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TV Catchup – Streaming is a “communication to the public”

*ITV Broadcasting Ltd & 6 Ors v TV Catchup*¹

SPEED READ

Last week, the Court of Justice of the European Union (CJEU) ruled that online streaming constitutes a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29 (InfoSoc Directive)² requiring authorisation from the rights owner. The Court’s ruling clarifies the law and provides comfort to rights owners that their right to authorise or prohibit communication to the public of their works is not exhausted by the first communication or broadcast.

Transmission or retransmission of the works, including by way of streaming, is a separate communication, the Court says, that requires the permission of the rights owner. The decision will be welcome to broadcasting organisations who have been directly competing with services such as TV Catchup that offer a one-stop-shop internet streaming platform. On that basis the somewhat artificial question of whether the communication is to a “new public” becomes redundant and this removes a potential uncertainty created by earlier rulings of the CJEU.

¹ Case C-607/11 *ITV Broadcasting Ltd & 6 Ors v TV Catchup (TV Catchup)*.

² Council Directive 2001/29/EC of 22 May 2001 On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/17, (*InfoSoc Directive*).

Background

TV Catchup (TVC) operates an online platform that retransmits intercepted terrestrial and satellite TV channels, enabling subscribers to watch "near-live" UK television on their computers, tablets, mobile phones and other devices. TVC's service is funded by advertising before the live stream is viewed³ (accounting for the delay), as well as by "in-skin advertising". Several UK commercial broadcasters (including ITV, Channel 4 and Channel 5) brought proceedings before the English High Court contending that the streaming of their broadcasts (and films and other works comprised therein) is an unauthorised "communication to the public" of their copyright works.⁴ The English Court took the view that it was not clear from previous CJEU case law that there was a "communication to the public" under circumstances such as this where works are streamed to subscribers who are already entitled to access the original broadcast signals via TVs in their own homes, and referred this question to the CJEU.⁵ The English Court also asked whether it made a difference to the CJEU's response if subscribers were only allowed a one-to-one connection to TVC's server, and whether the

fact that TVC was acting in direct competition with the commercial broadcasters, both in terms of viewers and advertising revenues, should have any effect on the decision.⁶

³ The advertisements already contained in the original broadcast are left unchanged and sent to the user as part of the stream.

⁴ Prohibited by s. 20 of the Copyright Designs and Patents Act 1988, and by Article 3 (1) of the InfoSoc Directive. The claimants also alleged that copyright in their broadcasts and films was infringed by TVC making, or authorizing the making, of transient copies of the works in TVC's servers and on screens of users, *ITV Broadcasting Limited & 6 Ors v TV Catchup* [2011] EWHC 1874 (Pat), at para 16.

⁵ Mr. Justice Floyd having deferred giving judgment until the decision of the CJEU in Joined Cases C-431/09 and C-432/09 *Airfield NV and Canal Digital NV v Belgische Vereniging van Auteurs, Compositoren en Uitgevers CVBA (Sabam) and Airfield NV v Agicoa Belgium BVBA* [2011] (*Airfield*) was not persuaded that the principle of law engaged in *TV Catchup* was rendered acte claire by *Airfield*.

⁶ *ITV Broadcasting Limited & 4 Ors v TV Catchup Limited* [2011] EWHC 2977 (Pat), at para 24.

The Judgment

The CJEU in considering the questions of the referring court, first determined the interpretation of "communication", within the meaning of Article 3(1) of the InfoSoc Directive, in order to ascertain whether TVC's activity came within the scope of this concept. Having

decided that it did, it went on to determine whether this communication of the protected works was to a "public", within the meaning of the same Article. The CJEU also answered this in the affirmative.

Was there a ‘communication’?

