Communication to a New Public?

The CJEU's case law on retransmission and hyperlinking

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Outline

- Communication to the public
- Cases on retransmission of broadcasts
- Cases on hyperlinking
- Evaluating the ‘new public’ test
- EC policy on ‘modernizing’ EU copyright
- A new neigbouring right for publishers?

‘Communication to the Public’
EU Information Society Directive, Art. 3

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

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

‘Communication to the Public’
EU Information Society Directive, Recitals

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

Cases on retransmission of broadcasts

1) Is initial transmission ‘communication to the public’?
   - *Lagardère Active Broadcast* (C-192/04)
   - *SBS Belgium* (C-325/14)
2) Is secondary transmission ‘communication to the public’?
   - *SGAE* (C-306/05)
   - *Football Association Premier League and Others & Murphy* (C-403/08, C-429/08)
   - *ITV Broadcasting and Others* (C-607/11)


Lagardère
ACTIVE

Lagardère Active Broadcast CJEU 14 July 2005 (C-192/04)

"a limited circle of persons who can receive the signals from the satellite only if they use professional equipment cannot be regarded as part of the public, given that the latter must be made up of an indeterminate number of potential listeners (see C-89/04 *Mediakabel*)."


SBS
SALES BELGIUM
SBS
SBS
SBS

SBS Belgium
CJEU 19 November 2015 (C-325/14)

Transmission by broadcasting organization of programme-carrying signals to specified individual cable distributors "without potential viewers being able to have access to those signals" is not communication to the *public* within meaning of 3.1 ISD

See Lagardère Active Broadcast (C-192/04)

SBS Belgium
CJEU 19 November 2015 (C-325/14)

However, “it is not inconceivable that a distributor might find itself in a position that is not independent in relation to the broadcasting organisation and where its distribution service is purely technical in nature, with the result that its intervention is just a technical means, within the meaning of the Court’s case-law.

If that were to be the case, which it is for the national court to ascertain, the subscribers of the distributors in question could be considered to be the public for the purposes of the communication made by the broadcasting organisation, with the result that that organisation would make a ‘communication to the public’.”

Norma v NL Kabel
Dutch Supr. Crt, 28 March 2014

Transmission of broadcasting content to cable operators via digital ‘media gateway’ is not communication to the public.

→ Dutch CMO Norma has no statutory right under SatCab Directive to license retransmission of rights of performing artists.

NORGES HØYESTERETT

Den 10. mars 2016 avsa Høyesterett dom i

HR-2016-00562-A, (sak nr. 2015/1101), sivil sak, anke over dom,

Norwaco	(advokat John S. Gulbrandsen)
mot	
Get AS	(advokat Rasmus Asbjørnsen)

S T E M M E G I V N I N G :

(1) Dommer **Webster:** Saken gjelder spørsmålet om det er videresending av kringkastingssendinger, jf. åndsverkloven § 34 når et kabelselskap distribuerer fjernsynskanaler som det mottar i lukket elektronisk forsendelse, men som samtidig kringkastes via satellitt og over bakkenettet.

(2) Norwaco er en paraplyorganisasjon for rettighetshaverorganisasjoner som ble opprettet i 1983. På vegne av norske og utenlandske rettighetshavere innkrever Norwaco vederlag for blant annet videresending av opphavsrettsbeskyttede verk i tv-programmer. Norwaco har godkjenning etter åndsverkloven § 38a til å forestå slik innkreving.

