

Case note on C-275/15 *ITV Broadcasting and Others* (TVCatchup II case)

31.3.2017

Case facts

TVCatchup offers an Internet television retransmission service which enables its users to live-stream free-to-air UK television broadcasts – including those of the claimants, ITV and Channel 4 – over the Internet. Users in the UK only have access to content to which they are legally entitled as per their TV licence and geo-blocking ensures that access is restricted to the UK territory.

The CJEU has dealt with this case twice. First, when the UK High Court¹ referred to the CJEU the question of whether TVCatchup's streaming activities were a "communication to the public" under Article 3(1) of the Information Society Directive 2001/29/EC. The CJEU held that the retransmission of protected works and broadcasts over the Internet was a new communication to the public and therefore must be authorised by the authors concerned.² It should be noted that under UK copyright law, broadcasting organisations enjoy an exclusive right to communicate their broadcasts to the public, subject to certain limitations and exceptions, in a similar way as authors.

Following this decision the High Court ruled that TVCatchup activities were in breach of copyright. However, the Court also found that TVCatchup could perhaps rely on the "reception area" exception in Section 73 of the UK's Copyright, Design and Patents Act (CDPA). This provision applies when "*a wireless broadcast made from a place in the UK is received and immediately re-transmitted by cable*". In this case copyright is not infringed "*if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable and forms part of a qualifying service*"; qualifying services are defined as including (*inter alia*) broadcasting services from the BBC, Channel 4, Channel 5 or the public teletext service.

The broadcasters filed an appeal against this new High Court decision, concerning the interaction between the UK national defence provision and Article 9 of the InfoSoc Directive, "*This Directive shall be without prejudice to provisions concerning in particular [...] access to cable of broadcasting services [...]*." The Appeals Court stayed its proceedings and referred the question to the CJEU, whether "*access to cable of broadcasting services*" allows for national legislation stating that there is no breach of copyright "*in the case of the immediate transmission by cable (including the Internet), in the area of initial broadcast, of works broadcast on TV channels subject to public service obligations.*"

¹ High Court of Justice (Chancery Division) 18.7.2011, Case No: HC10C01057

² CJEU 7.3.2013, C-607/11 (ITV Broadcasting and Others)

Court ruling

The conclusions of the first decision naturally influenced the second case. In both cases the CJEU emphasises the InfoSoc Directive's objective of a high level of protection of authors – in this case broadcasters which enjoy the same rights under UK law – and ensuring appropriate rewards for the use of their work, or broadcast as the case may be.

- Communication to the public

Article 3 InfoSoc Directive states that Member States shall grant authors the exclusive right to permit or forbid any communication to the public of their works, by wire or wireless means. The CJEU underscored the intention of the EU legal framework that authors have the right to authorise each transmission or retransmission of a protected work by a specific technical means. The Court has a broad interpretation of the concept of the right of communication to the public as demonstrated in its earlier decision on TVCatchup, where it found that online retransmission was a new communication to the public, given the fact that the online retransmission of the broadcast uses a different technical means than the original communication. The question of whether there was a “new public” involved in the retransmission was thus deemed to be no longer relevant. Additionally, as the service targeted all persons with an internet connection and paying a UK TV licence, the retransmission was deemed to be communicated to a “public”. As a result the relevant right-holders had to give their consent to both means of transmission separately.

Nine days later, the CJEU decided in a quite similar case concerning the retransmission of broadcasts under Austrian copyright law. Section 17 paragraph 3 of the Austrian Copyright Act states that the simultaneous, complete and unaltered national relay of the ORF service by cables in Austria is considered as part of the original broadcast. Even though the provision favours cable companies to the detriment of copyright holders, the Austrian legislator decided to include the provision to ensure that the population would be provided with access to broadcasts.³ The referring Austrian Court asked whether the transmission of programmes in this provision is a “communication to the public” in the sense of the InfoSoc Directive 2001/29 and the Berne Convention. In this case the CJEU – in contrast to the earlier *ITV Broadcasting and Others* case – focused on the requirement of a “new public”, i.e. a public that has not been taken into account by the authors in granting the original authorization and which appeared to be the decisive factor (while the use of cable as a different technical means recedes into the background). According to the CJEU's analysis the right-holders represented by the claimant are presumably aware of the fact that the broadcasts can be received by everyone in Austria when they granted the original authorization. As the relay by cable is conducted on the national territory, the CJEU followed that there is no “new public” if the relevant public has already been taken into consideration and thus the cable operator would not require, in this case, the agreement of those right-holders.⁴

³ Lusser/Krassnigg-Kulhavy, § 17 UrhG, in Kucsko, urheber.recht (1.12.2007, rdb.at)

⁴ CJEU 16.3.2017, C-138/16 (AKM) – In the same case the CJEU held on the other hand that the transmission of broadcasts via a small (not more than 500 subscribers) communal antenna installation may be a communication

- Continued application of other legal provisions

The main legal issue of the second CJEU decision on TVCatchup was the relationship between national and European law. The CJEU referred to case law and determined the autonomous interpretation of the notion "access to cable of broadcasting services" throughout the European Union. The CJEU set out – in line with the opinion of the Advocate General – that "access to cable" and "retransmission by cable" were two different things, because access to cable did not designate the transmission of audiovisual content as it does in the notion of "retransmission".

Moreover, the Court held that the purpose of Article 9 InfoSoc Directive is for provisions in areas other than those harmonised by the Directive to remain applicable. Given that none of the exceptions and limitations in the exhaustive list of Article 5 InfoSoc Directive apply in this case, it would not be in line with the objectives of the Directive, and especially the high protection it affords to authors, to interpret Article 9 as covering retransmissions. In consequence, a national law that would justify a copyright infringement when retransmitting (including via the internet) TV channels subject to public service obligations by cable, and even if limited to the reception area of the initial broadcast, cannot be considered as an example of "access to cable of broadcasting services".