The CJEU, acknowledging that the InfoSoc Directive did not exhaustively define the concept of “communication”, held that its meaning and scope had to be understood in the context in which it occurred, as well as in the light of the principal objective of the Directive to establish a high level of protection for authors, allowing them to obtain an appropriate reward for the use of their work.⁷

“Communication to the public” had to be interpreted broadly; it was clear that this authorial right covered any transmission or retransmission of a work to the public not present at the place where the communication originates, by wire or wireless means, including broadcasting.⁸ Furthermore the European Union legislature intended that when a given work is put to multiple use, with each use having a different technical means of transmission (as was the case here, first as a terrestrial/satellite broadcast and then an internet stream), each transmission or retransmission of that work had to, “*as a rule, be individually authorised by the author of the work in question*”.⁹ The CJEU held that this interpretation was apparent from Article 3(3) of the InfoSoc Directive, which provides that authorising the inclusion of protected works in a communication to the public does not exhaust the right to authorise or prohibit other communications of those works to the public. Articles 2 and 8 of the Cable and Satellite Directive also supported this interpretation, as they required fresh authorisation for an unaltered retransmission of TV or Radio programmes containing protected works, even though those programmes may already be received in their catchment area by other technical means (such as by wireless means or terrestrial networks).¹⁰

The CJEU concluded that as TVC was making the works in the original “terrestrial” TV broadcast available over the

internet (and hence using a different “technical means” to retransmit the broadcast) this retransmission was a “communication” within the meaning of the Article 3(1) of the InfoSoc Directive. Consequently it required the authorisation of the authors of the retransmitted works when these are communicated to the public.

The CJEU was emphatic that TVC’s internet streaming was not a mere technical intervention to maintain and/or improve the quality of the reception of the terrestrial TV broadcast in its catchment area.¹¹ The CJEU did however acknowledge that had this been its sole purpose, authorisation would not have been required.¹²

⁷ Joined cases C-403/08 and C-429/08 *The Football Association Premier League Ltd and Others v QC Leisure and Others*, and *Karen Murphy v Media Protection Services Ltd* [2011]. (FAPL) para 186.

⁸ *InfoSoc Directive* Recital 23.

⁹ *TV Catchup* para 24.

¹⁰ Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission. OJ 1993 L 248/15 (*SatCab Directive*). The reference of the CJEU to the latter Directive is in line with an established principle that in order to achieve harmonisation concepts in European law should be given the same meaning in related Directives.

¹¹ For example as is the case with the installation and use of transceivers.

¹² *TV Catchup* para 28, referring to *FAPL* para 194, and *Airfield* paras 74 and 79. *InfoSoc Directive* Recital 27, “*The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive*”.

Was this communication to a “public”?

The CJEU next ascertained whether the commercial broadcasters’ protected works had in fact been communicated to a “public” by TVC. The CJEU noted that the term “public” in Article 3(1) of the InfoSoc Directive denotes an “*indeterminate number of potential recipients*” and implies “*a fairly large number of persons*”, as adjudged in the *SGAE* case.¹³ The cumulative effect of access to the works in succession, as well as simultaneously had to be taken into account. Responding to the English Court’s question, the CJEU held that it was “irrelevant” that the potential recipients of TVC’s streaming service accessed the works through a one-to-one service, as this did not prevent a large number of persons having access to the same work at the same time. In this instance TVC’s streaming of the protected works was aimed at all persons resident in the United Kingdom who have an internet connection and who claim to hold a television licence. Those persons may access the protected works at the same time in the context of the “live streaming” of television programmes over the internet. The CJEU held that TVC’s internet retransmission of the protected works, fulfilling the *SGAE* criteria as it did, was a communication to a “public” within the meaning of Article 3(1) of the InfoSoc Directive.

But was the communication to a “new public”; a public not considered by the authors of the protected works when they authorised the broadcasts in question, as appeared to be necessary from the CJEU’s prior case law?¹⁴ The CJEU stated that it did not need to answer this question, distinguishing the circumstances of the TVC case from those of the *SGAE*, *FAPL* and *Airfield* cases. In the latter cases the deliberate intervention of the operator made the original broadcasts containing the protected works available to a different public. The CJEU stated that in this case one was dealing with a new transmission, which required an individual and separate authorisation from the copyright owners.¹⁵

¹³ Case C- 306/05 *Sociedad General de Autores y Editores de Espana v Rafael Hoteles SL* [2007] BUS. L. R. (*SGAE*) paras 38 and 39.