(3) Get AS er distributør av kabeltjenester og tilbyr blant annet fjernsynssendinger over kabelnett. Selskapet produserer ikke selv innholdet i tv-sendingene, men skaffer seg tilgang til kanaler fra produsenter av tv-kanaler. Deretter setter Get AS sammen kanalpakker som tilbys abonnenter. Blant kanalene som selskapet tilbyr, er TVNorge, som produseres av SBS Discovery AS i Norge, og FEM, MAX og VOX, som produseres for det norske markedet av SBS Discovery Media Ltd. i Storbritannia. SBS Discovery AS


rafaelhoteles

SGAE
CJEU 7 December 2006 (C-306/05)

- General public = *indeterminate number of potential television viewers* (Lagardère, C-192/04)
- Hotel television service reaches cumulatively indeterminate number of successive guests, so “a fairly large number of people”
- Private nature of guest rooms does not rule out communication to the public
- Hotel television is “not just a technical means to ensure or improve reception of the original broadcast”, but active *intervention* by hotel operator
- Transmission therefore reaches *new public*


sky NEWS
FRIDAY
SORTED
FRIDAY THRILLERS
8 - 10PM
HOUSE SPIRITS
2 - 1

FAPL And Others & Murphy
CJEU 4 October 2011 (C-403/08, C-429/08)

- Communication to the public requires *public not present at the place where the communication originates*
- Pub owner carries out act of communication because of active and intentional *intervention*
- Communication reaches *new public*, i.e. “a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public”
- Communication is of a “profit-making nature”

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Channel 4	14:40 - 16:45 Brewster's Millions
Five	14:55 - 16:45 Richie Rich
ITV +1	15:25 - 17:35 Evil Under the Sun
Channel 4 +1	15:40 - 17:45 Brewster's Millions

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Showing this week on TVCatchup

ITV Broadcasting and Others
CJEU 7 March 2013 (C-607/11)

- "the EU legislature intended that *each transmission or retransmission* of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question.
- "*intervention* by TVCatchup consists in a transmission of the protected works at issue which is different from that of the broadcasting organisation concerned"
- "it is irrelevant whether the potential recipients access the communicated works through a one-to-one connection. That technique does not prevent a large number of persons having access to the same work at the same time" → communication to the *public*
- Requirement of *"new public" is not relevant* in present context
- "*profit-making nature is not necessarily an essential condition*"

CJEU Case law on retransmission of broadcasts: summary

1) Initial transmission to intermediary is not 'communication to the public', unless
   - Signal directly receivable by the general public, or
   - In case of completely passive retransmission to general public.

CJEU Case law on retransmission of broadcasts: summary

2) Secondary transmission is ‘communication to the public’, if

- Active ‘intervention’ by intermediary
- Public (“fairly large number of people”) is reached
- Public is ‘new’, i.e. not taken into account by authors when authorizing initial communication.

Cases on hyperlinking

1) Is hyperlinking ‘communication to the public’?
   - *Svensson and Others* (C-466/12)
2) Is hyperlinking *to illegal content* ‘communication to the public’?
   - *BestWater International* (C-348/13)
   - *GS Media* (C-160/15)


Retriever

Svensson and Others
CJEU 13 February 2014 (C-466/12)

A hyperlink constitutes a ‘communication’ and also reaches a ‘public’, but *no new public*: “the users of the site [which provides the hyperlink] must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.”

So: *(deep) linking is no communication to the public*.

Svensson v. Retriever
CJEU 13 February 2014 (C-466/12)

What about ‘framed’ or ‘embedded’ linking?

> It makes no difference if ‘the work appears 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’, unless ‘that link appears to circumvent restrictions put in place by the site on which the protected work appears’

YouTube DE

wasserfilter bestwater

BestWater International
CJEU 21 October 2014 (C-348/13)

- Framed link to film on YouTube is no communication to the public, if no new public is reached and no technical measures circumvented by hyperlink.

