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Copyright, technology and the exploitation of audiovisual works in the EU

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2014-4

The Influence of New Technologies on Copyright

LEAD ARTICLE

Copyright, technology and the exploitation of audiovisual works in the EU

- Current Landscape: what rights of exploitation?
- Internet: a new form of communication to the public?
- Cable retransmission: a disappearing form of communication to the public?

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The Influence of New Technologies on Copyright

Foreword

Technology affects economics and economics affects regulation. This is generally how the chain operates. The rules usually come later, and sometimes they may become outdated.

The last time the European rules on copyright were adapted to fit technological developments was almost fifteen years ago. This had a particular effect on the notion of communication to the public, which includes the right of the public to have access to copyright protected works, at their preferred place and time. In the meantime many audiovisual services developed online, yet it is not always clear whether certain acts of making audiovisual content available online fall within the scope of the right to communicate to the public, as defined by the InfoSoc Directive. Another interesting aspect is knowing when there has been a case of retransmission under the SatCab Directive, which has remained unchanged since 1993. Might it be timely to consider a REFIT exercise for these directives?

The Lead Article of this edition of IRIS *plus* explores the criteria that have been developed over the years by the Court of Justice of the European Union (CJEU) to assess whether there has been a “communication to the public” under the terms of the InfoSoc Directive. These criteria are used to determine the identity of the “user”, the definition of “the public”, the profit-making nature of communication to the public and the concept of “new public”.

Assessing each of these criteria may become a fairly complex exercise when it comes to live streams of TV broadcasts or hyper-linking to internet sites, where standard hyperlinks, embedded links and framing links are distinguished from one another. The authors of the Lead Article, Lucie Guibault and João Pedro Quintais, explore the European jurisprudence on each of these cases and guide us through the different scenarios of technical restrictions, subsequent unavailability of the content, contractual restrictions, access to unauthorised content and unfair competition.

Cable retransmission is another issue relevant to addressing technological development and the scope of copyright rules. In this case the usual suspect is the SatCab Directive and the requirement of a “retransmission” to justify mandatory collective administration. The authors consider in depth the case of “direct injection”, taking into account recent decisions of the Dutch and Norwegian courts that held there is no retransmission where there is no “secondary communication” following the “primary communication”. It is worth noting that the CJEU has recently been asked to address this question, following a Belgian preliminary ruling.

The Related Reporting in this edition of IRIS *plus* covers rulings from the CJEU and from national courts. It gives an insight into recent developments in private copying and liability for service providers in the case of online infringement. Interesting cases of non-liability are also included.

The Zoom section focuses on the issue of cross-border access to online content. Francisco Cabrera and Sophie Valais give an overview of the most recent initiatives that have been taken at EU level, i.e. the “Licences for Europe” stakeholder dialogue and the public consultation on the review of EU copyright rules, both launched in 2013; they also look into the announcements made by the newly elected Commission regarding future programmes.

Strasbourg, November 2014

Maja Cappello
IRIS Coordinator
Head of the Department for Legal Information
European Audiovisual Observatory

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Copyright, technology and the exploitation of audiovisual works in the EU

*Lucie Guibault and João Pedro Quintais
Institute for Information Law (IViR), University of Amsterdam*

I. Introduction

Two generations ago,¹ members of the European public watched movies in cinema theatres and television programmes on their local or national broadcasters' television channels. Roughly one generation ago, the advent of satellite broadcasting and cable retransmission opened new horizons for makers of audiovisual works and the viewing public alike: foreign productions were accessible not only in cinemas but also from the comfort of people's own homes. Today, less than half a generation later, digital technology allows an increasingly higher proportion of the European public to screen movies and programmes from all over the world on their high definition television sets, computer equipment and mobile devices. Audiovisual works are now available everywhere through broadcasting (including by satellite), rebroadcasting, webcasting, pay-per-view, video-on-demand, streaming, internet-based video platforms, video on demand (VoD) services, and countless other channels. Most of these services are offered on a territorial basis and subject to different conditions.²

To keep up with the progress of digital technology, new business models for the production and distribution of films and television programmes continuously emerge, in an attempt to match the supply of audiovisual works to the demand for those works. At the root of these business models is the rightsholder's expectation that the law grants in each territory of operation the right to authorise or prohibit others from exploiting their works; or, in absence of an exclusive right, that they can at least count on the payment of an equitable remuneration for the use of their works. New business models promoting innovative forms of exploitation of works are developed only if rightsholders and their assignees can rely on the existing copyright framework to license and enforce rights in their audiovisual works in each territory. Without the protection of the law, no income could be generated from the exploitation of these works and no new investment would be made.

Over the years, the European copyright framework has undergone a number of adaptations to adjust the regime to each new technological reality. Directive 2001/29/EC on copyright and related rights in the information society (InfoSoc) has brought the most recent change to the general right of communication to the public. It has done so by the insertion of a right to make works publicly available, in such a way that members of the public may access them from a place and at a time individually chosen by them. New forms of online exploitation of works, like streaming, video-on-

1) The length of one generation is estimated to last about 25 years: <http://en.wikipedia.org/wiki/Generation>

2) Helberger N. et al., *Digital Consumers and the Law: Towards a Cohesive European Framework*, Kluwer Law International: Alphen aan den Rijn, 2013.

demand or webcasting, arguably fall within the scope of the broad right of communication to the public. Or do they? The question arises whether these, and future, acts of communication to the public are indeed covered by the owner's exclusive right. In other words, following which criteria can a form of exploitation be said to amount to an act of communication to the public in the sense of the European copyright acquis? National courts, but more importantly the Court of Justice of the European Union (CJEU), play an important role in the interpretation and delineation of the scope of the exclusive right of communication to the public.

However, the advent of digital technologies can also seriously disrupt existing business models, for example when new forms of exploitation push older forms of exploitation into obsolescence. Legal uncertainty is likely to arise where a business model is based on a specific, technology-dependent rights system. This situation has arisen in several Member States with respect to cable retransmission: the right of remuneration for the cable retransmission of programs is governed under the European acquis by a specific legal regime.³ Directive 93/83/EEC on satellite broadcasting and cable retransmission (SatCab),⁴ defines 'cable retransmission' as 'the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.'

But what if no act of 'retransmission' takes place anymore? How must the law be interpreted and what consequences could it have for rightsholders?⁵ Put differently, if what broadcasters do no longer qualifies as cable retransmission under the SatCab Directive, will it qualify as a communication to the public under the InfoSoc Directive? Are rightsholders then entitled to claim royalties on the basis of their exclusive right, rather than an equitable remuneration for rebroadcasting?

This article explores, in two different but related ways, how digital networked technology has an impact on the exploitation of audiovisual works under the applicable EU copyright regulation. Firstly, it analyses whether the exploitation of works via the internet falls within the scope of the right of communication to the public; secondly it considers how digital technology affects the exercise of specific forms of communication to the public, particularly the right of cable retransmission. This article is further structured as follows: section 2 gives a general overview of the legal framework that constitutes the European acquis on the subject of the right of communication to the public. Section 3 analyses the impact of internet use as a mode of exploitation of audiovisual works, with particular reference to the CJEU interpretation of 'communication to the public' in the InfoSoc Directive in relation to communication on the Internet. On the basis of the relevant case law of the CJEU and of national jurisdictions, section 4 discusses the impact of digital technology on the regulatory regime applicable to cable retransmission and its impact on the actions of cable distributors. Section 5 draws conclusions on the scope of the right of communication to the public, the future of the cable retransmission right and the exercise of exclusive rights in the digital environment.

II. Current Landscape: what rights of exploitation?

1. Legal Framework

Economic rights can be distinguished as rights to authorise or prohibit on the one hand, and remuneration rights on the other. Under the Information Society Directive, the three main clusters of economic rights (rights of reproduction, distribution and communication to the public) have been

3) Hugenoltz P. B. "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", IRIS *plus* 2009-8, European Audiovisual Observatory, Strasbourg, 2009, p. 7.

4) 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 L 248, 06.10.1993, pp. 15–21.

5) Triaille J.-P. et al. *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*, De Wolf and partners, PN/2009-35/D, Brussels, December 2013, p. 199 et seq.

broadly harmonised for works of authorship and related subject matter. The Directive leans heavily on the WIPO 'Internet Treaties' (WCT and WPPT), which in turn build on the Berne Convention, the Rome Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Article 2 of the Directive sets out a broad, comprehensive definition of the reproduction right, covering all relevant acts of reproduction, whether on-line or off-line, in material or immaterial form. Adapting the *acquis communautaire* to the needs of all rightsholders, under the InfoSoc Directive the reproduction right is conferred on authors, performers, phonogram and film producers and broadcasting organisations. In respect of the acts protected by the reproduction right, each of these enjoys the same level of protection of their works or other subject matter.⁶ In practice, the very broad wording of the right of reproduction ensures an overlap with the right of communication to the public. Indeed, the right of reproduction covers almost any use of a work or other subject matter, even where similar acts of use in the analogue world (such as receiving a television signal or reading a book) would fall well outside the scope of what intellectual property aims to protect.⁷ The reproduction right extends in practice to all parties involved in the dissemination and use of protected works and other subject matter, even where in the physical distribution environment their roles – especially those of mere carriers – would not have involved restricted acts. But the broad scope of the reproduction right also increases the number of restricted acts of content providers such as broadcasters or online providers. That has the effect that multiple licenses are required for unitary acts of usage.⁸

In accordance with Europe's international obligations,⁹ Article 3(1) of the InfoSoc Directive grants authors a general 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'. One of the main objectives of the provision is to make it clear that this right covers interactive 'on-demand' services. It ensures legal certainty by confirming that the right of communication to the public is also relevant when members of the public have individual access, from different places and at different times, to a work that is on a publicly accessible site. This provision regulates not only acts of making works available online, but also more traditional methods of communicating works to the public, such as broadcasting. Indeed, one of the most challenging aspects of the right of making available is its delineation vis-à-vis broadcasting. A clear distinction is important because it provides legal certainty for all stakeholders.

Pursuant to Article 1(2) of the InfoSoc Directive, the framework leaves unaffected the rules applicable to broadcasting of programmes by satellite and cable retransmission. Cable retransmission is regulated under Article 8 of the SatCab Directive, which states that 'Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators'. According to Article 9 of the SatCab Directive, 'the right of copyright owners and holders or related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society'. As mentioned in the introduction to this article, the regime that applies to cable retransmission is characterised as

6) Guibault L. "Le tir manqué de la Directive européenne sur le droit d'auteur dans la société de l'information", *Cahiers de propriété intellectuelle*, 2003-2, p. 545.

7) See inter alia, Hugenholtz P. B. "Adapting copyright to the information superhighway", in Hugenholtz P.B. (ed.), *The future of copyright in a digital environment*, Kluwer Law International, The Hague, 1996, pp. 81-102 at pp. 92-93; Westkamp G. "Towards access control in UK Copyright law?", *Cri*, 2003-1, pp. 11-16; Hart M. "The Copyright in the information society directive; an overview", *EIPR*, 2002, pp. 58-64; Spoor J. "The copyright approach to copying on the internet: (over)stretching the reproduction right?", in Hugenholtz P.B. (ed.), 1996, *op. cit.*, pp. 67-79.

8) Guibault L. et al., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Report to the European Commission, DG Internal Market, February 2007, p. 24.

