

Sanoma v. GS Media and the EU Value Gap Proposal: An Introduction

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Vereniging voor Auteursrecht 14 October 2016



Does hyperlinking to protected content constitute a communication to the public?

Hyperlinking to authorized content:

Svensson (ECJ 13 February 2014)

Best Water (ECJ 21 October 2014)

Hyperlinking to unauthorized content:

Sanoma v. GS Media (8 September 2016)



STYLE + GOODLIFE + KNOWHOW + ENTERTAINED + WOMEN + HUMOR MAGAZINE + PLAY

UITGELICHT → JE LEEST HET GOED: MILKA OREO KINDER BUENO NUTELLA CHEESECAKE

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Coveronthulling Britt

2 november 2011 Magazine

Alle foto's (+de niet gestolen foto's) en backstage videomateriaal zijn vanavond na afloop van de Wereld Draait Door hier te zien. Eindelijk is het zover: Britt Dekker, het onverklaarbare, hysterisch...



300649 leden / 6258 stijllozen online

e-penis:  81K

Tik hier je zoekterm



HEADLINES

13-10

Ayaan Hirsi Ali reageert op
ophef Machteld Zee

Verwarring met de NOS. Is het
een hipster of moslim?

Tuig beukt tankstation Tilburg
helemaal de tandjes

Fucking uitgelekt! Naaktfotoos Britt Dekker



Ach nee. Hoe KAN dat nou goedverdoemme telkens weer? Het is toch niet te gleuven? Na [Amanda Krabbé](#) zijn de kroonjuwelen van het bloedblad wederom op straat komen te liggen. Het is één grote lektober daar bij de Playboy. Ook de blootplaatjes van Britt Dekker zijn nu uitgelekt. Amper drie weken na de naaqtshoot op een appeltjesbruin Canarisch Eiland ([deze](#)) liggen de fapfotoos van het Pareltje van Purmereutel open en bloot op straat. Je zou toch denken dat ze daar bij de Sanoma enige maatregelen getroffen hebben na het vorige lek. Personeel op straat flikkeren, toegangspasjes doormidden knippen, logins voor het CMS onklaar maken, het fotomateriaal 24/7 laten bewaken door een homofiele Men's Health-lezer (is dat dubbelop? - ff uitzoeken). Maar nee. Niets van dat alles. Het lijkt wel of ze het erom doen? Mensen. Dit is toch geen toeval meer? Ennieweetjes. Vanavond een totaal ontredde en hoofdschuddende PB-hoofredacteur Jan Heemskerk - die er ook niks van snapt - in RTL Boulevard en Shownieuws. En dan nu het linkje met pics waar u op zat te wachten. Wie het eerst fapt, die het eerst komt. [HIERRR](#). De bloeddoddige mevrouw Dekker complimenteren met het keurig aangeharkte voortuintje kan [daar](#). Pritt ♥ Britt.

[Update](#). Vooruit dan.

Pritt Stift | 27-10-11 | 07:59 | Link | 156 reacties |  34 

REAGUURSELS

DUMPERT



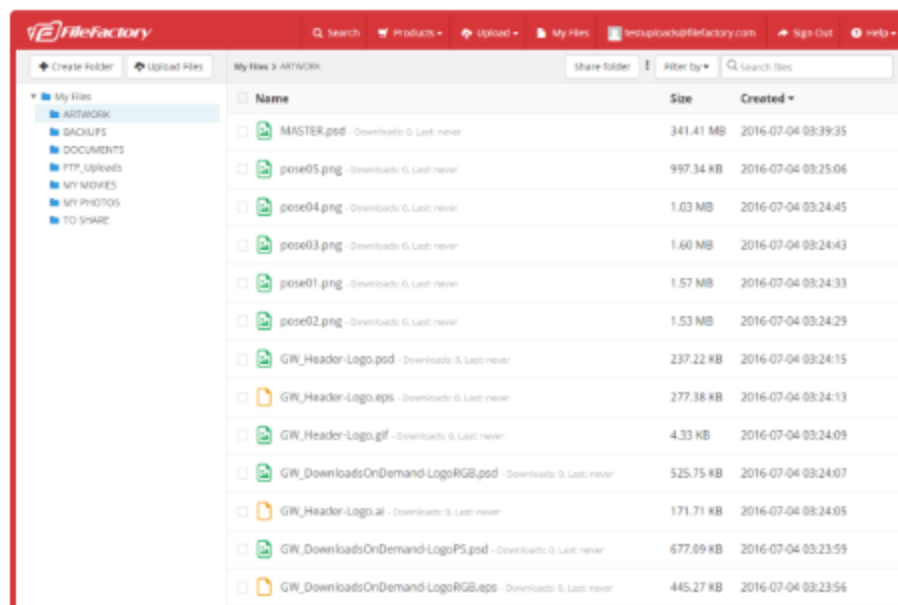
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*Tendentieus, Ongefundeerd
& Nodeloos kwetsend*

HEADLINES

13-10

Ayaan Hirsi Ali reageert op ophef Machteld Zee

Verwarring met de NOS. Is het een hipster of moslim?

