



Press and Information

Court of Justice of the European Union

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Judgment in Case C-160/15

GS Media BV v Sanoma Media Netherlands BV,  
Playboy Enterprises International Inc.,  
Britt Geertruida Dekker

**The posting of a hyperlink on a website to works protected by copyright and published without the author's consent on another website does not constitute a 'communication to the public' when the person who posts that link does not seek financial gain and acts without knowledge that those works have been published illegally**

*In contrast, if those hyperlinks are provided for profit, knowledge of the illegality of the publication on the other website must be presumed.*

GS Media operates the website GeenStijl, which includes, according to information provided by that website, 'news, scandalous revelations and investigative journalism with lighthearted items and wacky nonsense' and is one of the ten most visited news websites in the Netherlands.

In 2011, GS Media published an article and a hyperlink directing viewers to an Australian website where photos of Ms Dekker were made available. Those photos were published on the Australian website without the consent of Sanoma, the editor of the monthly magazine Playboy, which holds the copyright to the photos at issue. Despite Sanoma's demands, GS Media refused to remove the hyperlink at issue. When the Australian website removed the photos at Sanoma's request, GeenStijl published a new article that also contained a hyperlink to another website on which the photos in question could be seen. That site complied too with Sanoma's request that it remove the photos. Internet users visiting the GeenStijl forum then posted new links to other websites where the photos could be viewed.

According to Sanoma, GS Media infringed copyright. Hearing the appeal, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) seeks a preliminary ruling from the Court of Justice on this subject. Pursuant to an EU Directive, every act of communication of a work to the public has to be authorised by the copyright holder.<sup>1</sup> However, the Hoge Raad notes that the internet is overflowing with works published without the rightholder's consent. It will not always be easy for the operator of a website to check that the rightholder has given his consent.

In today's judgment, the Court declares that, in accordance with the directive concerned, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works. At the same time, that directive seeks to maintain a fair balance between, on the one hand, the interests of copyright holders and related rights and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, as well as the general interest.

The Court recalls its earlier case-law in accordance with which the concept of 'communication to the public' requires an individual assessment, which must take account of several complementary criteria. Those criteria include, first, the deliberate nature of the intervention. Thus, the user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, in order to give access to a protected work to its customers. Secondly, the concept of the 'public'

<sup>1</sup> European Parliament and Council Directive 2001/29/EC of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

covers an indeterminate number of potential viewers and implies a fairly large number of people. Thirdly, the profit-making nature of a communication to the public is relevant.

The Court specifies that its earlier case-law<sup>2</sup> concerned only the posting of hyperlinks to works that have been made freely available on another website with the consent of the rightholder, and that it cannot, therefore, be inferred from that case-law that the posting of such hyperlinks would be excluded, as a matter of principle, from the concept of 'communication to the public' when the works at issue have been published on the other website without the rightholder's consent.

As regards that latter situation, the Court emphasises, however, that the internet is of particular importance to freedom of expression and of information and that hyperlinks contribute to its sound operation and to the exchange of opinions and information as well. In addition, it accepts that it may prove difficult, in particular for individuals who wish to post such links, to ascertain whether the works involved are protected and, if necessary, whether the copyright holders of those works have consented to their publication on the internet.

Having regard to those circumstances, the Court holds that, for the purposes of the individualised assessment of the existence of a 'communication to the public', it is 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. Indeed, such a person, does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet.

In contrast, 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 published, for example owing to the fact that he was notified thereof by the copyright holders, the provision of that link constitutes a 'communication to the public'. The same applies if that link allows users to circumvent the restrictive measures taken by the site where the protected work is posted in order to restrict the public's access to its own subscribers.

Furthermore, when hyperlinks are posted for profit, it may be expected that the person who posted such a link should carry out the checks necessary to ensure that the work concerned is not illegally published. Therefore, it must be presumed that that posting has been done with the full knowledge of the protected nature of the work and of the possible lack of the copyright holder's consent to publication on the internet. In such circumstances, and in so far as that presumption is not rebutted, the act of posting a clickable link to a work illegally published on the internet constitutes a 'communication to the public'.

In the present case it is undisputed that GS Media provided the hyperlinks to the files containing the photos for profit and that Sanoma had not authorised the publication of those photos on the internet. It appears from the facts, as stated in the Hoge Raad's request for a preliminary ruling, that GS Media was aware of the illegal nature of that publication and that it cannot, therefore, rebut the presumption that it posted those links in full knowledge of the illegal nature of that publication. Subject to the checks to be made by the Hoge Raad, by posting those links, GS Media therefore effected a 'communication to the public'.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*Unofficial document for media use, not binding on the Court of Justice.*

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<sup>2</sup> Case [C-466/12](#) *Svensson and Others* and Order of 21 October 2014, *Bestwater International* ([C-348/13](#), not published).

The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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