9) Article 8 of the WIPO Copyright Treaty and Art. 10 and 14 WIPO Performances and Phonograms Treaty, both signed in Geneva, on 21 December 1996.

'the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State'. If the transmission does not meet all of the requirements of the definition, the regime of mandatory collective administration of rights does not apply, as we shall see in section 4 below.¹⁰

Since the adoption of the InfoSoc Directive in 2001, the need for interpretation of the notion of 'communication to the public' has given rise to numerous requests to the CJEU for a preliminary ruling. Interestingly, the cases have shown a progression in the modes of exploitation submitted for consideration by the Court, from broadcasting signals through terrestrial transmitters between subsidiaries of a single organisation,¹¹ to television and/or radio installations in hotel bedrooms through which the hotelier distributes a broadcast signal,¹² to the transmission of broadcasts of copyright protected works in a pub,¹³ to a single communication to the public by satellite,¹⁴ to playing music in the waiting room of a dentist's office.¹⁵ Through the passage of time, the Court developed several criteria for the assessment of whether a specific act of communication constitutes a 'communication to the public'. Four main criteria can be distilled from this series of cases:

1) *The identity of the 'user'*

According to the CJEU, when making a communication to the public, the 'user' (i.e. the person using a means of communication) makes an act of communication when she intervenes, with full knowledge of the consequences of her action, to give her customers access to a broadcast containing the protected work. Without that intervention the customers, although physically within the area covered by the broadcast, would not otherwise be able to enjoy the broadcast work.¹⁶ This criterion received a fairly flexible interpretation in the Premier League case, the Del Corso case and the Phonographic performance case: transmitting football matches in a pub on a television screen, broadcasting music in hotel rooms and broadcasting music in a dental practice have been considered to involve the intervention of the user, as defined.

2) *Definition of the 'public'*

The 'public' has been consistently interpreted as encompassing an indeterminate and fairly large number of potential beneficiaries of the communication. In the Phonographic Performance case, the Court summarised its previous case law as follows:

[A]s regards, the criterion of 'a fairly large number of people', the Court has made clear that this is intended to indicate that, on the one hand, the concept of public encompasses a certain de minimis threshold, which excludes from the concept groups of persons which are too small, or insignificant. On the other hand, in order to determine that number, account must be taken of the cumulative effects of making works available to potential audiences. In that connection, not only is it relevant to know how many persons have access to the same work at the same time but it is also necessary to know how many of them have access to it in succession.¹⁷

To fall within the terms of the InfoSoc Directive, the communication must be made at a distance to a public that is not present at the place where the communication originates, within the meaning

10) Hugenholtz P. B. "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", IRIS plus 2009-8, European Audiovisual Observatory, Strasbourg, 2009, p. 7.

11) CJEU 14 July 2005, Case C-192/04, *Lagardère Active Broadcast v. Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*, Reports of Cases 2005 I-07199 (*Lagardère*)

12) CJEU 7 December 2006, Case C-306/05 (*SGAE v. Rafael Hoteles*); CJEU 15 March 2012, Case C-162/10 (*Phonographic Performance (Ireland)*).

13) CJEU 4 October 2011, Case C-403/08 (*FA Premier League v. QC Leisure* and Case C-429/08 *Karen Murphy v. Media Protection Services Limited*).

14) CJEU 13 October 2011, Cases C-431/09 and C-432/09 (*Airfield/AGICOA*).

15) CJEU 15 March 2012, Case C-135/10 (*Società Consortile Fonografici (SCF)/Del Corso*).

16) CJEU 15 March 2012, Case C-162/10 (*Phonographic Performance (Ireland)*), para. 31.

17) CJEU 15 March 2012, Case C-162/10 (*Phonographic Performance (Ireland)*), para. 35.

of recital 23 in the preamble to the Copyright Directive.¹⁸ According to the Court, the public that is the audience of the communication should be both targeted by the user and receptive, in one way or another, to that communication, and not merely 'caught' by chance.¹⁹

3) *The profit-making nature of communication to the public*

Referring to the decision in the SGAE case,²⁰ the Court has reiterated in several decisions that, as a third criterion, it is not irrelevant that a 'communication' within the meaning of Article 3(1) of Directive 2001/29 is of a profit-making nature.²¹ The Court has justified this reasoning by saying that in a situation such as that in the Premier League case, 'it is indisputable that the proprietor transmits the broadcast works in his public house in order to benefit therefrom and that that transmission is liable to attract customers to whom the works transmitted are of interest. Consequently, the transmission in question has an effect upon the number of people going to that establishment and, ultimately, on its financial results'. This criterion was in fact one of the main factors in the Del Corso case that led the Court to dismiss the playing of music in the waiting room of a dentist's office as a communication to the public under Article 3 of the InfoSoc Directive.²²

The requirement developed by the Court concerning the profit-making character of the communication is less straightforward than the first two criteria. This requirement is difficult to explain in view of the wording of Article 3(1) of the InfoSoc Directive and the corresponding international obligations in the WCT and WPPT. None of these statutory provisions even suggest that the entity making the communication should be motivated by profit. In fact the reference passage in the SGAE case the Court seems to downplay the importance of this factor:

*Therefore, even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature in circumstances such as those in the main proceedings.*²³

Considering the cautious wording used by the Court, it is remarkable that this requirement received so much attention in the later cases. Moreover, it is surprising that this interpretation was retained, as it seems to contradict the age-old licensing practice of collective management organisations (CMOs) in the area of public performance of musical works. CMOs grant licenses to users of musical works who perform the works in public, irrespective of the commercial nature of the activity pursued. Hence, licenses are commonly issued to public and social institutions like hospitals, care homes and schools. This begs the question whether the Court's interpretation would affect this traditional practice of CMOs.

4) *The concept of 'new' public*

In the SGAE, Airfield and Premier League rulings, the CJEU held that copyright owners must authorise any communication to the public. Such authorisation must be obtained in particular where the communication makes the protected works accessible to a 'new' public, that is to say, a public that was not envisaged by the authors of the protected works within the framework of an authorisation given to another person.²⁴ The origin of this requirement is also rather vague. The Court explained that the criterion has its origin in recital 17 of Directive 93/83, according to which the rightsholders must be ensured an appropriate remuneration for the communication to the public by satellite of their works, that takes account of all aspects of the broadcast, such as its

18) CJEU 4 October 2011, Case C-403/08 (*FA Premier League v. QC Leisure*) and Case C-429/08 (*Karen Murphy v. Media Protection Services Limited*), para. 203.

19) CJEU 15 March 2012, Case C-135/10 (*Società Consortile Fonografici (SCF)/Del Corso*), para. 91.

20) CJEU 7 December 2006, Case C-306/05, (*SGAE v. Rafael Hoteles*), para. 44.

21) CJEU 4 October 2011, Case C-403/08, para. 204.

22) CJEU 15 March 2012, Case C-135/10 (*Società Consortile Fonografici (SCF)/Del Corso*), para. 97.

23) CJEU 7 December 2006, Case C-306/05, (*SGAE v. Rafael Hoteles*), para. 44

24) CJEU 13 October 2011, Cases C-431/09 and C-432-09 (*Airfield/AGICOA*), para. 72.

actual audience and its potential audience. In other words, the Court consistently links the concept of 'potential audience' to that of 'new public', both of which are very ambiguous terms, prone to various interpretations and difficult to specify in practice.

2. Rights of exploitation in the audiovisual sector

Against this backdrop, the predominant exploitation model in films is currently individual management based on exclusivity and contractual freedom. Unlike the model followed in music production, film producers aggregate all relevant rights; this solves problems of fragmentation, the principal obstacle to multi-territorial licenses. In spite of this the EU licensing market for films is mostly national, mirroring a territorially-based copyright regime. From the recent Licenses for Europe initiative, it appears that the audiovisual sector is aware of the challenges posed by cross-border access, and that it seeks to address them within a framework of copyright exclusivity and flexible market based licensing.²⁵ In that vein, pledges were made to further develop cross-border portability of subscription services for consumers and to improve identification and discoverability of audiovisual content online, with an aim to increase legal offers.²⁶ It is believed that legal offers constitute the most effective means to curb mass scale online piracy.²⁷ From a consumer perspective, access restrictions on audiovisual services caused by territorial exploitation and technical measures are problematic and give rise to complaints of unjustified price discrimination, artificial partitioning of markets and lack of transparency. Most online service providers share some of these concerns with cross-border availability of content.²⁸

Copyright law is a key determinant in the development of this landscape. Because most online dissemination of audiovisual works encompasses technical reproductions and/or online dissemination of works (browsing, downloading, streaming, uploading, linking), the interpretation of the scope of the rights of reproduction and public communication/making available has an impact on the legal status of existing and future offers. The variable scope of these rights, the challenges of localising of the making available right, and the potential application of both rights to a single act of digital transmission, raise challenges for licensing and enforcement which are met with diverging positions by each category of rightsholder, service providers and consumers.²⁹

In that respect, the InfoSoc Directive provides normative guidance by recommending that copyright law, 'should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation', to face technological development, rather than through 'new concepts for the protection of intellectual property'.³⁰ When interpreting the acquis and its Member State progeny, national courts and the CJEU seem to follow this guidance and are thus shaping the scope of exclusive rights in old and new forms of exploitation of audiovisual works, with an emphasis on the right of communication to the public. The following sections explore in greater detail the relevant case law and its implications.

25) See the following documents coming out of the Licences for Europe Audiovisual Subgroup discussions 2013: *Language Versioning...; Statement by EuroVoD on Portability... ; Joint Statement on Cross-border Portability of lawfully-acquired Audiovisual Content*. All documents are available at the website of Licences for Europe: <http://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site>

26) Licences for Europe, Ten pledges to bring more content online 2013, available at: http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf

27) See, e.g., Mazzitotti G. (rapporteur), *Copyright in the EU Digital Single Market*, Centre for European Policy Studies – CEPS Digital Forum, 2013, 29-30, 50.

28) *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, pp. 6-7, 10-11. Available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

29) *Public Consultation on the review of the EU copyright rules*, p. 11, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf. See also Report on Public Consultation Copyright 2014, pp. 13-14, 16ff.

30) Recital 5 InfoSoc Directive.

III. Internet: a new form of communication to the public?

After a first generation of CJEU cases on the interpretation of the right of communication to the public in relation to more traditional forms of exploitation, the CJEU is now called upon to rule on the scope of the right of communication to the public in the light of new forms of communication made possible by the internet, like live-streams of TV broadcasts and hyper-linking to web pages. This section discusses the criteria developed by the Court as applied to both the traditional and the internet-based forms of exploitation. Importantly, these cases do not explicitly address two key issues for online provision of audiovisual services: the overlapping of the right of reproduction and to the making available right, and the localization of the latter.³¹

1. Live streams of TV broadcasts

On 7 March 2013 the CJEU delivered its judgment in *ITV Broadcasting* following a request for a preliminary ruling from the High Court of Justice (England and Wales).³² The judgment focused on the interpretation of the author's right of communication to the public over the internet under Article 3(1) of the InfoSoc Directive, as well as on the corresponding related rights in Articles 2 and 8(1) of the SatCab Directive.

