

Hyperlinks & communication to the public according to the CJEU

A cat in a bag?

Léon Dijkman

HOYNG ROKH MONEGIER LLP, Amsterdam

13 September 2017

HOYNG
ROKH
MONEGIER

We do IP.

AMSTERDAM
BRUSSELS
DÜSSELDORF
MADRID
MANNHEIM
MUNICH
PARIS

Tardar Sauce a.k.a. the Grumpy Cat



W



realgrumpycat

Follow

1,140 posts

2.3m followers

36 following

Grumpy Cat The Official Instagram for Grumpy Cat. The World's grumpiest cat!

Grumpy Cat

2.33k Pins

804 Followers

Grumpy kitty

Kitty cats

Cats humor

Cat memes

Funny grumpy cats

Funny cats

Funny memes

Funny stuff



Aubrey Plaza Aubrey O'day Christmas >

She speaks! The first trailer for



I'M NOT RIGHT IN THE HEAD.COM

Grumpy cat quotes are funny to re Tardar Sauce also known as the Grumpy cat is a celebrity and cute

HOYNG
ROKH

AMSTERDAM
BRUSSELS
DÜSSELDORF
MADRID
MANNHEIM

How about copyright?



We will not talk about other uses of the Grumpy Cat (at least today...):



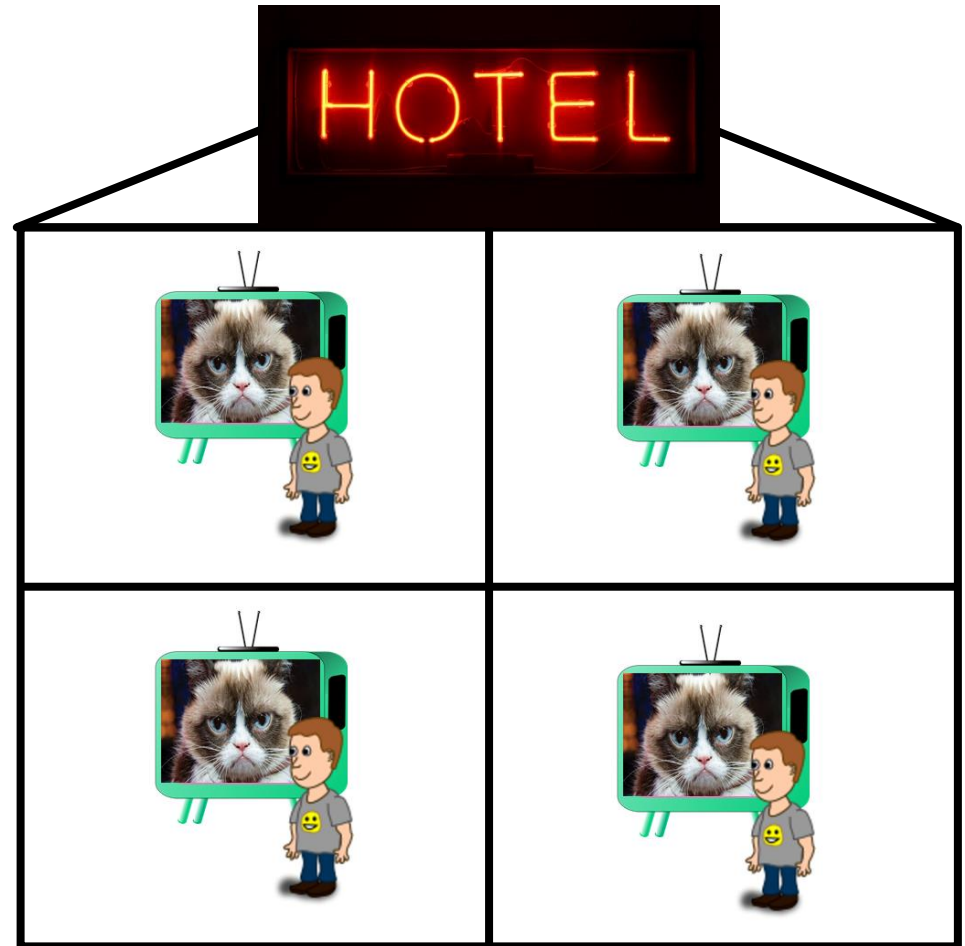
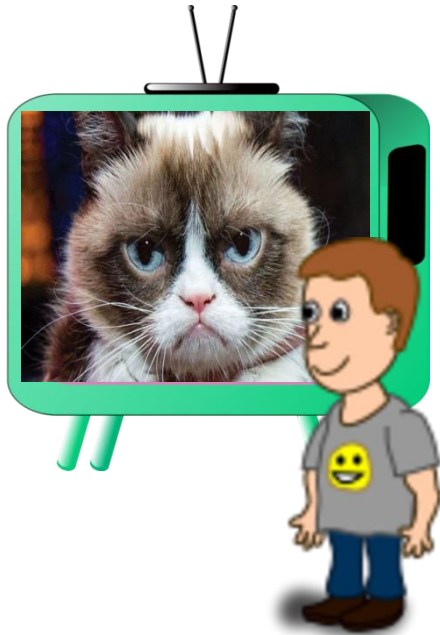
Article 3

Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

(See e.g. C-117/15 (*Reha Training*), par. 37)

C-306/05 (*SGAE/Rafael Hoteles*)



C-306/05 (SGAE/Rafael Hoteles)

- CJEU (par. 42):
 - *The clientele of a hotel forms such a new public.*
 - *The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area.*
 - *On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers.*
 - *In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.*

C-466/12 (*Svensson*)

M News ▶ UK News ▶ Must see

Follow Grumpy Cat, the world's most miserable mog, as she takes a tour of London

Snowshoe Siamese cat Tardar Sauce became an internet hit thanks to her frowny face – and even a VIP trip to meet fans in the capital couldn't make her smile

“OMG Grumpy Cat is coming to London! Check it out <http://www.mirror.co.uk/news/uk-news/follow-grumpy-cat-worlds-most-8486300>”



C-466/12 (Svensson)

- CJEU (par. 26):

“The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them.”

C-466/12 (Svensson)

- CJEU (par. 27+28):

“In those circumstances ... the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.”

“Therefore, since there is no new public, the authorisation of the copyright holders is not required for a communication to the public such as that in the main proceedings.”

C-160/15 (GS Media)



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 bloedplaatjes van Britt Dekker zijn nu uitgelekt. Amper drie weken na de naaqtshoot op een appeltjesbruin Canarisch Eiland (**deze**) liggen de papfotoos van het Parelkje 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 de redactie, toegangspasjes doormidden knippen, logins voor het CMS onklaar maken, servermateriaal 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-hoofdredacteur 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 bloeddodige mevrouw Dekker complimenteren met het keurig aangeharkte voortuintje kan **daar**. Pritt ♥ Britt. **Update**. Vooruit dan.

C-160/15 (*GS Media*)

- CJEU (par. 41):

“However, it follows from the reasoning of those decisions that, by them, the Court intended to refer only to the posting of hyperlinks to works which have been made freely available on another website with the consent of the rightholder, the Court having concluded that there was no communication to the public on the ground that the act of communication in question was not made to a new public.”

C-160/15 (*GS Media*)

- CJEU (par. 49):

“In contrast, where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.”

Copyright: basic framework

- To summarize:
 - Copyright infringement requires (1) an act of communication, (2) targeted at a new public;
 - Where content is placed on the internet with the consent of the right holder, it is directed “at everyone” (=linking does not create new public);
 - Where content is placed on the internet without the consent of the right holder, linking may provide a new public, but only if linker (1) knows content is illegal or (2) acts for profit

Not everyone is happy...

- Is the “new public” criterion in conformity with the Berne Convention?



Back to *Hoteles*

- CJEU (par. 40):

*“It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11bis(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. **Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.**”*

Art. 11 *bis* BC



(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.



- In my view, the criticism is unconvincing:
 - Under the circumstances of *Hoteles*, ‘new organisation’ was defined by virtue of ‘new public’
 - ‘New organisation’ criterion hard to apply
 - In any event, ‘the cattle has left the barn’



CJEU approach: balance

... criterion as formulated by CJEU
... mental gymnastics...

... is a pragmatic approach,
... tise between free internet and
... lers

- NB1: CJEU approach has important consequences for revenue generation on the internet
- NB2: the EU copyright acquis is far from done!

The end



You!

Feel free to contact me for discussion or feedback:
leondijkman@hoyngrokh.com