GEENSTIJL

Tendentieus, Ongefundeerd & Nodeloos kwetsend

HEADLINES

29-11

Opstelten praat aantoonbaar poep

NOS vervangt wereldberoemd sportmeisje

Fucking uitgelekt! Naaktfotoos Britt Dekker

Ach nee. Hoe KAN dat nou goedverdoemme telkens weer? Het is toch niet te gleuven? Na Amanda Krabbé zijn de kroonjuwelen van het blootblad wederom op straat komen te liggen. Het is één grote lektober daar bij de Playboy. Ook de blootplaatjes van Britt Dekker zijn nu uitgelekt. Amper drie weken na de naaqtshoot op een appeltjesbruin Canarisch Eiland (deze) liggen de fapfotoos van het Pareltje van Purmereutel open en bloot op straat. Je zou toch denken dat ze daar bij de Sanoma enige maatregelen getroffen hebben na het vorige lek. Personeel op straat flikkeren, toegangspasjes doormidden knippen, logins voor het CMS onklaar maken, het fotomateriaal 24/7 laten bewaken door een homofiele Men's Health-lezer (is dat dubbelop? - ff uitzoeken). Maar nee. Niets van dat alles. Het lijkt wel of ze het erom doen? Mensen. Dit is toch geen toeval meer? Ennieweetjes. Vanavond een totaal ontredderde en hoofdschuddende PB-hoofdredacteur Jan Heemskerk - die er ook niks van snapt - in RTL Boulevard en Shownieuws. En dan nu het linkje met pics waar u op zat te wachten. Wie het eerst fapt, die het eerst komt. **HIERRR**. De bloeddoddige mevrouw Dekker complimenteren met het keurig aangeharkte voortuintje kan daar. Pritt ❤ Britt.

Update. Vooruit dan.

Pritt Stift | 27-10-11 | 07:59 | Link | 156 reacties |

GS Media

Concl. AG Wathelet 7 April 2016 (C-160/15)

Main question:

- Is link to work placed in (publicly accessible) digital locker without authorization of right holder a communication to the public?

GS Media

Concl. AG Wathelet 7 April 2016 (C-160/15)

AG Wathelet:

- Communication to the public, including making available, requires act of *(re)transmission* and *intervention*
- Hyperlinks facilitate access to work, but do not *make available* the work
- Placing hyperlink is not an act of communication → overrule Svensson!
- Whether or not work is placed on website without permission is irrelevant, unless hyperlink circumvents technical measures.

Opinion on the Reference to the CJEU in Case C-466/12 Svensson

Introduction

1. The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of Europe, seeking to promote their views of the overall public interest. The Society is not funded by, nor has been instructed by any particular stakeholders.

2. The ECS wishes to take the opportunity to put on record its views of the issues before the Court in Case C-466/12, *Svensson*. The importance of this particular reference should be evident to the Court. Although hyperlinking takes many forms and has multiple functions, there can be no doubt that it is

Search …

RECENT OPINIONS

Barcelona, 20 May 2016: An Open Debate with the ECS

The ECS has responded to the Public Consultation on Reform of the EU Directi on Cable and Satellite Broadcasting.

Evaluating the ‘new public’ test

Historic error: ‘new public’ already rejected at Brussels BC Rev. Conference (1948):

‘any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one’ (11bis (1)(ii) BC)

Evaluating the ‘new public’ test

Lack of legal certainty: scope of exclusive IP right should be objectively defined, not mixed with subjective (contractual) elements

- How can (il)legal status of content be ascerted?

Evaluating the ‘new public’ test

Flawed economics:

- Communication to the public should apply to all economically relevant exploitations
- Whether or not ‘new public’ is reached is irrelevant
  - E.g. radio broadcasting < > Spotify: same music/same public, but separate markets: separtae acts of communication to the public

So: ‘new communication’, not ‘new public’

How to deal with hyperlinking?

- No communication to the public, because no intervention (= ECS/AG Wathelet)
- Linking to illegal content with (negligent) intent is unlawful act (of unfair competition)
  - Need for harmonization of law of unfair competition!

EUROPEAN
COMMISSION

Brussels, 9.12.2015
COM(2015) 626 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

Towards a modern, more European copyright framework

reuse or retransmission of copyright-protected content.