The case relates to the distribution by TV Catch-up (TVC) over the internet, substantially in real time, of television broadcasts transmitted by certain broadcasters, including ITV Broadcasting Ltd (ITV). TVC uses a four-level network of servers (comprising acquisition, encoding, origin and edge servers) to allow users access to TV broadcasts via an internet stream.³³ In essence, TVC offers a service that allows users to receive through the internet 'live' streams of free-to-air television broadcasts, including those transmitted by ITV. However, users can access only that content which they are legally entitled to watch under a UK television license.

With this in mind, the ECJ examined whether the concept of 'communication to the public' covers the above described internet retransmission of the works included in a terrestrial television broadcast. The Court did so through a step-by-step analysis.

The first step was to inquire whether such retransmission qualifies as a 'communication' for copyright purposes. The Court considered that it does, arguing that a TVC service amounts to a separate – and therefore restricted – act of transmission or retransmission of a work through a specific technical means. In supporting this conclusion, the Court argued that TVC's intervention goes beyond the provision of a mere technical means to ensure or improve reception of the original transmission in its catchment area.³⁴

Having established this to be a copyright-relevant communication of works, the Court then moved to the second step of analysis and asked whether such communication is to a 'public'? The answer is again affirmative. The concept of public includes an indeterminate number of potential recipients, implying a fairly large number of persons.³⁵ It is therefore relevant to ascertain the number of persons who have access to the same work at the same time and successively.³⁶ TVC's internet retransmission acts are aimed at all UK residents with an internet connection and a valid television licence. Because these users may simultaneously access the live streaming of television programs online, the Court considers there is a communication to the public.³⁷

31) See Triaille J.-P. et al., *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*, De Wolf and partners, PN/2009-35/D, Brussels, December 2013, p. 120 et seq., for a detailed analysis of the "localization" issue.

32) CJEU 7 March 2013, Case C-607/11 (*ITV Broadcasting/TV Catchup*).

33) CJEU *ITV Broadcasting*, paragraphs 9-13.

34) CJEU *ITV Broadcasting*, paragraphs 28-30.

35) CJEU *ITV Broadcasting*, para. 32, referring to SGAE, 37 and 38 and the case law cited therein.

36) CJEU *SGAE*, para. 39; CJEU *ITV Broadcasting*, para. 34.

37) CJEU *ITV Broadcasting*, para. 35.

Referring to previous case law on the public communication right, the CJEU went on to consider a third requirement: whether the communication in question reaches a 'new' public. However, because TVC's internet retransmission is a separate restricted act requiring an independent authorisation – due to specific technical conditions, means and intended public – there was no need to examine the 'new public' requirement.³⁸ In completing its analysis, the Court found that only the first two elements were essential to the qualification of an act as a copyright-relevant (and therefore restricted) communication to the public. Other complementary but non-essential elements are the profit-making nature of the act (e.g. if the business model is funded by advertising) – typically linked to the role of the user and his intent – or the fact that the organisation responsible for the act 'is acting in direct competition with the original broadcaster'.³⁹

The ITV Broadcasting case can be seen as an example of the CJEU taking an economic approach to the interpretation of exclusive rights. The Court was faced with a new mode of exploitation with economic significance and placed it under the umbrella of the public communication right, interpreted in light of the 'existence and degree of several interdependent criteria with regard to the person of the user (potential infringer) and the targeted public'.⁴⁰

A fundamental aspect of the decision is that it highlights a novel and alternative criterion to qualify acts under this exclusive right, namely that 'of an independent, specific technical means of making available to the public'.⁴¹ Thus qualified, such acts configure an intervention that goes beyond the provisions of mere technical means to ensure or improve reception of the original transmission, and therefore does not trigger the need to examine the 'new public' requirement. However, it is not always clear when a technically distinct transmission takes place, which makes it unnecessary to examine the existence of a new public.⁴² While transmissions via new communication mediums will surely meet the 'specific technical means' requirement, it remains doubtful whether the same conclusion can be drawn for disruptive technologies within the same communications medium.⁴³ Imagine, for example, an innovative model of internet retransmission of audiovisual works where such content is previously available for online streaming.

In sum, transmissions and retransmissions of audiovisual works through different communication means, trigger the exclusive right and require individual authorisations. Importantly, this implies that the entity responsible for the initial transmission wishing to engage in these new uses will (also) need to secure the requisite authorisations for those rights it does not own. This already seems to be happening, at least with broadcasters involved in online cross border provision of services, as noted above. Conversely, new uses within the same communications media will probably not trigger the 'specific technical means' requirement and thus the public communication right. However, where they do not, the subsequent analysis of the 'new public' criterion might assist rightsholders in securing control of novel forms of exploitation, especially after the Svensson decision (see below).

Going forward, the CJEU's economic approach is favorable to rightsholders as it guarantees control over prospective models for online dissemination of audiovisual works. The more technologically disruptive the third party use, the more likely it is that it amounts to an 'independent, specific

38) CJEU *ITV Broadcasting*, para. 39. On this requirement see: CJEU *SGAE*, para. 40; CJEU *Premier League*, para. 197; CJEU *Airfield*, para. 72. On the latter case, see Vouzden S. "Airfield, intermediaries and the rescue of EU copyright law", *Intellectual Property Quarterly*, 2012(4), 311-325.

39) CJEU *ITV Broadcasting*, paragraphs 43-46. Note however the argument that the profit making nature of the act may be determinative of its qualification under the public communication right of related rightsholders pursuant to CJEU case law, made by Klafkowska-Wasniowska K. "Public communication right: towards the full harmonisation?", *E.I.P.R.* 2013, 35(12), 751-758, at pp. 756-757.

40) Leistner M. "Europe's Copyright Law Decade: Recent Case Law of The European Court Of Justice And Policy Perspectives", *Common Market Law Review* 2012, 51, 559-600, at pp. 569-570.

41) Leistner 2014, 569-572.

42) Raising the issue, see Klafkowska-Wasniowska K. "Public communication right: towards the full harmonisation?", *E.I.P.R.* 2013, 35(12), 751-758, p. 756.

43) See: Arezzo E. "Hyperlinks and making available right in the European Union - what future for the Internet after Svensson?", *IIC*, 2014, 45(5), 524-555, pp 535-536; Savola P. "Blocking injunctions and website operators' liability for copyright infringement for user-generated links", *E.I.P.R.* 2014, 36(5), 279-288.

technical means', thus requiring a license, even where the communication is not aimed at a new public. Where that is not the case, the 'new public' criterion may nevertheless trigger the exclusive right, as demonstrated below.

2. Hyper-linking to websites on the internet and the 'new public' criterion

On 13 February 2014 the CJEU delivered its judgment in the *Svensson* case following a request from the *Svea hovrätt* (Sweden) for a preliminary ruling. The question before the Court related to the interpretation of Article 3(1) of the InfoSoc Directive, namely whether the author's exclusive right of communication/making available to the public applies to acts of 'linking'. Because of its importance, the technology involved and the debate it generated preceding the CJEU's decision in the *Svensson* case⁴⁴, we first provide some background and context, before analysing the judgment and its implications.

'Linking' is an umbrella term encompassing multiple similar acts, such as 'deep-linking, framing, inline linking and embedded linking'.⁴⁵ Linking can be characterised by the different techniques used.⁴⁶

- **Standard hyperlinks** are clickable pointers (e.g. text, thumbnail or other format) that once clicked cause the web browser to redirect or 'push' the user to another (target) page. This can either be the main or home page (*surface linking*) or a sub-page or resource (*deep linking*). Such links were addressed by the ECJ in *Svensson*.
- **Inline or Embedded links** are links where the 'browser transparently fetches material (e.g. an image or another web page) and displays it as part of the current [source] page'. Here, the content is stored in a certain website but is pulled and embedded' in the source website, where it appears to users. This type of linking to a YouTube video is the subject of the *Bestwater International* case.⁴⁷
- **Framing links** preserve the original web page address even when linking to foreign pages and display it in such a way that it appears part of the linking site, i.e. within a 'frame', such as a pop-up window, and without the need to open a new browser window. This act of 'pulling' content to the vicinity of the source page makes framing similar to embedded linking. The legal status of framed links to internet streams of sports matches is the subject of the *C More Entertainment* case (pending before the CJEU).⁴⁸

In essence, hyperlinks act as references and means of access to other sources on the web. As such, they constitute essential reference tools for programmers, online service providers and users. Because hyperlinks will at best constitute a means to indirectly make works available online, it may be difficult to qualify them as falling under the 'making available' right. Given the centrality of hyperlinking to the functioning of the internet, the wisdom of so qualifying them is questionable.⁴⁹ These descriptive and normative considerations caused the *Svensson* decision to polarise European copyright scholarship.⁵⁰

44) CJEU 13 February 2014, Case C-466/12 (*Svensson/Retriever Sverige AB*).

45) Headdon T. "An epilogue to Svensson: the same old new public and the worms that didn't turn", *Journal of Intellectual Property Law & Practice*, 2014, 9(8), 662-668, p. 662.

46) See Savola, p. 280 and fn.10, on which this characterisation heavily relies. (Citations in the following paragraphs are to this source). See also Tsoutsanis A. "Why Copyright and Linking can Tango", *Journal of Intellectual Property Law & Practice* 2014, 9(6), 495-509, pp 496-497; Arezzo 2014, 526-527.

47) CJEU 21 October 2014, Case C-348/13 (BestWater International). [Editor's note] The decision of the CJEU in this case was issued after the writing of this article.

48) CJEU -279/13, Request for a preliminary ruling from the Högsta domstolen lodged on 22 May 2013 - *C More Entertainment AB v. Linus Sandberg*, pending.

49) Making the same point, see Savola 2014 (EIPR), 281. See also Arezzo, 525.

50) See: Tsoutsanis 2014; Ginsburg 2014; and Savola 2014 (EIPR).

On one side of the debate, the European Copyright Society (ECS) argued that hyperlinking (including framing) should not be covered by the right of communication to the public, for three separate reasons. First, hyperlinks are not acts of communication as they are not transmissions of a work. Second, even if so qualified, they are not interventions giving access to a work or a communication of a work, but instead references or location tool for an Internet protocol (IP) address (via a request to a server). Third, even if hyperlinks are considered communications of a work, they are not communications to a new public, in light of the universality of the targeted public.⁵¹ It is important to note that this opinion predated the *ITV Broadcasting* case, which introduced the 'separate technical means' criterion that preempts analysis of the 'new public' requirement.

In a subsequent 2013 Report and Opinion focusing on internet linking techniques, the International Literary and Artistic Association (ALAI) followed a different route. It argued that the 'right of making available covers links that enable members of the public to access specific protected material', but not those 'that merely refer to a source from which a work may subsequently be accessed'.⁵² Both the technical means (e.g. hypertext or inline linking) and the infringing nature of the work referred to are irrelevant; what matters is the act of offering (for individualised streaming or downloading) that triggers the exclusive right. The right is therefore infringed in any of the following circumstances: (1) the content is initially made available without consent; (2) technological protection measures were circumvented; or (3) the content is made available against 'the declared or clearly implied will of the rightholder'.⁵³ In essence, the ALAI position results in rightsholders having an exclusive 'right to control the contexts where a work is mentioned or referenced'.⁵⁴

The Svensson case involved a Swedish company, Retriever Sverige AB, operating a website that provided clients with links to articles published on other websites. The applicants in the main proceedings – all journalists, including Svensson – claimed compensation from Retriever for loss suffered as a result of the inclusion on its website of hyperlinks redirecting users to freely accessible press articles in which the former held the copyright. The main question before the Court was whether the provision on a website of links to protected works 'freely accessible' on another website constitutes a restricted act of communication to the public. For that to be the case, the Court ruled that two cumulative criteria must be met: (1) that it is an 'act of communication' of a work; and (2) that the communication is to a 'public'.⁵⁵

Regarding the first criterion, the CJEU found that Article 3(1) of the InfoSoc Directive merely requires the work to be made available in such a way that members of the public may access it. As such, the provision of direct access to the work via a link from one website to another constitutes an act of 'making available' and, therefore, 'communication to the public'.⁵⁶ Note that the act of transmission is not mentioned as a requirement.

