GeenStijl v. Sanoma

Dutch Supreme Court, 14/01158, NJ 2015/183, 3 April 2015

The Dutch Supreme Court referred to the CJEU a question as to whether it is relevant that a work that a hyperlink directs to has been placed online without the copyright owner's consent; the decision provides further analysis of *Svensson* and *BestWater*.

In two of its decisions rendered last year, *Svensson*[1] and *BestWater*[2], the Court of Justice of the European Union ('CJEU') provided guidance on the topic of hyperlinking. This guidance however does not suffice in the view of the Dutch Supreme Court: confronted with a dispute between GeenStijl and Sanoma, the Dutch Supreme Court recently decided to seek further clarification from the CJEU on this topic[3].

Geenstijl is a Dutch blog on which - in the blog's own words - news facts, scandalous revelations and journalistic research alternate with light topics and pleasantly crazy nonsense. GeenStijl attracts around 230,000 visitors every day. In 2011, the blog featured a (later much discussed) article about leaked photos of a Dutch reality TV star. These photos were meant to be published in an upcoming edition of a magazine. The article on GeenStijl ended with the text: 'And now the link to photos you all have been waiting for,' followed by a hyperlink which directed visitors to the leaked photos on Filefactory.com, a third party file sharing and storage website. Sanoma, the publisher of the magazine, managed to have the photos removed from Filefactory.com. The Dutch blog then updated its article with 'Not seen the photos yet? They are HERE,' and posted a new hyperlink that directed visitors to another third party website on which the photos were available. Sanoma succeeded in having the photos on that website removed too, but by then the photos had already spread across the internet and visitors to GeenStijl kept posting new hyperlinks to the photos by way of comment on the article.

The publisher brought the case before the District Court of Amsterdam, which ruled that posting the hyperlinks to the copyright-protected photos in the case at hand constituted copyright infringement[4]. The District Court found that the hyperlinks constituted a communication to the public. The District Court considered that the photos initially could not be easily found and accessed by the public: only the small number of people who knew the exact URL of the two file sharing websites could view them. By posting the hyperlinks, GeenStijl had intervened to provide the public with access to the photos. As a result of this intervention, aimed at attracting visitors to the blog, a new public was reached: the 230,000 daily visitors to the blog. Considering the foregoing, the District Court held that all three relevant criteria derived from CJEU case law[5] were met: (1) there was an intervention, (2) as a result of which a (new) public was reached and (3) the intervention was aimed at making a profit. The conclusion therefore was that GeenStijl had infringed the copyright in the photos by posting the hyperlinks.

The District Court's judgment received significant media attention in the Netherlands and provoked much debate in the legal community. Some commented that the judgment would go against the then current case law. Others even took the position that the judgment undermined the very essence of the internet.

On appeal

On appeal, the Appeal Court of Amsterdam disagreed with the District Court and reached the conclusion that GeenStijl's hyperlinks do not constitute copyright infringement[6]. The Appeal Court considered that the internet in its current form is an open communication network which is freely accessible to anyone. According to the Appeal Court, the person placing a work on the internet in such a way that it is accessible to the public, is the one who communicates that work to the public. A hyperlink to a work which as such has been communicated to the public at another location on the internet, would not be much different from using a footnote in a book or in an article to refer to another published work. As a rule, hyperlinking in that case would not constitute an independent communication to the public. By the same token, this, in principle, would not involve an intervention either.

In this regard, Sanoma argued that the photos stored at Filefactory.com could not at all be found and were inaccessible to the public. As such, the bare fact that the photos had been placed on the internet could not justify the conclusion that they have already been communicated to the public. The Appeal Court in principle agreed with Sanoma's line of reasoning, but dismissed the argument, because it found that Sanoma had not established that the photos stored online were completely private. The Appeal Court therefore found that although GeenStijl had facilitated access to the photos to some extent, it had not provided the public a new access channel to the photos. Considering this, the conclusion was that there was no intervention by GeenStijl and consequently no copyright infringement either.