Tuig beukt tankstation Tilburg helemaal de tandjes

VIDEO. Sneue treinrukker kan treinrukken niet laten

LOL. Asscher verneukt persmomentie Monasch

Blote Britt gaat GeenStijl aanklaguh



Fucking officieel! Juridische post in de stijlloze inbox. Deze keer van Playboy en Britt Dekker. Moederbedrijf Sanoma is namelijk pislinsk vanwege de [uitgelekte foto's](#) van de geschoruh flamoes van het Purmereutelse bakvisje. Boze advocatenbrief [HIER](#), [HIERR](#) en [HIERRR](#). Volgens raadsman Christiaan Alberdingk Thijm van SOLV heeft GeenStijl met opzet gelinkt naar de blote voorbips van Britt Dekker [alsook](#) die van Amanda Krabbé. Om bandbreedte te sparen. Hierdoor zijn Sanoma/Playboy een triljoentriljard euro misgelopen en zijn voornoemde dames in hun goede naam en portret aangetast. U raadt het al: GeenStijl heeft het weer eens allemaal gedaan. Wij lezen: *"namens bladibla sommeruh wij u om voornoemde berichtuh met daarin opgenomuh links en foto's alsmede de daarbij geplaatstuh reacties uiterlijk om **maandag 7 november om 18:00 van GeenStijl te verwijderen**."* Welnu, die deadline hebben we niet gehaald. Maar verder zijn we ook niet van plan wat dan ook te verwijderen. Kunnuh wij het helpuh dat mensuh ons linkjes sturuh met daarin de nieuwste fappica's? En nog veel belangrijker: GeenStijl doet helemaal niets dat verboden is. Linken (ook naar onrechtmatige cuntent) is niet verboden in Nederland. Daar is zeer recent nog een [haarscherpe](#) uitspraak over geweest. Zoals Alberdingk Thijm als gerenommeerde [internetadvocaat](#) zelf ook wel weet staat er niks illegaals op onze servers. We wensen Sanoma dus veel sterkte met hun aangekondigde rechtsmaatregelen en zien iedere claim tot schadevergoeding met vertrouwen tegemoet. Sterker, normaal gesproken vragen we hoge bedragen voor dergelijke succesvolle reclameuitingen op GS. Dus Sanomaatje, Brittje, Amandaatje en hoe jullie allemaal ook mogen hetuh: Stoppen met zeuren of we sturen jullie een rekening van 25K.

Update: Naaktpics Britt nog niet gezien? Ze staan [HIERRR](#).

Redactie | 07-11-11 | 21:30 | Link | 295 reacties | [f](#) [21](#) [t](#)

DUMPERT



Rutte n

4 8

het „Nee

TOPPERS

VIDEO. Sneue treinruk

DEBAT! Kabinet dient

Help! Ik ben wit. (Met



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HELP



Is posting a hyperlink to the Britt Dekker photos a copyright infringement?

District Court Amsterdam: yes

Court of Appeal: no, but it is unlawful to induce users to view the photos which otherwise would have been difficult to find

Supreme Court refers questions to ECJ



ECJ:

‘Communication to the public’ (Article 3 Directive 2001/29) to be interpreted broadly

At the same time...

ECJ:



At the same time the harmonisation is to maintain a fair balance between:

- the interests of right holders in protecting their intellectual property rights (Article 17(2) Charter),

on the one hand, and on the other:

- the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information (Article 11 Charter), and
- the general interest.

ECJ

- repeats the criteria developed in prior decisions and puts (squeezes) them into a more or less consistent model
- formulates presumptions that allow rightholders to enforce against commercial hyperlinkers while keeping hyperlinking consumers out of the heat

ECJ:



Two cumulative criteria:

- act of communication
- to the public

Requires individual assessment, taking into account complementary criteria, which are not autonomous and are interdependent and which are to be applied both individually and in their interaction with one another.

Complementary criteria (1)

Deliberate intervention:

the user intervenes in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work.

ECJ:



Complimentary criteria (2)

indeterminate number of potential viewers and a fairly large number of people

ECJ:



Complimentary criteria (3)

It is relevant that a 'communication' is of a profit-making nature.

Complimentary criteria (4)

work must be communicated using specific technical means, different from those previously used (*ITV/TVCatchup*)

or, failing that, to a ‘new public’, *i.e.* a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work

Svensson:

No new public is reached by posting a hyperlink to content that is posted on a freely accessible website with the rightholder's consent.