With respect to the second criterion, because the link is aimed at all potential users of the website – i.e. an 'indeterminate and fairly large number of recipients' – the Court found that works are indeed communicated to a public.⁵⁷ However, for such communication to trigger Article 3(1) it 'must also be directed at a new public', meaning a 'public not taken into account by the copyright holders when they authorised the initial communication to the public'.⁵⁸ The Court considered that in this case there was no communication to a new public, because the public targeted by the initial

51) ECS Opinion 2013, para. 6 et seq., relying for all three reasons on the language and the *Travaux préparatoires* of the InfoSoc Directive, International law, and CJEU case law on communication to the public, namely *SGAE, Premier League, and Airfield*.

52) ALAI Report and Opinion on the making available and communication to the public in the internet environment - focus on linking techniques on the Internet, available at: <http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf>. On the broader context of the report, see Ginsburg 2014.

53) *Ibid.*

54) Savola 2014 (EIPR), 281 and fn. 23.

55) CJEU *Svensson*, para. 16. See, to that effect, CJEU *ITV Broadcasting*, paragraphs 21 and 31.

56) CJEU *Svensson*, paragraphs 19-20.

57) CJEU *Svensson*, para. 25.

58) CJEU *Svensson*, para. 24.

communication comprised all potential visitors to the website in question, which consists of 'all internet users', as access to the works was not subject to 'restrictive measures'. That would be the case, for example, if the linked works originated from a subscription only website. Accordingly, Retriever's website users are part of the public taken into account by the applicants when they first authorised the making available of their works.

Hence, even if there is a 'communication to the public', no authorisation is required because it is not to a *new public*. That conclusion remains valid even if the link causes the work to appear 'in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site'.⁵⁹ That could exempt acts of 'framing' *per se* (and possibly embedding) from copyright infringement. Conversely, where a link allows users to circumvent restrictions that have been put in place by the linked website and that are designed to limit access to subscribers to the linked web site, it 'constitutes an intervention without which those users would not be able to access the works transmitted'. In such cases, those users are considered to comprise a new public (not targeted by the initial communication) and an authorisation by the copyright holders is required.

The CJEU ruled that Article 3(1) cannot be construed as allowing Member States to give 'wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision'.⁶⁰ To do so would undermine the InfoSoc Directive's objectives of remedying legislative differences and legal uncertainty vis-à-vis copyright protection, in a way that adversely affects the functioning of the internal market. Contrary to the *ITV Broadcasting* decision, which considered public communication through retransmission, the *Svensson* decision mostly addressed acts of making available on-demand. It clarifies several important aspects, namely the requirements of *transmission* and *new public* in the making available right. If access by the public is a requirement, then it is arguable that certain cloud services that merely allow individual users (or a close circle of family and friends, depending on the applicable law) to make upstream copies of works in hosting servers and subsequently to download/stream their material for private or personal use, do not trigger the making available right, even if they will for the most part trigger the reproduction right.⁶¹

A second major aspect of *Svensson* relates to the new public criterion. In a nutshell, an online act of making available that is not carried out through a 'specific technical means' (pursuant to *ITV Broadcasting*) can give rise to the need for authorisation, if it is made to a new public. Two elements are crucial in examining this criterion:

- a) Whether the link targets material that was made freely accessible,⁶² and
- b) Whether the link expands the audience of the original website by circumventing access restrictions.⁶³

59) CJEU *Svensson*, para. 29.

60) CJEU *Svensson*, paragraphs 37, 41.

61) See Triaille J.-P. et al., *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*, De Wolf and partners, PN/2009-35/D, Brussels, December 2013, p. 45, 119. The private copying limitation covers reproductions on all technologies and media, of all types of protected subject matter, with the exception of computer programs and databases. To qualify, reproductions must be for private use, meaning for personal purposes of the natural person beneficiary and within his/her private sphere, which in several EU Member States can include a broader or narrower circle of (close) family and friends. See von Lewinski S. and Walter M.M. "Information Society Directive", in: Walter & Von Lewinski (eds.) *European Copyright Law. A Commentary*, Oxford University Press, 2010, 1032-1033. The term "private use" features also in Art. 15(1)(a) Rental and Lending Rights Directive (2006/115/EC), and Arts. 6(2)(a) and 9(a) of the Database Directive (96/9/EC). For further implications of this concept, see: Poort J. and Quintais J.P. "The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies", 2013, 4 *JIPITEC*, 207-209; Karapapa S. *Private Copying*, 2012, Routledge, London, 49-78.

62) Arezzo 2014, 541-543.

63) Similarly, see Stevens P. "A hyperlink can be both a permissible and an infringing act at the same time", *Journal of Intellectual Property Law & Practice*, 2014, 9(7), 548-549.

If the link points to freely accessible content and does not broaden the initially targeted audience, then it does not infringe copyright, even if it is possible that injured parties avail themselves of unfair competition type of protection.⁶⁴ Where this is not the case, the link infringes the right of making available. It is important to understand how these two prongs of the 'new public' requirement might apply to different linking scenarios. In the following paragraphs we briefly outline some possibilities, including those covered in the case C More Entertainment and BestWater cases.

Technical restrictions

If the (deep) link provides access to content that is subject to technical measures restricting access (e.g. subscription paywalls or 'sessions IDs'), it clearly infringes copyright. Current geo-blocking access control measures used by broadcasters and service providers in the audiovisual sector would qualify as technical restrictions. Infringement would result from the fact that the content is not freely accessible and the link circumvents access requirements, which amounts to a communication to a new public.⁶⁵ This would apply to content made available on demand, as well to content originally streamed through the internet (if subject to technical restrictions).

Subsequent unavailability

If the link provides access to content initially freely accessible but subsequently subject to technical restrictions, it infringes copyright. However, this will rarely happen automatically, as the original link will technically not provide access to the work once the restrictions are put in place. Only where the link circumvents the subsequent restrictions will it be infringing; therefore, concerns that Svensson imposes a 'duty to monitor' by 'linkers' seem implausible.⁶⁶ Such a duty would result from the Court's stipulation that links are exempted from the authorisation requirement only where they provide access to a work that was made available on freely accessible terms and remains available on such terms.⁶⁷ Immunity from infringement would, the argument goes, be dependent on the constant monitoring by 'linkers' of the freely accessible nature of the work. This fact pattern is unlikely to occur, as removal of the content or imposition of technical restrictions by rightsholders should prevent the link from providing access to works. However, this issue might become relevant if subsequent contractual restrictions imposed by rightsholders are considered per se sufficient to legally restrict access to works.

Contractual restrictions

The situation is unclear if the link provides access to content on freely accessible websites that impose restrictive terms and conditions (or 'legal restrictions').⁶⁸ Svensson opens the door for implied license theories insofar as it considers the making available of works without technical or contractual terms, to be a blanket permission engage in the act of linking. However, nothing is said of cases where the rightsholder of the linked work, for example, subsequently places a notice on the web page prohibiting embedded links to that content, without removing the work itself or putting in place technical restrictions.⁶⁹

Unauthorised content

What if the link provides access to an unauthorised copy of a film on website A that a rightsholder has made freely accessible on website B? Headdon responds by focusing on the concept of work,

64) Moir et al. 2014, 400.

65) See: Tsoutsanis 2014, 507; Moir A. et al. "Communication to the public: the CJEU finds linking to material already 'freely available' cannot be restricted by copyright owners: Nils Svensson and Others v Retriever Sverige AB (C-466/12)", *E.I.P.R.* 2014, 36(6), 399-400, p. 400; Headdon 2014, 665.

66) See Headdon 2014, 665; See Arezzo 2014, 545-546 (articulating the concern mentioned in the text).

67) See Arezzo 2014, 545-546.

68) Moir et al. 2014, 400; Headdon 2014, 665.

69) See Savola 2014 (*E.I.P.R.*), 282-283, arguing that Svensson does not prohibit linking in this scenario. See also Arezzo 2014, 541-542.

rather than that of public. He argues the act to be infringing because the copy is unauthorised, there is no exhaustion of the public communication right, and the hyperlink amounts to a communication to a new public as it provides access to a different copy.⁷⁰ Conversely, Savola argues that the legality of linking to this material should not depend on authorisation by the rightsholder or the source's lawfulness, because such elements are typically unknown to the linker.⁷¹ Hence, it is preferable to judge infringement based on secondary (rather than strict) liability.⁷² Doing so would require first to determine whether the reproduction and making available of the work on the third party website constitute copyright infringement; if so, it needs to be determined whether the act of linking to the third party web site could give rise to secondary liability. The contrasting arguments highlight the uncertainty surrounding this linking scenario, which extends to the effect of imposing technical restrictions on originally freely accessible content.⁷³ Whatever the outcome, rightsholders should have some means of redress under this scenario.

Unfair competition

Some authors suggest that acts of linking that do not infringe copyright (e.g. certain instances of framing) might be still be prevented on the ground of passing-off (in the UK) or unfair competition (in other EU jurisdictions).⁷⁴ This would afford rightsholders an extra layer of protection through tort law, triggering the civil liability of 'linkers'.

In the EU there are no harmonised rules on unfair competition applying to business-to-business acts, such as linking to third party content. In fact, harmonisation of unfair competition law is a reality only in specific areas, such as certain conflict of laws rules on non-contractual obligations,⁷⁵ consumer protection against unfair commercial practices⁷⁶ and protection of traders against misleading and unlawful comparative advertising.⁷⁷ Applicability of tort law to an act of linking would therefore require an analysis of each fact pattern against national laws, which is beyond the scope of this paper. However, the following examples may illustrate the point.

In the UK, specific acts of framing could amount to passing off, if they cause consumer confusion in the market. This provision therefore protects traders against the unfair behavior of competitors. On this basis, the goodwill of the original content provider would be protected against misrepresentations by the linking platforms that mislead the public as to the origin or the quality of goods/services. In Germany, in contrast, the Act against Unfair Competition (the Gesetz gegen den unlauteren Wettbewerb or UWG) contains a general tort of unfair competition in §3 UWG, which could be invoked to prohibit acts of linking likely to significantly affect the interests of competitors, consumers or other market participants. Beyond confusion regarding the origin of the content displayed, economic damage giving rise to unfair competition torts may result from linking techniques (e.g. deep-linking) that circumvent access restrictions and/or point directly to secondary pages, bypassing advertisements on the main page and therefore causing losses of related revenue.⁷⁸ In sum, even where copyright infringement is not found, unfair competition torts might provide rightsholders with tools for use against unauthorised acts of linking.

70) See Headdon 2014, 665, relying on Article 3 and Recital 29 InfoSoc Directive.

71) Savola *EIPR*, 282-283.

