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Provisional Opinion

of ALAI's Executive Committee

On the Right of communication to the public ; the Advocate General's Opinions in *Filmspeler* Case C-527/15 and *Ziggo* Case C-610/15

Both cases address the facilitation of unlawful communication to the public, in *Filmspeler* by selling a device loaded with hyperlinks that lead to websites that make available infringing streams of audiovisual works, in *Ziggo* by providing access to an indexing site for a peer-to-peer network “sharing” infringing copies of audiovisual works. In both cases, the Advocate Generals’ opinions conclude that the device seller and the indexing site are communicating works to the public. ALAI endorses the conclusions of both Opinions, but expresses reservations concerning some of the reasoning in *Ziggo*. In both cases, the Opinions apply the framework developed by the CJEU in the *GS Media* case (C-160/15) and several of its predecessors imposing a “new public” prerequisite to liability for infringement of the right of communication to the public. ALAI has in past Reports and Opinions¹ raised concerns that the CJEU’s “new public” caselaw has significantly departed from the basic international treaty norms of communication to the public set out in the Berne Convention and the WIPO Copyright Treaties. In this Provisional Opinion, ALAI suggests that the Advocate Generals’ Opinions can at least in part be read to offer an approach that reconciles the right owner and user concerns that the CJEU’s recent caselaw has sought to balance, but without making

¹ ALAI Report and Opinion (2015) on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet (see: <http://www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion-2.pdf>) ; ALAI Opinion (2014) on the criterion “New Public”, developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public (see: <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>) and ALAI Report and Opinion (2013) on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet (see: <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>).

knowledge an element of the infringing act. The approach that emerges from the Opinions instead allows consideration of knowledge of infringement only with respect to the liability of one who facilitates infringement, rather than as a criterion for determining whether the act itself is a communication to the public. The act itself, whether directly or indirectly communicating the work, remains, irrespective of the actor's knowledge, a "communication" "to the public.",

In *Filmspeler* Advocate General Sanchez Bordona took as a starting point the following propositions derived from *GS Media* and predecessor decisions (para. 42):

(a) the provision of clickable links to protected works must be considered to be 'making available' and, therefore, such conduct is an 'act of communication'; (b) that concept refers to any transmission of the protected works, irrespective of the technical means or process used, and (c) there is a rebuttable presumption that the posting of a hyperlink to a work unlawfully published (without the authorisation of the right holders) on the internet amounts to a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/79, if it is done in pursuit of profit.

And (para. 43):

the concept of communication to the public of a protected work requires either the communication to be made by a specific method different from those used before or, failing this, the work to be distributed to a 'new public', deemed to be a public which the right holders did not take into account when they authorised the original (limited) distribution of the work.

The *Filmspeler* facts met the "new public" criteria because the pre-loaded links made the audiovisual content available to a "public" (purchasers of the devices who clicked on the links) whom the rightholders had not taken into account when they provided restricted access to the content (para. 59). Importantly, the Advocate General rejected the argument that a provider of hyperlinks loaded into a device should be treated differently from a provider of hyperlinks from a website (paras 51, 52), adding (by the way) that the device-seller was clearly pursuing profit (para. 54).

Filmspeler had contended that the availability of those links from other sources meant that *Filmspeler*'s "intervention was 'not crucial' and that [the defendant] merely 'enabled' the public to have access to content that can be downloaded from other websites. The *filmspeler* is not, therefore, [according to the defendant and the Commission] an essential part of the process connecting the website on which protected content is made available unlawfully and the end user." (para. 47). In rebuffing this reasoning, the Advocate General, consistently with prior CJEU caselaw, broadly construed the concept of the "indispensable role played by the user" (*GS Media*, para. 35; *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, para. 31).

Under that caselaw, "indispensable" does not in fact mean "*sine qua non*". For example, in *Phonographic Performance (Ireland)*, hotel guests could have accessed the radio broadcasts had they brought their own radios, or had they connected their digital devices to digital simulcasts of the broadcasts. Similar observations might be made about the decision that initiated the "new public" line of cases, *SGAE v Rafael Hoteles* C-306/05 (7 December 2006), see para. 42 (hotel's customers were in broadcaster's catchment area). In *GS Media*, it would not have mattered had other websites also offered links to the same infringing content.

Indeed, if “indispensable role” were to mean (as some have urged) that one who makes infringing content available engages in a communication to the public only if no one else is also offering access to that content, then the concept would effectively eviscerate the right of communication to the public. ALAI therefore believes that paragraph 52 of Advocate General Sanchez Bordona’s Opinion correctly analyzes the role of the user:

Whatever the method or technical process by which they are installed, hyperlinks serve to enable third parties to access digital content which has already been uploaded — in this case, unlawfully — to the internet. The significant aspect of the communication to the public which takes place through those hyperlinks is the fact that it increases the range of potential users who, I repeat, are provided with a functionality involving the prior selection of websites that allow digital content to be viewed free of charge.

Preloading the hyperlinks onto the filmspeler device does not make the infringing content available in the absolute, but it does make that content more *easily* available to the public. In effect, by dispensing the members of the public from having to find the “right” hyperlinks themselves, the sellers of the filmspeler have “aimed directly at enabling purchasers” whether or not they might otherwise not have expended the effort of locating pathways to infringing content, “to access copyright-protected works on the internet without the consent of right holders.” (para. 50). Advocate General Szpunar in *Ziggo* expresses a similar concept of the “indispensable role of the user” with regard to The Pirate Bay’s facilitation of peer-to-peer file sharing (para. 50):

However, those works would not be accessible and the operation of the network would not be possible, or would at any rate be much more complex and its use less efficient, without sites such as TPB, which enable works to be found and accessed. The operators of those sites therefore arrange the system which enables users to access works that are made available by other users. Their role may therefore be regarded as necessary.

