality Britt Dekker based on an anonymous tip. GeenStijl also placed part of one of the pictures on its website. The pictures were, prior to publication in Playboy Nederland, placed on the Australian file sharing and storage website filefactory.com without the copyright holders consent.

Sanoma, the publisher of Playboy Nederland, filed a lawsuit against GeenStijl arguing that linking to unauthorized content constitutes a copyright infringement. The Amsterdam District Court ruled that placing the hyperlink

constituted copyright infringement, because the pictures were made accessible to a “new public”. In appeal the Amsterdam Court of Appeal partially reversed this ruling and found that the linking itself did not infringe upon the right holders copyright because the pictures were already made publicly available on filefactory.com. The linking did however constitute a tort according to the Court of Appeal, since GeenStijl facilitated access to the pictures by publishing the hyperlink.

The Supreme Court decided to stay the proceedings and to ask the CJEU for a preliminary ruling on the question whether linking to unauthorized content made available on a third party website constitutes a “communication to the public” within the meaning of Article 3(1) of the Information Society Directive (“InfoSoc Directive”).

The legality of hyperlinking to copyrighted content is a highly debated subject. In previous decisions of the CJEU the concept of a “new public” has become the key factor in assessing the question whether linking constitutes a “communication to the public” and therefore a copyright infringement.

In the Svensson-case the CJEU found that the provision of clickable links to copyright protected works must be

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considered to be an act of communication (C-466/12). A new communication to the public however requires that the protected content is communicated by either different technical means than the initial communication, or is directed at a new public - a public that was not taken into account by the copyright holder when he authorized the initial communication.

The CJEU has also recently issued a decision in the *BestWater*-case, which concerned the embedded linking to a YouTube-video that was allegedly uploaded without the copyright holders consent (C-348/13). In this case the CJEU decided that embedded linking does not constitute a communication to the public. It however did not deal with the fact that it allegedly involved content that was uploaded without authorization of the copyright holder.

The *C-More Entertainment* decision is the most recent CJEU ruling on hyperlinks and involved a case where unauthorized hyperlinks were provided to protected content behind a paywall (C-279/13). However, after the *Svensson*-decision four out of five preliminary questions in this case were retracted. Therefore the Court only decided on the issue of the level of protection of the right of communication to the public in the *InfoSoc* Directive and in national laws in case of live online broadcasts.

According to the Dutch Supreme Court the rulings in the aforementioned three cases provide insufficient guidance to rule in the case at hand and referred the following questions to the CJEU (summarized):

1. Does a link to a publicly accessible third party website on which a work is made available without the consent of the copyright holder constitute a “communication to the public” and does it make a difference in this regard whether the work is also not communicated to the public in any other way with the copyright holders consent?

Should it be taken into account to what extent the “hyperlinker” has knowledge of or should have knowledge of the absence of the copyright holders consent?

2. If 1 is answered in the negative: does it constitutes a “communication to the public” if the third party website which is linked to is not freely accessible for the average internet user, but only after having put effort into tracing it?

To be continued.

1.2. *Copydan Båndkopi v Nokia Danmark S/A: the “private copying exception” in the eyes of the CJEU.*

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On 5 March 2015, the Court of Justice of the European Union (“CJEU”) issued its decision on the case *Copydan Båndkopi v. Nokia Danmark A/S*, following a request for a preliminary ruling from the High Court of Eastern Denmark (“Østre Landsret”) on the interpretation of Articles 5.2, lett. b) and 6 of

the EU Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (“Directive”).

As a background, please note that according to Article 2 of the Directive, authors, performers and producers enjoy an exclusive right of reproduction in relation to certain types of creative work. However, Article 5.2 of the Directive allows Member States to limit such right of reproduction in particular situations and, among the others, when reproductions on any medium are made by a natural person for private use and for ends that are non-commercial, on condition that the right holders receive fair compensation that takes account of the application or non-application of technological measures referred to in Article 6 of the Directive to the work concerned (Article 5.2, lett. b)).

Going back to our case, in 2012 *Copydan Båndkopi*, a collecting society which collects, manages and distributes private copying levies in Denmark, brought a lawsuit against *Nokia Danmark S/A*, manufacturer and provider of mobile phones, claiming that the company had to pay private copying levies on certain models of mobile phones which were including detachable memory cards (additional to the internal memory) able to store data, such as contact details and photographs, but also files containing copies of protected works (e.g. music, films which may have been downloaded from the web or from DVDs, CDs, MP3 players, etc.). *Nokia* appealed on multiple grounds and, as a result, Østre Landsret addressed to the CJEU a number of questions surrounding the “private copying exception” set out in Article 5.2 lett. b) of the Directive and other issues relating to the level of the private copying levy.

As a result, the main points addressed by the CJEU are as follows:

Article 5.2 lett. b) of the Directive does not prevent national legislation to impose a levy on memory cards for mobile phones. In particular, the payment of the fair compensation may be required in principle in any case where at least one of the functions of the “multifunctional medium” (such as detachable memory cards) enables the user to use it for private copying purposes, and even if such function is merely ancillary, as there is a presumption that users take full advantage of all the functions provided by the medium (thus, there is no need to show that private copies are actually made). However, the fact that the copying function is ancillary, together with “the relative importance of the medium's capacity to make copies” may affect the amount of the fair compensation and, should the harm caused to the right holders be “minimal” (i.e. in practice all users of a medium rarely use the function), the making available of such a function does not give rise to an obligation to pay fair compensation.

Each Member State may set out its own threshold of “minimal” harm, provided that it is compliant with the principle of equal treatment.

The voluntary implementation of technological protection measures (TPMs) addressed to reduce the risk of unauthorized copying does not affect in principle the requirement to pay fair compensation. However, Member States may decide that their

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