72) Ibid. See also Arezzo 2014, 545 et seq.

73) Debating this issue, see Arezzo 2014, 545-547.

74) See Moir et al. 2014, 400; Arezzo 2014, 527.

75) See Art. 6 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

76) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

77) Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version).

78) Arezzo 2014, 427.

IV. Cable retransmission: a disappearing form of communication to the public?

Only in the ITV Broadcasting case did the CJEU briefly touch upon the issue of the interaction between the general regime of the InfoSoc Directive's right of communication to the public and the special regime of the SatCab Directive's remuneration right for cable retransmission.⁷⁹ However, because the case dealt primarily with live streams for which TV Catchup ensures that those using its service can obtain access only to content which they are already legally entitled to watch in the United Kingdom by virtue of their television licence, the Court could not discuss the impact of technological change on the workings of the cable retransmission services and on the need for cable distributors to obtain authorisation for this type of activity.

Let us recall that, pursuant to Article 3 of the SatCab Directive, 'cable retransmission' is 'the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.' As such, cable retransmission implies a 're-broadcasting' of programmes that had been initially broadcast by another organisation. Cable retransmission organisations 'captured' the broadcast signals in order to reach their own, separate audience, different from the 'primary' communication, which must be intended for reception by the public and could occur either over the air or by wire. The cable retransmission therefore qualifies as an act of 'secondary' communication to the public.⁸⁰ On the basis of Article 9(1) of the SatCab Directive, this act of 'secondary' transmission is subject to mandatory collective administration.

The gradual switchover from analogue to digital television that took place during the first decade of the new millennium was completed by 2012.⁸¹ As a result broadcasting companies no longer directly deliver their content to viewers via analogue terrestrial television. In a number of Member States viewers can now receive the content indirectly via distributors – e.g. through a media gateway, through free to air digital terrestrial television or through the cable, telephone, and satellite TV companies, with whom viewers have a contractual relationship.⁸² The reception of programs via a media gateway is known as 'direct injection'. Since no retransmission of signals initially broadcast by another organisation occurs any more, broadcasting and cable companies in some Member States argue that they are no longer engaged in 'secondary' communication, but rather in 'primary' communication. Consequently, under this argument the rules of the SatCab Directive on mandatory collective administration would not apply.

As early as 2007 a long and complex dispute arose in the Netherlands on this very issue between Norma, the CMO entrusted with the administration of Dutch performers' rights, and the Association of Dutch cable operators. The Dutch Supreme Court handed down its ruling on 28 March 2014.⁸³ The Court had to answer two questions: are the activities of the cable operators to be qualified as an act of communication to the public; and if so, who is the owner of the right, between the television program producer and the CMO?

The Dutch Supreme Court applied the criteria in Article 3 of the SatCab Directive and concluded that, because the delivery of program-carrying signals by broadcasters through an accessible one-to-one connection between broadcasters and cable operators did not reach the general public, no communication to the public took place. Two key aspects of the ruling are worth mentioning:

79) CJEU 7 March 2013, Case C-607/11 (*ITV Broadcasting/TV Catchup*).

80) Hugenholz 2009, p. 12.

81) Communication of 24 May 2005 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on accelerating the transition from analogue to digital broadcasting, COM(2005) 204 final.

82) EU Law Radar, 'Case C-325/14, SBS Belgium – broadcasting via third parties', available at: <http://eulawradar.com/case-c-32514-sbs-belgium-broadcasting-via-third-parties/>

83) Dutch Supreme Court 28 March 2014, ECLI:NL:HR:2014:735, (*Norma/NL Kabel*).

1. The cable distribution of television programmes as it currently takes place in the Netherlands is indeed no longer a 'cable retransmission' in the sense of the SatCab Directive, because it is no longer preceded by an 'initial transmission' that is 'intended for reception by the public'. Since 2006 cable operators have received the signal directly in a one-on-one transmission from the 'MediaGateway' at which the broadcasters make it available to them. Therefore the mandatory collective management of cable retransmission rights prescribed by Article 9 of the SatCab Directive no longer applies, nor does the rule in Article 9.2 that the relevant collecting societies have a mandate to represent non-members.⁸⁴
2. The rights transfer from individual performing artists of all their broadcasting rights relating to their past and future performances, to the relevant collecting society, was not precise enough in this case and therefore not valid under Dutch civil law.

The Dutch case is not unique in Europe; similar disputes between cable broadcasters and CMOs have arisen in Norway and Belgium. In Norway, the district court of Oslo came to a similar conclusion to that of the Dutch Supreme Court. This happened on two separate occasions, in cases involving the CMO Norwaco against cable broadcasters.⁸⁵ As in the Netherlands, the Oslo court ruled in favour of the cable operators on the basis that the lack of an initial transmission meant that there was no retransmission in the sense of the SatCab Directive and therefore no remuneration was due.

In July of this year, the Court of Appeal of Brussels referred a very similar question to the CJEU for a preliminary ruling:

Does a broadcasting organisation which transmits its programmes exclusively via the technique of direct injection — that is to say, a two-step process in which it transmits its programme-carrying signals in an encrypted form via satellite, a fibre-optic connection or another means of transmission to distributors (satellite, cable or xDSL-line), without the signals being accessible to the public during or as a result of that transmission, and in which the distributors then send the signals to their subscribers so that the latter may view the programmes – make a communication to the public within the meaning of Article 3 of InfoSoc Directive?⁸⁶

It is hoped that this request for a preliminary ruling from the CJEU will shed some light on the question of whether the activities of the cable operators qualify as cable retransmission under the SatCab Directive or as an act of communication to the public under the InfoSoc Directive. But it will unfortunately not clarify the very important issue of the future role of CMOs in the administration of broadcasting rights, let alone the question of whether it is the producer or the CMOs to whom the rights of the authors or performers is transferred.

V. Conclusion

The definition of the concept of 'communication to the public' in copyright law is essential for the determination of the scope of the rightsholder's exclusive right, with the consequential possibility to license the right to third parties and to stop unauthorised uses. But as the case law of the Court of Justice of the European Union shows, defining what constitutes an act of communication to the public is no easy task. Over the years and through the cases before it, the Court developed several criteria that should come into play when determining whether an act of communication qualifies under Article 3(1) of the InfoSoc Directive as an act of communication to the public for which the rightsholder's authorisation is required. It is hoped that these criteria will help evaluate situations arising in the future as a result of improvements in the technology.

84) Ibid. para. 4.2.3.

85) District court of Oslo, 30 May 2013, (*Rikstv AS/Norwaco*); District Court of Oslo, 31 December 2013 (*Get AS/Norwaco*).

86) C-325/14, Application filed on 29 August 2014 (*SBS Belgium/SABAM*).

The first criterion concerns the identity of the person using a means of communication, i.e. whether the user intervenes in the process of communicating a work to the public. As the CJEU proposed in the ITV Broadcasting case, a novel and alternative criterion to assess whether acts of communication fall within the scope of the exclusive right, is that 'of an independent, specific technical means of making available to the public'.⁸⁷

The second criterion is the definition of the public, which the CJEU consistently interprets as an indeterminate and fairly large number of potential recipients.

The third factor is that of a 'new' public, i.e. whether the communication reaches a 'public... not taken into account by the copyright holders when they authorised the initial communication to the public.'

Finally the fourth requirement, albeit of lesser importance since the Svensson decision, is whether the act of communication pursues a profit motive.

Already in 2009, the future of the SatCab Directive's dedicated regime for cable retransmission was said to be very bleak,⁸⁸ in large part due to the changes brought about by digital technology to the way cable broadcasters are communicating works to the public. Five years later, in light of the case law in the Netherlands, Norway and Belgium, as well as on the basis of the criteria developed by the CJEU with respect to the notion of 'communication to the public', the fate of the cable retransmission regime seems bleaker than ever.

Technology evolves: new forms of exploitation emerge; older forms become obsolete. With the emergence of new modes of exploitation that reach a 'new' public, rightsholders can hope to receive remuneration from new sources. But while cable retransmission of audiovisual works is fading out as a secondary means of communication of works to the public, important questions arise: does the communication by a cable operator through 'direct injection' constitute an act of communication to a 'new' public, or does it fall within the scope of another pre-existing 'primary' act of communication to the public? Does the cable operator need to obtain separate authorisation and pay additional remuneration for such acts? If so, from whom would the cable company need to obtain permission: the producer of the audiovisual work or the CMO? What is the impact on the remuneration of individual authors? As the technological landscape changes, individual authors risk getting short changed: they may lose the benefit of an unwaivable right of remuneration for acts of cable retransmission, in exchange for an exclusive right of communication to the public that may be difficult to enforce in practice.

87) Leistner 2014, 569-572.

88) Hugenholtz 2009, p. 12.

Recent Case Law

In addition to the Svensson case explored in the Lead Article of this IRIS *plus* edition, two important judgements were delivered in 2014 by the CJEU: in ACI Adam/Stichting de Thuiskopie the Court stated that the private copying exception cannot cover reproductions made using unlawful sources; in UPC Telekabel Wien the Court set the criteria for the legitimacy of site blocking orders, where websites provide access to infringing material.

Moving on to national courts, 2014 seems to have been the year of liability issues. The Court of Appeals of Madrid found that the development of P2P software is not "per se" an IPR infringement, on the assumption that P2P developers cannot be qualified as intermediaries under the E-commerce Directive. Remaining in the sphere of file sharing, the German Federal Supreme Court also came to a "not guilty" conclusion, but with regard to parents in the case of copyright infringement allegedly committed by their grown-up children and without the parents' actual knowledge.

Violations were, however, found in two Dutch judgements. The first, handed down by the Amsterdam District Court, concerned the case of cable companies distributing TV programmes without the authorisation of the copyright holders. That decision recognised the authority of the collective rights management organisation to represent the authors. The Court of Appeal in The Hague delivered the second judgement. The case addressed the question of whether an injunction was compatible with the freedom to conduct business and the principle of proportionality. On that basis, the court overturned an initial order blocking access to Pirate Bay by the subscribers to two Dutch internet service providers.

Another infringement was found by the US Supreme Court in the case of an online television service provider allowing its subscribers to watch programmes over the internet without the authorisation of the copyright owners. This decision was reached on the grounds that the works were the same and that images and sounds were contemporaneously visible and audible on the computers of the subscribers.

EUROPEAN UNION

Court of Justice of the European Union

No Private Copying Levy for Downloading from an Illegal Source

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On 10 April 2014, the Court of Justice of the European Union (CJEU) delivered its opinion in Case C-435/12 (ACI Adam/Stichting de Thuiskopie). The Court considered whether reproductions from unlawful sources fall within the private copying exemption of Directive 2001/29/EC (Copyright Directive). Advocate General (AG) Villalón was of the opinion that reproductions from unlawful sources fall outside the scope of private copying (See IRIS 2014-3/3). The CJEU followed the AG's opinion and stated that the private copying exception cannot cover reproductions made from unlawful sources, and that accordingly, the levy cannot be calculated on the basis of such unlawful reproductions.

The Court's reasoning is, for the most part, in line with the AG's opinion. However, a notable difference is that the CJEU put more emphasis on the fact that the internal market can be negatively influenced if member states are allowed to include reproductions made from unlawful sources under the private copying exemption. Other than that, the CJEU also based its decision on the principle of strict interpretation and the application of the three-step-test as formulated in the Copyright Directive. The outcome of the case is identical to that which the AG concluded.

