Invoking copyright to block the submission of evidence? Nice try, but no cigar!

Mr. Peter Blomme
Associate
peter.blomme@altius.com

The Court of Justice of the European Union delivers judgments regarding the concept of “communication to the public” faster than legal scholars can read and dissect them. While we are eagerly awaiting the Court’s analysis of different types of hyperlinking, it has taken less than two months to follow Advocate General Hogan’s opinion regarding the emailing of evidence containing copyrighted works to a court in legal proceedings.

Dispute giving rise to the preliminary question

The dispute giving rise to the preliminary question has its origin in Sweden. There, two natural persons, both operating a website, ended up before the Swedish civil courts.

One of these parties (A) submitted to the local court an extract of the other party’s (B) website. This extract contained not only text, but also a photograph. It is important to note that under Swedish law anyone, including persons who are not a party to the legal proceedings in question, can request the disclosure of evidence transmitted to the court in the context of those legal proceedings.

In reaction, Party B claimed to hold the copyright to that photograph in the extract of its website, and argued that party A had infringed this copyright by filing it with the court.

The stakes involved become quite clear: if this kind of act could be regarded as a copyright infringement, then it would become quite difficult to provide evidence in court when such evidence would contain material protected by copyright held by the opposing party.

Confronted with the need to strike a balance between copyright law and the rights of defence, the Swedish appeal court referred the case to the Court of Justice.

The Court of Justice's analysis

No communication to the public

In its judgment dated 28 October 2020 (C-637/19, BY v CX, EU:C:2020:863), the Court of Justice has first analysed whether the transmission of copyright protected works by electronic means (such as email) to a court, as evidence in judicial proceedings between individuals, amounts to a "communication to the public" under copyright law.

The Court of Justice has applied the two well-known criteria: for there to be a "communication to the public", 1) there must be a communication of a work, and 2) this communication must be to a public.

The first condition has been fulfilled. Indeed, the user does give access to a protected work with full knowledge of the consequences of that action.

The second condition, however, has not been fulfilled. The communication is not made to a public, which is an indeterminate number of potential recipients, or persons in general. Indeed, the communication has been made to "a clearly defined and closed group of persons holding public service functions within a court", or specific professionals.

The fact that Swedish law allows access to public documents (such as evidence transmitted to courts) is irrelevant according to the Court of Justice when assessing this act by the litigating party, because that access granting concerns another act. That second act is not committed by the litigating party that submitted the work to the court, but by the national court itself on the basis of Swedish law regarding access to public documents. Regarding this second act, the Court of Justice has noted that the Infosoc Directive, which harmonises the right of communication to the public, explicitly states that it does not affect the laws on access to public documents.

Therefore, under copyright law, no infringement was found.

Balance of interests

Secondly, following its recent balancing trend (see for example the judgment of 29 July 2019, C-476/17, Pelham, EU:C:2019:624), the Court of Justice continued that its interpretation under copyright law strikes a fair balance between:

- the interests of the copyright holders in the protection of their intellectual property rights;
- the protection of the interests and fundamental rights of the users of the works; as well as
- the public interest.

Interestingly, the Court of Justice has repeated that the protection of the right to intellectual

property must not be guaranteed in an absolute manner, but must be weighed against the other fundamental rights, such as the right to an effective remedy. Such a right would be seriously compromised if no evidence could be submitted in court if it would contain copyright-protected works.

Thoughts

The Court of Justice is to be commended for this short and clear judgment on the difficult concept of “communication to the public”, and this has come so quickly after Advocate General Hogan’s opinion.

The Court of Justice’s conclusion is in my opinion the only correct one. The right to a fair trial and the rights of defence indeed require that the parties are free to submit all evidence relevant to their arguments. It would be quite shocking if a party could prevent the use of evidence, which is harmful to its case, simply by objecting to the use of its copyrighted work(s) in such a piece of evidence.

In the same vein, the rights of defence could also be relied upon to submit evidence to the court containing personal data under the GDPR. Indeed, in my opinion, the rights of defence should be regarded as a legitimate interest that can serve as a basis for the processing of such data (Article 6(1)(f) GDPR). In particular, the “defence of legal claims” serves as an exception to:

- the prohibition on processing sensitive data (Article 9(2)(f) GDPR);
- the prohibition on processing criminal data (Article 10(1)(1) of the Act of 20 July 2018 implementing the GDPR);
- the right to erasure (Article 17(3)(e) GDPR), the right to restriction of processing (Article 18(2) GDPR), to the right to object (Article 21(1) GDPR);
- the prohibition to transfer personal data outside of the EU without appropriate safeguards (Article 49(1)(e) GDPR).

I suspect that in the coming years the Court of Justice will continue to be called upon to strike a balance between fundamental rights. Copyright holders need to take into account the fact that their intellectual property rights are not absolute, and can, in certain circumstances, be set aside in favour of other fundamental rights. A global consideration of the situation at hand seems to be more important than ever before.