ILN IP Insider

An International Lawyers Network IP Group Publication

The GS Media case: "He's making it up as he goes along!"

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POSTED IN CASE STUDIES, FOREIGN PROTECTION, ONLINE CONTENT, PROTECTION & ENFORCEMENT, UNITED KINGDOM

The *GS Media* case: "He's making it up as he goes along!"[1]

This is not a Brexit whinge, but when I reread the ECJ's decision in the *GS Media* case[2], I do understand where 52% of my countrymen were coming from. Generally, the EU has (IMHO) been a force for good in IP law, by trying to keep the law up to date in a period of insane technological development and promoting consistency across the member states to reduce the number of local wrinkles that businesses have to deal with.

The price for this is accepting the jurisdiction of the ECJ, a body which was one of the key targets of the venom of the Brexiteers. But judicial interpretation and enforcement is part and parcel of any rational rule of law, so in many cases this enmity was unfounded. However, judges are there to interpret law, not

to make it, and the ECJ has a nasty habit of making up law as it goes along. Sometimes (as in the *Davidoff* case relating to international exhaustion[3]) the court has had to choose a yes or no answer which the legislation was completely silent about, and I can understand that. But on a number of other occasions, the ECJ has simply made up a law to suit the purposes of the case before it. In the UK, we had this experience in the 1970s and 80s with a well-known judge called Lord Denning; usually with the best of intentions, he would ignore or twist established common law to produce a result that fitted the case before him to produce the fairest result on the facts. But that created a huge amount of uncertainty as to the law to apply to other cases on slightly different facts, and it took quite a while for a sensible balance to be restored.

In my view, the judgment in *GS Media* is a glaring example of this. You might think that the ECJ has got a fair balance and is being pragmatic, and that is certainly arguable, but there is no basis for saying that the judgment has a clear legal foundation.

So, a quick recap on the facts. The claimants, led by Sanoma, were the copyright owners of photographs taken for publication in *Playboy* magazine (you can guess the content of the photos). The defendants, GS Media, operated a news/gossip website called *GeenStijl* aimed at the Dutch market; they were sent a hyperlink to an Australian site which allowed copies (unauthorised, of course) of the Playboy photos to be viewed and downloaded, and they published this link for their users to access under appropriate headlines. Sanoma immediately demanded that the link be taken down, but GS Media declined to do so, and when Sanoma got the photos removed from the Australian site, GS Media published a link to another site which held the photos (again unauthorised).

Sanoma claimed that publishing the hyperlinks amounted to "communication to the public" of copies of the photos by GS Media, an activity that contravened the exclusive rights of the copyright owner under Article 3 of the InfoSoc Directive[4]. GS Media referred to established precedent which held that simply providing a hyperlink to content which was already publicly accessible did not constitute "communication to the public"[5].

The ECJ decided that the previous authorities regarding hyperlinks applied only where the content was held on the relevant site with consent, and the rule did not automatically apply where the content to which the link pointed was infringing.

Instead, the ECJ decided that where a person "knew or ought to have known" that the link led to infringing content, that linking would be a "communication to the public". In addition, if that person was acting "for profit", there was a rebuttable presumption that the publication was carried out in full knowledge of the infringement, so any publication of the hyperlink would be a communication to the public.

What? Where in the legislation is there any reference at all to the state of mind or knowledge of the person "communicating" in determining whether the act of communication amounted to an infringement or not? Where is there any reference to a different test depending upon whether the act was carried out for profit or not? Such concepts are not unusual in IP law, but they do not appear in the section dealing with infringement by "communication to the public". Article 7 of the Directive (in the context of rights management information deletion) includes such a knowledge-based test, so it seems clear that if the legislators thought such a test was necessary for Article 3, they could, and presumably would, have included it.

While I appreciate the ECJ's desire to balance the rights of IP owners against rights of freedom of expression, I am unconvinced that this is the best way to go about it.

If I am pressed to express a view on the merits of the decision, in my view, the ECJ was stretching the understanding of "communication to the public" by including the provision of a hyperlink within its scope, whether the target of the link was authorised or not, as the link did not increase the number of people who could view the content, it just told them about it. If this blogpost concluded with a statement "*and I have heard you can see great pictures from Playboy at the naughtypix.co.uk site*[6]" would that mean I have communicated those pictures to the public? Even if I did not identify any specific pictures?

It's bad law, poorly thought through, to get the right result for the facts. Come Brexit day in 2019, I suspect the UK courts will happily rip this one out of the list of precedents.

[1] Credit to the Monty Python team for the brilliant line uttered by John Cleese in "The Life of Brian".

[2] *GS Media BV* v *Sanoma Media and others* C-160/15, judgment 8 September 2016.

[3] *Zino Davidoff SA* v *A&G Imports Ltd* C414/99, judgment 20 November 2001.

[4] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[5] *Nils Svensson and others* v *Retriever Sverige AB* C-466/12, judgment 13 February 2014.

[6] You can't, sorry – the domain name (when I wrote this, at least) is unused.

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Headed by Eddie Powell of Fladgate LLP, London, and Norman Zivin of Cooper & Dunham LLP, New York, New York, the ILN's Intellectual Property Group provides the platform for enhanced communication, enabling all of its members to easily service the needs of their clients requiring advice on cross-border transactions. Members of the group meet regularly at ILN conferences and industry events, and have collaborated on discussions and publications of mutual interest.

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