For the Netherlands, the country in which this case originates, the decision has two main implications in practice: individuals who download from unlawful sources are now copyright infringers, and the calculation method of the private copying levy must be changed. With regard to the first issue, the Dutch government stated that it will not criminally prosecute individual users. Also, Stichting Brein, a Dutch Anti-Piracy Organization, mentioned on its website that it will not change its enforcement policy to include enforcement against individual users. However, rightsholders can still initiate proceedings against individual downloaders.

According to the Dutch government, there is no need to amend the Dutch Copyright Act, as the wording of the relevant Article is quite broad and allows for the interpretation given by the CJEU. The Dutch government has stated that the CJEU decision will come into effect immediately. However, *Stichting Onderhandelingen Thuiskopievergoeding*, the organisation that determines the private copying levy in the Netherlands, has to develop a new calculation method. Until then, the old calculation method will be used, which means that for the time being, the private copying levy still takes into consideration reproductions made from unlawful sources. The new calculation method is due to be introduced in summer 2014.

- Judgment of the Court (Fourth Chamber), ACI Adam and Others v. Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopievergoeding, Case C-435/12, 10 April 2014
<http://merlin.obs.coe.int/redirect.php?id=17078>

Advocate General

No Private Copying Levy for Downloading from an Illegal Source

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In his opinion of 9 January 2014, the Advocate General of the Court of Justice of the European Union (CJEU), in Case C-435/12, considered whether reproductions from unlawful sources fall within the private copying exception of Directive 2001/29/EC (Copyright Directive). A related question considered by the Advocate General, is whether it is in line with the Copyright Directive to calculate the private copying levy based on reproductions from both lawful as well as unlawful sources.

According to Article 5(2) subsection (b) of the Copyright Directive, member states can exclude private copying for non-commercial purposes by natural persons from copyright infringement. The application of this exception must not, however, be in conflict with the normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the rightsholder. In light of this exception, the private copying levy was introduced. The goal of this levy is to ensure that rightsholders receive fair compensation for private copying of their works.

The Copyright Directive does not make an explicit distinction between works originating from a lawful or an unlawful source. This gave rise to the question of whether, in short, Article 5 of the Copyright Directive covers the reproduction of works that originate from an unlawful source. A Dutch Court of Appeals referred this matter to the CJEU for a preliminary ruling. In the Advocate General's opinion, the fact that there is no explicit distinction between lawful and unlawful sources in the Copyright Directive cannot imply that the European legislator intended to extend the fair compensation to works obtained from unlawful sources. The reasoning behind this, is that such an interpretation would be incompatible with Article 5(5) of the Copyright Directive, i.e. that the exceptions provided for in this Article "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work".

Stichting Thuiskopie, the defendant in this case, argued that the private copying levy is the only instrument that effectively deals with the publication and distribution of copyrighted works through unlawful sources. It was therefore argued that the levy on works originating from unlawful sources actually contributes to the normal exploitation, as opposed to a rule that prohibits every reproduction from unlawful sources. In this regard, the Advocate General pointed out that Dutch legislation tolerates downloading protected works from unlawful sources, and only prohibits the uploading of such materials. The Advocate General believes this to be an indirect stimulation for the mass distribution of protected works through unlawful sources. According to the Advocate General, it would be better to prohibit the downloading of protected works, as this would take away the need for fair compensation in the first place.

The Advocate General's conclusion was that the private copying levy cannot cover the reproduction of protected works through unlawful sources. If it would fall within the scope of the private copying exception, the levy would rise disproportionately, which would bring about the risk of imbalanced rights between rightsholders and users of protected materials. According to the Advocate General's opinion a private copying levy can thus only be calculated based on reproductions from lawful sources.

- Opinion of Advocate General Pedro Cruz Villalón, 9 January 2014
<http://merlin.obs.coe.int/redirect.php?id=16905>

Court of Justice of the European Union

Internet Service Providers may be ordered to block access to websites that contain IP infringing material

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On 27 March 2014, the Court of Justice of the European Union (CJEU) gave its ruling in Case C-314/12, a case between UPC Telekabel Wien, on the one hand, and Constantin Film Verleih and Wega Filmproduktionsgesellschaft, on the other. The CJEU considered whether it is permissible to order an internet service provider (ISP) to block its subscribers' access to a website on which copyright protected films are made available to the public, without the rightsholders' consent.

Constantin Film and Wega are film production companies. They claimed that some of the films in which they hold the copyright and related rights were made available on a website for streaming or downloading without their consent. The Vienna Commercial Court granted an order according to which UPC is prohibited from providing its customers with access to the website at issue. This order "was to be carried out in particular by blocking that site's domain name and current IP ('Internet Protocol') address and any other IP address of that site of which UPC Telekabel might be aware."

UPC contested the order, stating that "its services were not used" to infringe a copyright or related right pursuant to Article 8(3) Copyright Directive, which is a requirement for injunctions to be granted against an ISP. The underlying argument was that UPC did not have any business relationship with the operators of the website, and it was not established that its own customers acted unlawfully. Moreover, UPC argued that the blocking measures can be technically circumvented and are excessively costly.

In short, the Austrian Supreme Court presented four preliminary questions to the CJEU, of which two are particularly important. It first asked the question: when is a person deemed to be 'using the services of an intermediary' for the purposes of Article 8(3) Copyright Directive. Secondly, the Austrian Supreme Court asked whether it is compatible with Union law to grant an order to block access to a website in general terms, in light of the balance between parties' fundamental rights that must be made.

First, the CJEU noted that intermediaries are often in the best position to bring an end to infringing activities. The Court further stated that ISP's are inevitably actors in any transmission of infringing material over the internet; without granting access to the network, the transmission of such material is not possible. The Copyright Directive contains no indication that there must be a specific business relationship between the infringing party and the intermediary. Such a requirement would even be contrary to the purpose of that Directive, as it would reduce legal protection. According to the Court, there is also no need to show that the customers of the ISP actually accessed the infringing material. Thus, when infringing content is made available on a website, the person making it available is using the services of the internet service provider.

In considering the second question, the Court reiterated that, in any case, a fair balance must be struck between the applicable fundamental rights and principles of EU law. The fundamental rights involved in this case are the intellectual property rights, the freedom to conduct a business and the freedom of information of internet users. An important EU principle involved is the principle of proportionality. Although an order for an ISP to block access to a website restricts its freedom to conduct a business, the Court stated that it "does not seem to infringe the very substance" of that freedom.

A general order to prohibit access to a website leaves the ISP with the freedom to decide which specific measures should be taken. It gives the ISP the opportunity to choose measures that it believes are in line with its way of doing business. Therefore, intellectual property rights seem to outbalance the freedom to conduct a business under these circumstances. However, when giving

shape to the measures, the ISP must ensure compliance with the fundamental right to information of its subscribers. The measures taken must be "strictly targeted". In short, this means that the measures must not limit the possibility of lawfully accessing the information available.

Furthermore, the Court acknowledged that blocking measures might not completely prevent the infringing activities. However, it considers it to be sufficient if the measures "have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult [...]." In this regard, it is interesting to consider the Dutch XS4ALL case (See IRIS 2014-3/37). In that case, a Dutch Court of Appeal stated that the ISPs concerned did not have to block access to The Pirate Bay, based on a contrary balancing of the fundamental rights involved. The blocking measures were deemed ineffective and disproportionate.

Thus, the fundamental rights of EU law do not preclude a court order that prohibits an ISP from providing its customers with access to a website on which infringing material is made available, when the measures to be taken by the ISP are not specified. Also, it is not required that the measures have the effect of a complete end to infringing activities.

- UPC Telekabel v. Constantin Film Verleih, Court of Justice of the European Union, Case C-314/12 <http://merlin.obs.coe.int/redirect.php?id=17014>

IRIS 2014-5/2

NATIONAL

Germany

Federal Supreme Court Clears Parents of Liability for Filesharing by Grown-Up Children

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In a ruling of 8 January 2014 (case no. IZR 1169/12), the first civil chamber of the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that parents were not liable for copyright infringements committed by their grown-up children if they had no actual knowledge of the offences.

The plaintiffs, four major German record producers, had taken court action against the defendant. According to the charge, the defendant's 20-year old stepson had made around 3,750 music files available via online filesharing sites in 2006. The rightsholders had written to the stepfather, demanding lawyers' and caution costs of around EUR 3,500 on the grounds that he had failed to meet his obligation to monitor his son's activities.

Both the lower-instance *Landgericht Köln* (Cologne District Court, ruling of 24 November 2010 - 28 O 202/108) and *Oberlandesgericht Köln* (Cologne Appeal Court, ruling of 22 July 2011 - 6 U 208/10) had upheld the rightsholders' complaints. They had ruled that parents were obliged to monitor and instruct grown-up family members even if they were unaware of previous or future copyright infringements.

The BGH disagreed, ruling that these obligations only applied to Internet connection owners if they had concrete knowledge of the risk that an adult family member might commit an infringement, such as if a caution had previously been issued. A fundamental obligation to monitor and instruct children regardless of such concrete knowledge was in conflict with the particular relationship of

trust that existed between family members. The fact that adults were responsible for their own actions also meant that parents should be able to let their grown-up children use an Internet connection without having to monitor or instruct them.

- *Pressemitteilung des Gerichtshofs Nr. 5/2014* (Federal Supreme Court press release no. 5/2014)
<http://merlin.obs.coe.int/redirect.php?id=16918>

IRIS 2014-3/13

Spain

Offering advanced P2P technology is not connected to IPR infringement

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SMIT-iMinds

On 8 April 2014, the Madrid Court of Appeals found a Spanish software developer not guilty of an Intellectual Property Rights (IPR) infringement. According to the Regional Court of Appeals, developing a P2P software is legal and does not infringe IPRs; in particular, the Court decision states that P2P protocols are a tool to connect devices and therefore allows users to share content stored on his or her own computer. Indeed, P2P software allows direct and decentralised communication among users, and software developers do not interfere in the communication process as file sharing takes place among user devices.

Therefore, according to the Spanish Regional Court, developing P2P software does not imply 'per se' an IPR infringement, as this type of software is designed to connect devices and allow file sharing. P2P software development does not connect users to the network, nor does it transmit or store data; hence P2P developers cannot be considered as intermediaries and are not legally answerable for IPRs infringement.

According to Spanish law, IPR infringement only occurs when sharing files protected by copyright laws; this activity is unquestionably illegal in Spain. Thus, users will be liable for sharing files protected by copyright laws, but liability will not extend to P2P software developers - P2P software only enables device interconnection, it does not reproduce files or make them available for illegal consumption.

Unlike other national jurisdictions, such as the US, the Spanish Court of Appeal decision does not consider either 'contributory liability' or 'vicarious liability' to IPRs infringement in P2P software developing. According to the court, 'contributory liability' cannot be applied in this case due to the fact that the software developer did not promote IPR infringement; on the contrary, the outlawed web pages (www.bluster.com, www.piolet.com and www.manolito.com) displayed clear advice on the need to protect IPRs. Likewise, 'vicarious liability' cannot be applied in this case as the software developers do not receive any type of economic benefit in case of illegal file sharing and, most importantly, they do not intend to benefit either financially or commercially from it.

