Annex to Chapter 9 on the InfoSoc Directive – Communication to the public / making available to the public right

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INFOSOC DIRECTIVE #2

Chapter 9 aims to introduce the content and case law related to the right of communication and making available to the public under the InfoSoc Directive.

45 minutes

Reading task
Please read the following case accessible via the attached link, and answer/discuss the questions/notes below.

Case C-160/15 - GS Media BV v. Sanoma Media Netherlands BV and Others, Judgment of the Court of 8 September 2016

http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8633803

Please focus on how the CJEU interprets liability for linking activities. Please pay close attention to the fact how the contested images were put online originally.

Questions to the reading

1. What are the prerequisites of liability for hyperlinking?
2. In *Svensson*, the CJEU discussed whether copyright protected journal articles that were lawfully published on Göteborgs Posten's website can be hyperlinked. In *BestWater*, the CJEU sidestepped the important fact that the video embedded by the defendant was unlawfully uploaded to YouTube. In *GS Media*, the CJEU could not further evade discussing the issue of the lawfulness of the protected subject matter (here photographs). The Court tried to provide a balanced answer by differentiating between non-profit and for-profit uses, and concluded that the subjective knowledge of the user is relevant in determining his liability. The introduction of such a concept of subjective liability into European copyright law received open criticism among scholars. This is mainly because liability has generally been objective in the copyright systems of the EU Member States. (Knowledge can be relevant when it comes to damages.) Do you agree with such a development of liability regime?
3. In April 2017, as a next step in the European linking saga, the CJEU concluded in *Stichting Brein v. Jack Frederik Wullens* (the *Filmspeler* case) that the selling of set-top boxes with pre-installed add-ons that automatically directed end users to websites through which unlawful materials were accessible constituted

communication to the public. Is this kind of interpretation in line with the original purposes of the right of communication to the public, or does the Filmspeler ruling stretch this right?

Further recommended readings

http://copyrightblog.kluweriplaw.com/2016/09/09/a-new-chapter-in-the-linking-saga-its-becoming-a-horror/

http://ipkitten.blogspot.com/2016/09/hyperlinks-and-communication-to-public.html

Further questions/tasks to the chapter's content

1. Who are the beneficiaries of the right of communication to the public and the making available to the public under the InfoSoc Directive? Why did the directive miss to regulate related rights holders' communication to the public right?
2. Is there any meaningful difference regarding the scope of authors' and related rights holders' communication to the public right?
3. What does "communication" and "public" mean? What is the doctrinal difference between communication and making available to the public?
4. What is the "new public theory"?
5. Is the lawfulness of the source a prerequisite of lawful linking?

List of relevant definitions/concepts
Please think these definitions/concepts over again, as they are crucial in understanding copyright law in the EU.

successive publicity, different means of transmission, circumvention of technical protection measures, presumption of knowledge

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