¹⁴ *Ibid* at para 40, “*a public different to the public at which the original act of the communication of the work is directed*”, *FAPL* at para 197, “*a public that was not taken into account by the authors of the protected works when they authorized their use by the communication to the original public*”; *Airfield* para 72.

¹⁵ *TV Catchup* para 39.

Does making a profit and being in direct competition matter?

The CJEU held that it was not “*conclusively determinative*” that the profit making nature of TVC’s streaming service (being funded as it was by advertising) decided whether a retransmission was to be categorised as a “communication” within the meaning of Article 3(1) of the InfoSoc Directive. In so doing it adopted a stance in line with the Court’s earlier case law: in *SGAE* the court had noted that “*the pursuit of profit is not a necessary condition for the existence of a communication to the public*”; and in *FAPL* the Court also held that profit is not “*irrelevant*” but nor is it

determinative.¹⁶ The CJEU was however clear that its findings stood regardless of whether or not retransmissions are made in direct competition with the original commercial broadcasters’ offerings.

¹⁶ *SGAE* para 44; *FAPL* para 204.

Commentary

This is a decisive and confident judgment from the CJEU, reaching a decision without an Advocate General’s Opinion, and in a relatively speedy 15 months from referral from the English Court. The CJEU firmly puts the act of online streaming into the restricted copyright category requiring rights owners’ authorisation. It is arguably not a surprising judgment given the broad drafting and clear intention contained in the InfoSoc Directive’s recitals of establishing a high level of protection of authors in the online environment, allowing them to obtain an appropriate reward for the use of their works.

Importantly the CJEU decision reaffirms that under Article 3(3) of the InfoSoc Directive, authorising the

inclusion of protected works in a “communication to the public”, including online broadcasts, does not “exhaust” the right to authorise or prohibit other communications of those works to the public. The CJEU’s acknowledgment of the “non exhaustion” of broadcast copyright should also have come as no surprise, bearing in mind that Article 3 (3) is clearly worded, it is bolstered by Recital 29 of the same Directive¹⁷ and well supported by the jurisprudence of the CJEU.¹⁸ It had however been thrown into question by Advocate General Kokott’s Opinion in *FAPL*¹⁹ when she found that the *FAPL*’s copyrights in the broadcasts of live football matches were exhausted.

The important question to be asked in future cases along similar lines will be whether the technical means used by the defendant are limited to maintaining or improving the quality of reception of a pre-existing transmission; or whether the technical means amounts to a further transmission or re-transmission.

The case will now return to the English High Court for judgment, with the CJEU having confirmed Mr. Justice Floyd’s provisional view that, “*the acts of TVC in intercepting the claimants’ broadcasts (and works comprised therein) and making them available via the internet amount to acts of communication to the public*”.²⁰

¹⁷ *Info Soc Directive*, Recital 29, “*The question of exhaustion does not arise in the case of services, and online services in particular*”.

¹⁸ Case C-62/79 *Coditel*; Case C-262/81 *Coditel II*; Case C-158/86 *Warner Brothers/Christiansen/Metronome Video*; Case C-395/87 *Ministere Public/Tournier*; Case C- 61/97 *Videogramdistributörer/Lanserdisken*.

¹⁹ Joined cases C-403/08 and C-429/08 *The Football Association Premier League Ltd and Others v QC Leisure and Others*, and *Karen Murphy v Media Protection Services Ltd* [2011]. Opinion of AG Kokott, para 200.

²⁰ *ITV Broadcasting Limits & 6 Ors v TV Catchup* [2011] EWHC 1874 (Pat), at para 95.

What are the commercial implications of the decision?

The *TV Catchup* judgment is undoubtedly extremely welcome to broadcasters and authors. It does not rule out the development of new technologies to re-transmit works – it just means that copyright owners cannot be excluded from decisions about re-using their content. TVC, boasting to being Europe’s first all-in-one internet service, claims that the loss of 30% of users as a result of

the judgment is more than adequately compensated for by the addition of many new channels seeking to join. Its platform may be an attractive proposition for those terrestrial and satellite broadcast channels that do not have their own internet streaming platform.

Key contacts

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