- *Sentencia num. 103/2014, Audiencia Provincial Civil de Madrid, 8 Abril 2014* (Decision 103/2014, Madrid Court of Appeal, 8 April 2014)
<http://merlin.obs.coe.int/redirect.php?id=17061>

IRIS 2014-6/15

Netherlands

Cable companies broadcast programmes without copyright holder authorisation

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On 27 August 2014, the Amsterdam District Court handed down its judgment in a case brought by LIRA (a collective rights management organisation for authors) against three cable companies for violation of copyright. LIRA had claimed that the cable companies UPC, Zeelandnet, and Ziggo showed content to their subscribers, which infringed the copyright of authors represented by LIRA. In October 2012, the cable companies stopped paying LIRA for the offering of the content to their subscribers.

In the district court, the cable companies argued that the authors lacked the authority to transfer their copyrights to LIRA and that, therefore, LIRA lacked the authority to represent the authors before the court. The cable companies based their argument on Article 45d of the Dutch Copyright Act (DCA), which provides for the presumption of transfer of copyrights from authors of audiovisual works to film producers. The cable companies thus reasoned that the authors lacked the power to dispose of their copyrights because they were transferred a priori to the film producers.

The court ruled that Article 45d DCA did not prevent the transfer of copyrights by the authors to LIRA. The presumption of transfer of copyrights from the author to the film producer occurs when the film producer deems the audio-visual work ready for showing. Therefore, the transfer of copyrights of the authors' current and future audio-visual works to LIRA was legally valid and, on that basis, LIRA can claim the missed payments on behalf of the authors.

Second, the cable companies were of the opinion that the transfer of copyrights of future works did not meet the requirement following from Article 3:84 (2) of the Dutch Civil Code (DCC). According to Article 3:84 (2), DCC copyright has to be sufficiently defined to be eligible for transfer.

The judge ruled that the contract for the transfer of copyrights from the authors to LIRA sufficiently defined the material scope of the copyrights. Therefore the requirement of Article 3:84 (2) DCC was met, thus making the copyrights eligible for transfer.

Furthermore the cable companies disputed that the contracts, used to transfer the copyrights of the authors to LIRA, included the right of first publication of the content. The judge, after reviewing the contract, concluded that it did include the transfer of the right of first publication of the content.

Lastly, the judge ruled in favour of LIRA and stated that the cable companies infringed the copyrights vested in LIRA by offering the content to their subscribers without obtaining the required consent of the rights holders. The cable companies were ordered to cease and desist distributing the disputed content and are facing a penalty for non-compliance.

- *Rechtbank Amsterdam, 27 augustus 2014, ECLI:NL:RBAMS:2014:5397* (Decision of the Amsterdam District Court, 27 August 2014, ECLI:NL:RBAMS:2014:5397)
<http://merlin.obs.coe.int/redirect.php?id=17211>

Internet Service Providers XS4ALL and Ziggo Do Not Have To Block Access to The Pirate Bay Website

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On 28 January 2014, the Court of Appeal in The Hague ruled that two internet service providers XS4ALL and Ziggo do not have to block their subscribers from accessing The Pirate Bay website.

BREIN, the Dutch association for the protection of the rights of the entertainment industry, requested the District Court to issue an injunction to block subscribers to XS4ALL and Ziggo from accessing The Pirate Bay website. The purpose of the injunction was to stop copyright infringements, based on Article 26d of the Copyright Act and Article 15e of the Neighbouring Rights Act. Under these Articles, the Court can issue an injunction to prevent copyright and other rights' infringements through the services of intermediaries, by ordering the intermediaries to cease the services used for the infringements. On 11 January 2012, the District Court of The Hague ruled that a large portion of the XS4ALL and Ziggo subscribers had committed copyright infringement by uploading protected works to The Pirate Bay website without the consent of the copyright owner. The District Court issued a court order to block the subscribers of XS4ALL and Ziggo from accessing The Pirate Bay website.

The judgment of the Court of Appeal overturned the judgment of the District Court. The Court considered that the number of illegal downloaders had increased, despite the blockage of The Pirate Bay website and that the blocking of access to the website was therefore unsuccessful in that it did not prevent newcomers to the website from downloading content from an illegal source. Also, it was noted that the decrease in visitors to the website had not led to a significant reduction of copyright infringements committed by subscribers of XS4ALL and Ziggo. According to the Court, therefore, the blocking of The Pirate Bay website had been ineffective in preventing illegal downloading.

The Court also held that the blocking of the website affects the freedom to conduct business of Ziggo and XS4ALL. The Court argued that the fact that the blocking is technically very easy to do and adds little or no extra cost, does not detract from the impact the blocking has on the freedom to conduct business. The blocking of the website constitutes an infringement of the freedom of businesses to act at their discretion and does not fulfil the intended purpose, i.e. the prevention of illegal downloading. The Court found therefore, that the infringement of the freedom to conduct a business was not justified under the principle of proportionality.

BREIN claimed that XS4ALL and Ziggo knowingly and structurally facilitated, and thus promoted, large-scale infringements of intellectual property by their subscribers when they did not block the access to The Pirate Bay website as ordered by the District Court. The Court of Appeal did not consider this claim to have any basis due to the fact that it held the ordered blocking as ineffective and disproportionate.

- *Gerechtshof Den Haag, 28 januari 2014, ECLI:NL:GHDHA:2014:88, Ziggo & XS4ALL/BREIN* (Court of Appeal The Hague, 28 January 2014, ECLI:NL:GHDHA:2014:88, Ziggo & XS4ALL v BREIN)
<http://merlin.obs.coe.int/redirect.php?id=16928>

United States**Supreme Court prohibits online television service Aero**

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On 25 June 2014, the Supreme Court issued a ruling that online television service Aero, Inc. ("Aereo") violated the Copyright Act ("Act") by allowing its subscribers to watch television programmes over the Internet without obtaining consent from the programmes' copyright owners.

The Supreme Court agreed with the contention of the programmes' copyright holders that Aereo infringed their right to "perform" their works "publicly" within the meaning of the Copyright Act. The Supreme Court explained that Aereo performs the works within the meaning of the Act by transmitting the copyrighted works over its own equipment and housing in a centralised warehouse outside of its users' homes.

Aereo's defence centered around the argument that it does not transmit the works "to the public" within the meaning of the Act, because it only sends a private transmission that is available only to that subscriber and creates a subscriber-specific copy of the programme. The Supreme Court rejected this argument, finding that an entity transmits a performance to the public even if it is done through one or several transmissions as long as the performance is of the same works and the images and sounds are contemporaneously visible and audible on the subscriber's computer. The Supreme Court therefore explained that Aereo transmitted the works to the public by communicating the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other.

- Judgment of the Supreme Court, American Broadcasting Cos.,Inc.,et al. v. Aereo, Inc., Fka Bamboomlabs, Inc., 25 June 2014
<http://merlin.obs.coe.int/redirect.php?id=17151>

IRIS 2014-8/37

Cross-border access to online content: tearing down the wall?

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I. Introduction

On 12 September 2014, Neelie Kroes, outgoing Vice-President of the European Commission responsible for the Digital Agenda, gave a speech¹ at the International Broadcasting Convention (IBC) 2014, where she stated her dream of "a market that is open, borderless and competitive". For Ms Kroes's dream to be fulfilled, the single market must be embraced (she calls it "our crown jewel") and barriers have to be brought down: "technology is three steps ahead of our legal framework; territorial restrictions just put barriers in the way... [T]oday's rules are obstructing tomorrow's digital future". She also provided an interesting piece of advice to her successors at the European Commission: "Don't regulate too far or too fast: in some markets – still changing and converging – action would be premature. In other areas, like copyright, reform is long overdue". She gave an example of why this copyright reform is needed: "many people ask me – why can't I pay to access my favourite TV show when I travel? Or watch the match of my favourite football team from back home? And I just don't know how to answer them". Many people can surely relate to this statement. But finding a solution does not seem as easy as stating the problem. And it is not even clear that this is a matter that will be solved simply by copyright reform.

The following piece of common sense is attributed to Albert Einstein: "If I had an hour to solve a problem I'd spend 55 minutes thinking about the problem and 5 minutes thinking about solutions." The European Commission has actually given itself years rather than minutes to think about the "copyright problem". This article describes the most recent actions undertaken by the Commission in gearing towards reform of the current copyright framework, including the new European Commission plans set out by its President-elect Jean Claude Juncker.

II. Recent Actions

In its Communication on Content in the Digital Single Market of 18 December 2012² the European Commission set out two parallel courses of action: on the one hand, completing its continuing effort to review and to modernise the EU copyright legislative framework with a view to deciding in

1) Kroes N., "Taking TV and film into the digital age", International Broadcasting Convention (IBC) 2014, Amsterdam, 12 September 2014, available at: http://europa.eu/rapid/press-release_SPEECH-14-594_en.htm

2) Communication from the Commission on content in the Digital Single Market, COM/2012/0789 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0789&from=EN>

2014 on whether to table legislative reform proposals and, on the other hand, facilitating practical industry-led solutions through the stakeholder dialogue "Licences for Europe" on issues on which rapid progress was deemed necessary and possible.

1. Licences for Europe

The Commission launched the "Licences for Europe" stakeholder dialogue in February 2013.³ This dialogue was organised into four thematic working groups:

- Cross-border access and portability of services: how to foster cross-border online access and "portability" of content across borders, taking into account new developments like cloud computing and cross-border legal access to cloud-stored content and services. How to deliver practical solutions to promote multi-territory access and to eliminate cross-border sales restrictions.
- User-generated content and micro licensing for small scale users of protected material: how to foster transparency and ensure that end users have greater clarity on legitimate and illegitimate uses of protected material and easier access to legitimate solutions.
- Audiovisual heritage institutions: how to facilitate the deposit and online accessibility of films in the European Union, both for commercial purposes and non-commercial culture and educational uses.
- Text and Data Mining for scientific research purposes: how to promote the efficient use of text and data mining for scientific research purposes.

The main outcome of the "Licences for Europe" stakeholder dialogue is the following "Ten pledges to bring more content online":⁴

1. Further development of cross-border portability of subscription services.
2. Improved availability of e-books across borders and across devices.
3. Easier licensing for music.
4. Easier access to print and images.
5. Enabling the identification of your work and rights online.
6. More active reader involvement in the online press.
7. More heritage films online.
8. Freeing up TV footage archives through digitisation.
9. Improving identification and discoverability of audiovisual content online.
10. Easier text and data mining of subscription-based material for non-commercial researchers.

These pledges were agreed by copyright holders across different sectors, on a case-by-case basis, or they constitute plurilateral commitments on the part of a sector of the industry.

Of all the pledges, the one closest to the heart of the discussion on the digital single market is probably the first concerning the cross-border portability of subscription services. Currently in Europe, subscribers to audiovisual services online, e.g. streamed pay TV or VoD services, are often denied access to these services outside of their country of residence. Although multi-territory licensing is possible, distribution of content is sometimes contractually limited to a single EU member state by service providers and/or rightsholders. In order to change this state of affairs,

3) <http://ec.europa.eu/licences-for-europe-dialogue/>

4) Licences for Europe - Ten pledges to bring more content online, available at: http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf

statement⁵ was issued by representatives of the audiovisual sector.⁶ That statement affirmed their "continued interest in the development of cross-border portability of lawfully acquired audiovisual content through relevant services when travelling abroad and their willingness to continue to work towards its further development where economically sustainable, provided that content can be made secure and taking into account cultural diversity".