The participants in the P2P network make infringing copies of the works available; TBP’s role is not absolutely necessary to the unauthorized communication of works. But TPB greatly simplifies those communications, effectively making the works more available than they would otherwise have been. Both Advocates General therefore, correctly, in ALAI’s view, decline to characterize these facilitators of infringement as “mere enablers” who do not engage in communications to the public.

The difficulty, not present on the facts of either case, lies in ascertaining when making a third party’s infringing communication of a work accessible to the public is an act of communication to the public in its own right (governed by EU-wide norms), and when that activity is too remote to subject the actor to direct liability (the standard for indirect liability being subject only to national laws). As Advocate General Szpunar observed (para. 3), to sever acts of facilitation from communication to the public:

would, however, mean that liability, and ultimately the scope of the copyright holders’ rights, would depend on the very divergent solutions adopted under the different national legal systems. That would undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other rightholders within the single market. That is why

the answer to the problems raised in the present case must, in my view, be sought rather in EU law.

Other aspects of Advocate General Szpunar's Opinion nonetheless raise concerns that the "new public" analysis, derived from *GS Media* and its predecessors, may be misconstrued to unduly narrow the understanding of what constitutes a "communication to the public." It is important to clarify that all the cases applying a "new public" criterion have concerned some form of *further* making available of a third-party communication. The CJEU has never stated that one who *originates* an unauthorized communication to the public does not violate the exclusive right unless that actor is making the work available to a public different from the public to whom the rightholder made the work available. Such an interpretation would lead to the nonsensical result that the operator of a website who *directly* provides unauthorized access to works would not be engaged in a communication to the public if the rightholder was also offering access to the work. The Opinion (para. 4) fortunately cautions that the case of secondary communications (such as those made by hyperlinks) is "substantially different" from initial communications (such as those originating on a website or within a peer-to-peer network), but some passages of Advocate General Szpunar's Opinion could be misread to generalize the "new public" criterion even to the initial unauthorized source of a communication. For example (para. 40):

Under the second requirement, the public for which the communication in question is intended must be a 'new public'. In the view of the Court, so far as making available on the internet is concerned, the communication is not made to a new public when it relates to a work that has already been made freely available to the public on another website. In such a situation, the communication is targeted, at least potentially, at the same public as that targeted by the initial making available, namely all users of the internet.

The Opinion may reinforce the erroneous impression that the "new public" requirement applies to primary as well as to secondary transmissions when it characterizes TPB "as originating the making available to the public of works that are shared on the network without the consent of the copyright holders" (para. 53), but nonetheless applies a "new public" analysis to TPB's activities. Because the "new public" criterion as articulated in *GS Media* now incorporates a knowledge component, the generalization of that criterion to initial as well as secondary communications radically transforms the right of communication to the public away from a strict liability property right as to which neither knowledge nor profit motives are elements of the claim. Where profit motive once simply furnished evidence that the defendant was communicating the work to a public rather than merely to a circle of family or friends (apparently on the theory that one who communicates to that limited circle does not seek to make money off of family and friends) (e.g. *Rafael Hoteles*), in *GS Media* profit motive becomes a surrogate for knowledge.

But the Opinion in *Ziggo* fears a profit criterion would sweep too broadly, and thus demands that the originator of the communication have actual knowledge of its infringing character (para. 52). By contrast, Advocate General Sanchez Bordona correctly, in ALAI's view, considers knowledge to be relevant only to the secondary infringer's liability, not to the existence of a violation of the exclusive right (para. 71): "I believe the subjective component is more appropriate for excluding personal liability than for deciding on objective unlawfulness." Requiring a showing of knowledge on the part of one who originates an infringement (rather than facilitates access to infringing content that others have initially

made available) imports a novel limitation on the exclusive right and is in fundamental tension with the CJEU's often stated recognition that "Any harmonisation of copyright and related rights must take as a basis a high level of protection" (e.g., recital 9 of the preamble to Directive 2001/29/EC; *Phonographic Performance (Ireland)* para. 11; *GS Media*, para. 53).

By contrast, in the context of facilitation of an initial infringer's violation of the right of communication to the public, a knowledge criterion can illuminate the "role of the user" to permit a court to ascertain when a facilitator should be liable for an act of communication to the public. A "deliberate intervention" (*GS Media* para. 50) to make the work further available is what renders the actor liable for infringing communication to the public. When, however, the defendant has not "aimed directly at enabling [users] to access copyright-protected works on the internet without the consent of right holders" (*Filmspelers* Opinion, para. 50), it has not deliberately intervened in the infringing communication of that work. Hence the *Ziggo* Opinion's claim that "the decisive role in the [further] communication to the public of a given work cannot be attributed to [the defendant] if it is unaware that the work has been made available illegally" (para. 51). "Deliberate intervention" and "decisive role" imply an element of knowledge when the basis of liability for communication to the public concerns the furtherance, rather than the initiation of, an infringing communication. Moreover, recognizing that furtherance of infringing communications is a communication to the public in its own right confirms the coverage of such acts by the 2001 InfoSoc Directive, thus promoting EU-wide harmonization in an area of increasing economic and cross-border importance.

ALAI submits that in cases of further communication of an initial infringement, the CJEU could obtain the same "balance" of rightholder and user interests that it has sought to achieve through its accumulation of criteria (new public, different technical means, profit motive, actual knowledge) were it to abandon the "new public" criterion (a criterion lacking legal basis in either the Berne Convention or the Information Society Directive), and were it instead to focus on the deliberateness of the intervention to further or enhance infringing access to protected works on the one hand, and the criterion of the 'organisation other than the original one' of Article 11bis, 1(ii) BC on the other hand.

[end]