In this context the CJEU emphasised also that the InfoSoc Directive contains no legal basis justifying a limited degree of protection of public service content.

Implications of the judgment

- EU-wide harmonisation

This second TVCatchup decision is in line with recent CJEU case law that considers certain national exceptions to copyright as not compatible with the EU legal framework.⁵ This reflects the objective of ensuring a harmonised legal framework across the EU. The UK Government has announced that section 73 CDPA⁶ shall be repealed within the context of the Digital Economy Bill (after the European Commission opened an infringement procedure).⁷

to the public, as it enables additionally to the broadcasts of the national broadcasting corporation those of foreign broadcasters.

⁵ For instance CJEU 16.3.2017, C-138/16 (AKM) regarding the national exception for small communal antenna installations; CJEU 16.11.2016, C-301/15 (Soulier); CJEU 9.6.2016, C-470/14 (EGEDA and Others)

⁶ Section 73 CDPA was initially introduced *to facilitate the retransmission of public service broadcasts by cable in areas where aerial reception was poor*. This goal was meanwhile been achieved, namely resulting from the widespread use of digital TV services, therefore the UK government deemed this national provision to no longer be required. Section 73 Copyright Designs and Patents Act 1988 (10.2.2017),

<https://www.gov.uk/government/consultations/section-73-copyright-designs-and-patents-act-1988>

⁷ Section 73 CDPA 1988 to be repealed (3.8.2016), <http://intellectualpropertyblog.fieldfisher.com/2016/section-73-cdpa-1988-to-be-repealed/>; Section 73 Copyright Designs and Patents Act 1988 (10.2.2017),

<https://www.gov.uk/government/consultations/section-73-copyright-designs-and-patents-act-1988>

However in the comparable Austrian case, the Court did not seem to follow the same approach. The CJEU did not refer to its own broad interpretation of the term “communication to the public” as covering simultaneous retransmissions of broadcast services.⁸ This decision has the potential to create a more fragmented legal order at Member States’ level on the question of whether national law can regulate retransmissions and decreases legal certainty as it is difficult to determine which forms of communication have been taken into account by right-holders in granting permission.⁹

- Financial effects

With the repeal of the aforementioned UK law provision, streaming or other simultaneous retransmission of public service broadcasts will not be lawful without permission from the relevant broadcaster, which could demand monetary compensation for such use. According to the UK Government this would close an existing loophole, as right-holders should not be deprived of the benefits.¹⁰ TVCatchup has stated that it has adapted its technology and now offers a great media selection without infringing copyright.¹¹ Only time will tell the results of negotiations with other stakeholders.¹²

In this regard, it is important to bear in mind that fees for the communication of copyright works and those for the retransmission of broadcasts must be distinguished, as they involve different rights holders.¹³

- Must-carry rules

The CJEU ruling indicated that the intention of Article 9 InfoSoc Directive is “*to maintain the provisions applicable in areas other than that harmonized by the Directive*”,¹⁴ but it fell short of explaining which areas. Though the Court did not clarify the exact scope of Article 9, its statement that a provision such as the “reception area” exception does not fall under it, as it is not listed under Article 5 of the Directive, contributed to more legal certainty.

However, the question remains whether the InfoSoc Directive would allow a defence to infringement by cable retransmission based on a “must carry” obligation, the second scenario Section 73 CDPA provides where a broadcaster's copyright is not infringed. This element was not part of the questions referred to the CJEU.¹⁵ Taking the Court’s considerations, the

⁸ CJEU 16.3.2017, C-138/16 (AKM)

⁹ In this context, see the article “Does the retransmission of a broadcast infringe copyright? It might depend on how the broadcast is retransmitted” (24.3.2017), <http://www.osborneclarke.com/insights/does-the-retransmission-of-a-broadcast-infringe-copyright-it-might-depend-on-how-the-broadcast-is-retransmitted/>

¹⁰ Section 73 Copyright Designs and Patents Act 1988 (10.2.2017), <https://www.gov.uk/government/consultations/section-73-copyright-designs-and-patents-act-1988>

¹¹ Legal ruling on TVCatchup (1.3.2017) <http://informitv.com/2017/03/01/legal-ruling-on-tvcatchup/>

¹² Williams, ITV’s court victory over online broadcasts sets up showdown with Virgin Media (5.3.2017), <http://www.telegraph.co.uk/business/2017/03/05/itvs-court-victory-online-broadcasts-sets-showdown-virgin-media/>

¹³ The decision CJEU 16.3.2017, C-138/16 (Zürs.net) might re-open the question of financial compensation under certain circumstances.

¹⁴ Point 26 CJEU 1.3.2017, C-275/15 (ITV Broadcasting and Others)

¹⁵ For the UK, this question would seem to be no longer relevant because the repeal of (the whole of) Section 73 CDPA 1988 would also annul the defence based on a “relevant requirement” in Sec. 73(2) sub (a).

objective of the Directive and the similarities of the context of the provisions into account, it seems that the answer would have to be the same as for the "reception area" exception. After all, the InfoSoc Directive aims to harmonise the legal framework for all communication to the public of protected works, of which retransmission, by cable or via the Internet, is one of the sub-categories, and there is no indication in the exhaustive list of exceptions or limitations that such use could be exempted.

A similar conclusion that national must-carry rules must respect IP rights was made, in *obiter dictum*, by the Paris Court of Appeals in February 2016, in a case concerning the simultaneous Internet retransmission of broadcasts from the French public broadcaster.¹⁶

¹⁶ See <https://www.legalis.net/jurisprudences/cour-dappel-de-paris-pole-5-ch-1-arret-du-2-fevrier-2016/>