The Dutch Supreme Court

It was now the Dutch Supreme Court's turn to decide on this matter. In its decision of 3 April 2015, the Supreme Court extensively reflected on *Svensson* and *BestWater* to finally reach the conclusion that these two CJEU judgments do not provide enough guidance to decide the case at

hand. Essentially, the Dutch Supreme Court found that the CJEU should shed further light on the question as to whether or not it is relevant that the work to which the hyperlink directs has been placed on the internet without the copyright owner's consent. It follows from *Svensson* that a new public is 'a public that was not taken into account by the rights holder when he authorised the initial communication to the public.' The CJEU's answer focused on the circumstance that the work was already freely available online, without specifying if it is required that the rightsholder has given consent thereto. A possible explanation for this could be that *Svensson* concerned works which were published on the internet with the copyright owner's consent. In *BestWater*, it is unclear if the rightsholder had given consent to the initial communication to the public. Further, the questions put forward by the referring Court in that case did not relate to the relevance of such consent. As such, the Dutch Supreme Court concluded that *BestWater* does not provide the required guidance on this issue either.

Considering all the foregoing, the Dutch Supreme Court's first preliminary question to the CJEU is whether or not hyperlinking to a work on a freely accessible third party website, where such work has been made available without the copyright owner's consent, constitutes a communication to the public. In its decision of 3 April 2015, the Supreme Court also considered that the general public can find many works on the internet which have been made available without the copyright owner's consent. For website operators who wish to hyperlink to a work, it would not at all be easy to verify if a rightsholder has given consent to the initial communication to the public of that work. Probably in view of the perceived difficulties for website operators, the Dutch Court also asks if it is relevant that the 'hyperlinker' knows or should have known that such consent has not been given. If the CJEU's answer to the preliminary question is in the negative, the Supreme Court asks if there is a communication to the public, if the (work on the) website to which a hyperlink directs can be found by the general public, but not easily, so that the hyperlink greatly facilitates finding the work.

Conclusion

From the ongoing discussions about hyperlinking, it is apparent that *Svensson* and *BestWater* have left a few question marks lingering over this topic. The Dutch Supreme Court's thorough examination of both decisions and subsequent conclusion confirm this apparent need for further guidance from the CJEU.

In the Netherlands, this issue has often been approached from a standard of due care point of view: under the circumstances, hyperlinking to unlawful content[7] constitutes an unlawful act under Dutch law. The circumstances taken into consideration in that context appear to be very similar to the current considerations discussed in the questions of the Dutch Supreme Court about copyright infringement by hyperlinking. These questions of the Dutch Supreme Court for example consider whether it is relevant that the 'hyperlinker' knows that no consent has been given, and the circumstances surrounding the hyperlink that facilitates finding the work. A similar line of reasoning can be found in the decision rendered by the Court of Appeal of Amsterdam in the *GeenStijl/Sanoma* dispute. As discussed, the Appeal Court had found that the hyperlinks did not constitute copyright infringement. Nevertheless, the Appeal Court held that GeenStijl had breached the standard of due care. GeenStijl was aware that the communication to the public of the photos was unlawful. And yet, it posted the hyperlinks along with language encouraging visitors to view the photos. By posting the hyperlinks, GeenStijl had facilitated access to these unlawfully published photos. The Court of Appeal therefore concluded that GeenStijl had acted unlawfully *vis-à-vis* Sanoma.

The above finding of the Appeal Court is also to be examined by the Supreme Court. This legal question, however, is overshadowed by the focus on the circumstances under which hyperlinking constitutes a communication to the public, and as such, copyright infringement. Rightsholders should keep in mind that copyright infringement is, at least in the Netherlands, not the only legal basis that can be invoked when confronted with hyperlinks to copyright-protected content: this may also constitute a violation of the standard of due care, and as such, be an unlawful act.

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1. CJEU, 13 February 2014, C-466/12 (Svensson).
2. CJEU, 21 October 2014, C-348/13 (BestWater).
3. Dutch Supreme Court, 3 April 2015, 14/01158, NJ 2015/183 (GeenStijl/Sanoma).
4. District Court of Amsterdam, 12 September 2012, MF 2012/23 (Sanoma/GeenStijl).
5. E.g. CJEU, 7 December 2006, C-306/05 (SGAE/Rafael Hoteles).
6. Appeal Court of Amsterdam 19 November 2013, Computerrecht 2014/39 (GeenStijl/Sanoma).
7. I.e. copyright protected content which has been made available to the public without the rightsholder's consent.