There are various reasons for this situation, both legal and market-related (including the relative market power of the parties involved). From a copyright perspective, an important aspect is the definition of the rights of communication to the public and of making available. These rights govern the use of copyright-protected content in digital transmissions. Their definition therefore determines what constitutes an act on the internet over which creators and the creative industries can claim rights and can negotiate licences and remuneration. There are contentious grey areas and uncertainty about the way these concepts are defined in EU law, in particular about which online acts are considered 'communication to the public' (and therefore require authorisation by right holders), and under what conditions.[28] These questions create on the one hand uncertainty in the market and, on the other, put into question the ability of these rights to transpose into the online world the basic principle of copyright that acts of exploitation need to be authorised and remunerated. Apart from its significance for the fair distribution of value in the online market place, lack of clarity on the definition of these rights can also generate uncertainty for ordinary internet users.

[28] This uncertainty has resulted in a number of questions being referred to the CJEU for preliminary rulings.

More broadly, the situation raises questions about whether the current set of rights recognised in EU law is sufficient and well-designed. For news aggregators, in particular, solutions have been attempted in certain Member States, but they carry the risk of more fragmentation in the digital single market.

In addition, platforms can also consider that they are not engaging in copyright-relevant acts at all, or that their activities are of a merely technical, automatic and passive nature, allowing them to benefit from the liability exemption of the e-Commerce Directive.[29] This has prompted a growing debate on the scope of this exemption and its application to the fast-evolving roles and activities of new players, and on whether these go beyond simple hosting or mere conduit of content.

Another relevant issue is fair remuneration of authors and performers, who can be particularly affected by differences in bargaining power when licensing or transferring their rights.

Commission seeks views on neighbouring rights and panorama exception in EU copyright

Published on 23/03/2016

Have your say on the possible extension to publishers of the neighbouring rights currently granted to broadcasters or producers of someone else's copyrighted material. We would also welcome your views on the panorama exception, which concerns the use made of images depicting buildings, sculptures and monuments. The Commission wants to hear from everyone interested in the publishing sector and the digital economy including authors, researchers, publishers, online service providers, readers, internet users and others in the creative industries

Today the European Commission is launching an open consultation as part of its work to update EU copyright rules for the digital age. It is seeking views on the role of publishers in the copyright value chain, including the possible extension to publishers of the neighbouring rights. Publishers do not currently benefit from neighbouring rights which are similar to copyright but do not reward an authors' original creation (a work). They reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort (for example by a producer) which may also include a participation in the creative process. The Commission is also consulting on the panorama exception, which concerns the use made of images depicting buildings, sculptures and monuments located permanently in public places.

The Commission wants to hear from everyone interested in the publishing sector and the digital economy such as authors, researchers, publishers, online service providers, readers, internet users and others in the creative industries. The Commission invites all respondents to back up

EUROPEAN UNION, LEGISLATIVE PROCESS, NEIGHBOURING RIGHTS, SUBJECT MATTER (COPYRIGHTABLE)

Say Nay to the Neighbouring Right!

Bernt Hugenholtz / April 14, 2016 / Leave a comment
Institute for Information Law (IViR)

The European Commission keeps sending us surprises. After **December's Communication on Modernizing Copyright**, which contained a mixed bag of copyright goodies, we had expected just about anything but **the announcement that followed on March 23rd**. The European Commission has launched a public open consultation on 'the possible extension' of neighbouring rights to publishers. As we all know, neighbouring (or related) rights at EU level are currently confined to four categories: performing artists, phonogram producers, broadcasters and film producers. Apparently, someone has convinced the Commission that extending this regime to publishers might be a good idea.

In my opinion, it is not. Whereas the case for neighbouring rights for performers has always been strong, since performing artists are excluded from the domain of authors' rights even though performing a work of authorship is usually a creative act, the same has never been true for the other three categories of neighbouring right holders. The main argument here is that such rights 'incentivize' and reward investment in producing phonograms (i.e. sound recordings), broadcasts or films, but the economics of this rationale remain largely unproven. And now that digital technologies have reduced the costs of sound recording, broadcasting and video production by