Bestwater:

this applies also if the content is framed within the page that contains the hyperlink.



Why is there no new public?

ECJ makes an assumption:

as soon as and as long as the work is freely available on the website to which the hyperlink allows access, it must be considered that, where the copyright holders of that work have consented to such a communication, they have included all internet users as the public.

Rebuttable presumption?



So what if the content was not authorized for publication on the original website (Sanoma case)?

ECJ:

- this is a different situation because every act of communication to the public requires authorization.
- However, it should be noted that the internet to the freedom of expression and of information and hyperlinking contributes to its sound operation and the exchange of opinions and information..



How to meet these interests?

Additional complimentary criteria:

reasonable knowledge that the content was posted on the source website without consent

ECJ makes two rebuttable presumptions:

Presumption no. 1:

hyperlinking individuals who do not pursue a profit
do not know and cannot reasonably know that the
work had been published on the internet without
the consent of the copyright holder

No knowledge → no deliberate intervention → no
communication to the public



How can a rightholder rebut the presumption?

ECJ: by establishing reasonable knowledge, e.g.:

- by showing that the person was notified of the illegal nature
- by showing that the link allows users to circumvent access restriction measures taken by the original website → posting of link then constitutes a deliberate intervention without which those users could not benefit from the works broadcast



Presumption no. 2:

Person who posts links for profit can be expected to check the nature of the content and is therefore presumed to have knowledge of the illegal nature.

Unless presumption is rebutted, the act of posting a hyperlink constitutes a communication to the public.

ECJ:

- unless presumption is rebutted, the act of posting a hyperlink constitutes a communication to the public.
- rightholders may send notice of the illegal nature to the hyperlinker and take action if he refuses to remove the link
- the hyperlinker may not rely upon one of the exceptions listed in Article 5(3).



ECJ: it appears that GS Media:

- provided the links for profit
- knew that Sanoma did not authorize the posts
- therefore cannot rebut presumption of knowledge
- GeenStijl effected a communication to the public.



ECJ:

52 However, if there is no new public, there will be no communication to the ‘public’ within the meaning of that provision in the event that, referred to in paragraphs 40 to 42 of the present judgment, the works to which those hyperlinks allow access have been made freely available on another website with the consent of the rightholder.

No infringement if illegal content is posted with consent elsewhere on the internet?



The EC Value Gap Proposal

Value Gap:

Large amounts of user uploaded content available on internet platforms that rightholders cannot control:

- Social media platforms: YouTube, Facebook
- Filesharing platforms: Vimeo, Filefactory.com, Imageshack.us, ThePirateBay



Why can't rightholders exercise control?

- the content is uploaded by consumers. National courts decide that the consumer rather than the platform performs the act of communication to the public
- locating and licensing individual consumers is difficult and does not make sense: the platform generates value with the user uploaded content
- national courts apply the liability exemption of Article 14 Directive 2000/31/EC



Solutions in case law:

- ECJ (L'Oréal v. eBay): liability exemption does not apply where service provider plays an active role of such a kind as to give it knowledge of, or control over, those data.
- ECJ: service providers may be required to take appropriate and effective measures to prevent infringement and identify customers/users
- national courts use local legal concepts to assume liability in certain cases: secondary or accessory liability; joint tort; systematically facilitating. Myriad of regimes EU wide.



Solutions in practice:

(some) platforms take measures to:

- allow rightholders to share in ad revenues
- prevent illegal content:

YouTube ContentID



EC Impact Assessment:

rightholders complain:

- not all platforms want to negotiate with rightholders. Platforms deny responsibility.
- platforms that do want to negotiate, do so on a voluntary basis and as such are not willing to share ad revenues at the level of regular copyright license fees.



14 September 2016: EU proposal for a directive on Copyright in the Digital Single Market

EC formulates:

- guideline for direct liability of platforms
- guideline for eligibility for liability exemption
- measures to be taken by all service providers, including exempted hosting providers
- guidelines for collaboration between rightholders and service providers
- measures to be taken by Member States



Guideline for direct liability of platform:

38 Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.



Guideline on eligibility for liability exemption:

38 (...) In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.



Measures to be taken:

- information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users
- should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies.
- also when the service provider is eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.

Recital 39:

- collaboration between service providers and rightholders is essential for the functioning of technologies, such as content recognition technologies
- rightholders to provide data to identify content
- service providers must be transparent about the deployed technologies: type of technologies used; how they are operated; success rate
- the technologies should allow rightholders to get information on the use of their content covered by an agreement



Article 13:

1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. (...)



Article 13:

1. (...) Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.



Article 13:

2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.

3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.