The signatories made successful developments in cross-border portability of lawfully acquired audiovisual content subject to the following requirements:

- a voluntary, market led approach with the freedom for market operators to experiment with new business models, taking into account the fast moving evolution in digital EU marketplaces;
- industry initiatives that depend on clear market signals, rooted in actual and demonstrable consumer demand as well as secure technology enabling and managing individual access by authorised users;
- commercial and contractual freedoms;
- differentiated financing and distribution strategies for each type of audiovisual content, stressing the importance of raising and maximising distribution revenues in order to maintain the sustainability and competitiveness of the audiovisual content industries in Europe; and
- full compliance with EU competition law and principles governing consumer information.

Accordingly, the signatories proposed to "engage with the Commission at a mutually agreed time to continue the review of future market developments regarding cross-border portability of lawfully acquired audiovisual content".

2. Public consultation on the review of EU copyright rules

On 5 December 2013, the European Commission launched a public consultation on the review of EU copyright rules.⁷ The consultation is based on issues identified in the Communication on Content in the Digital Single Market, i.e.: "territoriality in the Internal Market, harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform".⁸

The questionnaire is organised under six main headings:

1. Rights and functioning of the Single Market;
2. Limitations and exceptions in the Single Market;
3. Private copying and reprography;
4. Fair remuneration of authors and performers;
5. Respect for rights;
6. A single EU Copyright Title.

In July 2014, the Commission published a report summarising over 9,500 replies to the consultation document and more than 11,000 messages, including questions and comments, sent

5) Licences for Europe – Structured Stakeholder Dialogue 2013 - WG 1 Audiovisual Subgroup- Joint Statement on Cross-border Portability of lawfully-acquired Audiovisual Content. Available at: <http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/1-AV-portability.pdf>

6) The signatories are the Association of Commercial Television (ACT), European Coordination of Independent producers (CEPI), Europa Distribution, EUROVOD, Federation of European Film Directors (FERA), International Federation of Film Distributors Associations (FIAD), International Federation of Film Producers Associations (FIAPF), Independent Film & Television Alliance (IFTA), International Video Federation (IVF), Motion Picture Association (MPA), Sports Rights Owners Coalition (SROC) and Society of Audiovisual Authors (SAA).

7) http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

8) This consultation builds on previous consultations and public hearings, in particular those on the Green Paper on copyright in the knowledge economy, and the Green Paper on the online distribution of audiovisual works and Content Online.

to the Commission's dedicated email address.⁹ The document reflected a wave of polarised opinions: while the copyright industry seems to favour maintaining the status quo, the IT sector and service users favour a profound reform of the existing EU legal copyright framework.

With regard to cross-border access to online content, the majority of consumer respondents reported being regularly confronted with access restrictions depending on the geographic location of their IP address. These restrictions would often lead to price discrimination and to different conditions for identical products and services, depending on the member state in question. The Commission report concluded that in general, consumers would like to be able to access all content from any online store in any country. As a basic minimum, consumers expect transparency in the possibility of cross-border access to content and on relevant territorial restrictions. Libraries also reported problems in providing content across borders, with some of them explaining that such problems do not stem only from the fact that copyright is territorial but also from technological, regulatory and taxation differences between EU member states.

The audiovisual creative sector seems to agree in general that cultural, language and regulatory differences among member states have an impact on the territorially-based nature of the services offered, aside from aspects related to market strategies and business practices of service providers operating in the digital single market. In this sector, most respondents consider the exclusive distribution on a territorial basis to be a tool for rightsholders to secure adequate financing for the production of films and other audiovisual works.

Authors and performers explained that multi-territorial licences are available (at least in the book, image and music sectors) and that service providers' commercial decisions determine how, when and where services distributing digital content are rolled out. Many broadcasters consider the viewing habits of consumers, consumer demand, language, the ability to provide consumer support in more than one language and the cost of marketing, to be reasons why there is no incentive to provide services across several member states.

Film producers generally considered that the relative absence of multi-territorial services is not related to copyright law and that the current EU copyright rules should not be changed. According to them, service providers cater mostly to national or specific linguistic audiences and are therefore not interested in multi-territorial licences except for territories in which the same language is spoken. They recall that multi-territorial distribution can be very costly due to the need for targeted local advertising campaigns; the employment of multilingual staff for customer services; the use of different delivery networks and varying territorial internet costs, broadband penetration, VAT rates, etc.

Regarding service providers, some (e.g. VoD-platforms) indicated that they are contractually required as a result of territorial licensing to prevent cross-border access to their content. Non-copyright related factors are also taken into account when deciding on the potential multi-territorial roll out of services. These factors include:

- The cost of compliance with divergent consumer protection laws;
- national rating systems; protection of minors obligations;
- taxation;
- release windows;
- private copying regulations;
- the cost of contextualisation (i.e. market-specific marketing) and versioning (subtitling and dubbing);
- the cost of providing customer care and responding to customer complaints in several languages;

⁹⁾ Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

- no common technical standards for content delivery;
- the risk of fraud and non-payments and the diverse economic realities which make a single price impossible;
- lack of digital infrastructure/access to high speed broadband;
- difficulties in payment processing; and
- divergent advertiser preferences.

Finally, providers of audiovisual services point to insufficient demand for cross-border services.

Whereas there seems to be some common understanding among industry members of the reasons why so far cross-border access to online content is less than perfect, the need for further legislative measures is met with different reactions within the industry. While the vast majority of authors and performers favour further measures to increase cross-border availability of content, many consider that measures should be taken in areas such as consumer protection, payment provisions and VAT, rather than in the area of copyright. For some broadcasters the market is moving naturally towards cross-border delivery of content where that delivery is economically viable. However, there is a divergence of views on the need for further measures at EU level in the area of territoriality: while some (mostly commercial) broadcasters do not see any need for legislative change, public service broadcasters in particular do see a need for some legislative changes.

Public service broadcasters call for the application of the country of origin approach to online media services (as a minimum to broadcast-related online services) and for the system currently applicable to cable retransmission under the Sat-Cable Directive to apply also to simultaneous retransmission of broadcasts via online platforms. For on-demand services which are related to linear programmes (e.g. catch-up TV) and which can be offered by the broadcaster itself or by third parties, they suggest that a solution could take the form of the system of extended collective licensing of the underlying rights to works and other subject matter used in broadcast programmes. A minority of broadcasters state that there is a general need to improve the licensing schemes in Europe and to encourage one-stop licensing. The vast majority of Collective Management Organisations (CMOs) do not see any need to intervene in copyright issues, although many do see the need for action in other areas, such as taxation. CMOs active in the audiovisual sector consider that licencing multi-territorial should be accompanied by the establishment of a framework to remunerate audiovisual authors. They also state that in some instances, territorial limitations in granting licences are a necessary consequence of the exclusive territorial distribution of audiovisual works. Most service providers call for the simplification of the licensing process in the single market. They cite the lack of information on the copyright status of content as a major obstacle in the clarification of rights and licensing in the EU. Some emphasise the need to develop right information initiatives and to enhance the transparency of who owns a given repertoire. Others call for one-stop-shop licensing based on the country of origin principle and for imposing on CMOs the obligation to license works. With regard to cross-border portability of services, they argue that licences should allow them to continue serving customers who have paid for the content, when those customers travel within the EU. Some also call for a harmonised VAT regime for online services and content.

III. Next steps? The new European Commission plans

The Commission had hinted that a white paper would be published by the summer of 2014 as a follow-up to the copyright consultation. The white paper would have included a roadmap of the direction the next Commission should take and would pave the way for legislative intervention during the next Parliament (2014-2019) on a number of important issues, such as cross border distribution, hyper-linking and browsing, certain exceptions (from libraries and archives to education and research, uses by people with disabilities, and text and data mining to user generated content), private copying levies, identifiers and formalities, and civil enforcement. However, after several postponements the publication of this white paper was finally dropped from the political agenda. This was due in part to divergent approaches among Directorates General in the Commission, which were also reflected at Council level where the position of member states is greatly polarised on these questions, but also in view of the new Commission reorganisation of portfolios.

In particular, on 10 September 2014 the European Commission President-elect Jean Claude Juncker announced the allocation of responsibilities in his team and the way work will be organised in the new European Commission.

The new Commission will have 6 Vice-Presidents in addition to the High Representative for Foreign Affairs and Security Policy. President-elect Juncker has entrusted the Vice-Presidents with specific tasks such as being in charge of a number of well-defined priority projects, steering and coordinating work across the Commission in key areas and subject to the Political Guidelines.¹⁰

President-elect Juncker has chosen to organise the new Commission around project teams. Among them, a team by the name of "A Digital Single Market", led by Andrus Ansip, Vice-President for the Digital Single Market, will be in charge of breaking down "national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law". Its aim will be to make better use of the opportunities offered by digital technologies.

As part of the Digital Single Market project team, Günther Oettinger, Commissioner for Digital Economy and Society, received a mission letter from Mr Juncker asking him, among other tasks, to focus on "[p]reparing, ambitious legislative steps towards a connected Digital Single Market". These steps are expected to be taken within the first six months of the new Commission's mandate. According to the mission letter, "Copyright rules should be modernised, during the first part of this mandate, in the light of the digital revolution, new consumer behaviour and Europe's cultural diversity".

This paper in no way aims to second-guess any future decision made by the European Commission. One thing is clear, however: the reform of the EU copyright legislative framework announced in Mr Juncker's letter will surely stand on the shoulders of the Commission's efforts in this field, as mentioned above.

10) A new start for Europe - Jean-Claude Juncker's Political Guidelines - 15/07/2014, available at: http://ec.europa.eu/news/eu_explained/140715_en.htm



Information services for the audiovisual sector

It is the task of the European Audiovisual Observatory to improve transparency in the audiovisual sector in Europe. It does this by collecting, processing and publishing up-to-date information about the various industries concerned.

The Observatory has adopted a pragmatic definition of the audiovisual sector in which it works. Its principal areas of interest are film, television, video/DVD, on-demand audiovisual media services and public policy on film and television. In these five areas, the Observatory provides information in the legal field as well as information about the markets and financing. As far as its geographical scope is concerned, the Observatory monitors, records and analyses developments in its member states. In addition, data on non-European countries is also made available when judged appropriate. The various stages involved in providing information include the systematic collection and processing of data as well as its final distribution to our users in the form of print publications, information on-line, databases and directories, and our contributions to conferences and workshops. The Observatory's work draws extensively on international and national information sources and their contributions of relevant information. The Observatory Information Network was established for this purpose. It is composed of partner organisations and institutions, professional information suppliers and selected correspondents. The Observatory's primary target groups are professionals working within the audiovisual sector: producers, distributors, exhibitors, broadcasters and other media service providers, international organisations in this field, decision-makers within the various public bodies responsible for the media, national and European legislators, journalists, researchers, lawyers, investors and consultants.

The European Audiovisual Observatory was established in December 1992 and is part of the Council of Europe thanks to its status as a "partial and enlarged agreement". Its offices are in Strasbourg, France. The Observatory's membership currently comprises 40 States and the European Union, which is represented by the European Commission. Each member appoints one representative to its board, the Executive Council. An Executive Director heads the international Observatory team.

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