**ECJ decision on hyperlinks to illegal content after image leak**
European Union - **Hoogenraad & Haak, Advertising + IP Advocaten**

**Hyperlinks**
**Infringement**

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In *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc and Britt Geertruida Dekker* (C-160/15, September 8, 2016) the European Court of Justice (ECJ) has decided on whether posting a hyperlink to illegal content constitutes a "communication to the public" within the meaning of Article 3(1) of Directive 2001/29.

The great fun of the Internet is that it is so easy to link from one website to another. Any restriction of that fun may violate fundamental rights such as the freedom of expression and information. However, posting a hyperlink to a website that contains copyright-protected content (eg, a film or a photo, a text) may infringe the copyright owner's fundamental right.

Since the *Svensson* decision it has been permitted to post a link to copyright-protected work published online with the right holder's consent. That content is already available to any internet user, so the link does not reach a new audience. Also, since the *BestWater* decision, embedding a video, within one's own website, of another person's work made available to the public on a third-party website (by means of a link using the framing technology), does not by itself constitute "communication to the public" within the meaning of Article 3(1) of Directive 2001/29.

However, can the right holder stop the hyperlinker if the hyperlink refers to content that was published *without* the right holder's permission? In *GS Media v Britt Dekker* the ECJ finally ruled on this matter. The case started with a request for a preliminary ruling by the Dutch Supreme Court on whether hyperlinking to a public third-party website containing works that were published without the consent of the right holder constituted a "communication to the public" within the meaning of Article 3(1). GS Media published hyperlinks to (the then secret) nude photos of Dutch celebrity Britt Dekker on the file-sharing site Filefactory, before they were actually published in *Playboy* magazine.

In order to know whether there is a copyright infringement, it must be assessed whether the hyperlinker *knew or ought to have known* that the hyperlink he posted, provided access to an illegally published work. The ECJ expects businesses (acting for profit) to check in advance whether the right holder duly consented with the linked publication. There is now a (rebuttable) *presumption* of knowledge of the protected nature of the work and of the possible lack of the right holder's consent. However as a general rule, people who do not publish for profit will not know whether the linked content was published with or without consent (or may not even know about the principle of protection at all). They can therefore post a link to a film or story on Facebook or Twitter. But in a clear case, the right holder may substantiate why *in that case* the hyperlinker ought to have known that the linked content was illegal. Then it may be deemed a copyright infringement after all.

Therefore, a business must check before posting a link on its website whether the linked content is legal. The ECJ did not explain how such checks may be executed in practice or how broad the wording "for profit" should be interpreted. Yet it is clear that GS Media should not have linked to the secret nude photos of Dekker on Filefactory.

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