[GB] Live Video Streaming Might Infringe Copyright

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ITV Broadcasting Limited, ITV 2 Limited, ITV Digital Channels, Channel 4 Television Corporation, 4 Ventures Limited and Channel 5 Broadcasting Limited are alleging that TV Catchup “has infringed the copyrights in their broadcasts by communicating those broadcasts to the public by electronic transmission.” This hearing was generally to determine whether there was any real prospect of the claimants succeeding and whether specifically “the fact that the defendant's transmissions are not broadcasts is necessarily fatal to the claim.”

TV Catchup facilitates live video streaming of content (including that of the claimants) to its members, which is accessible by PC, games consoles and mobile devices, such as the iPhone and iPad, over both 3G and WiFi networks. There is a short delay as advertisements are shown before the content, which is how TV Catchup makes its revenue. This, as a separate issue, concerns the BBC. In total, TV Catchup makes over 50 channels available. The legality of TV Catchup has been questioned earlier and it was suspended before being started up again without the network PVR functionality.

The judge began his analysis in terms of Directive 2001/29/EC, since Section 20 of the Copyright Designs and Patents Act 1988 implements Article 3 and in particular Recitals 9 and 10 (on protecting author’s rights), as well as 23 and 24 (how to understand the rights involved) of the Directive. He also relied on ECJ Case C-306/05 Sociedad General de Autores y Editores de Espana (SGAE) v. Rafael Hoteles SA, according to which: "It follows from the 23rd recital in the preamble to Directive 2001/29 that "communication to the public" must be interpreted broadly. Such an interpretation is moreover essential to achieve the principal objective of that Directive, which, as can be seen from its ninth and tenth recitals, is to establish a high level of protection of, inter alios, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public."

The claimants contended that TV Catchup’s service, whilst not a broadcast in terms of Section 6 of the Copyright Act 1988, does nonetheless involve “communication of the claimants’ broadcasts to the public by electronic transmission and so falls within the scope of section 20 of the Copyright Act 1988.”

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TV Catchup's position is that any finding that it had infringed the copyright in a broadcast under Section 20 of the Act hinged on the transmission being a broadcast as understood within the meaning of Section 6 - which the claimants agreed was not the case.

Mr Justice Kitchin concluded that TV Catchup had confused the "protected work and the restricted act." The former is the broadcast (although it could be some other genre of work, e.g., a photograph). A broadcast is a "transmission of visual images, sounds and other information for reception by or presentation to members of the public." The latter, on the other hand, is the "communication to the public by electronic transmission of all of those images, sounds and other information." In his opinion, that suggested that the claimants might succeed at trial. Following on from Article 3, he said that "it is clear that the right of communication of a work to the public must be interpreted broadly so as to cover all communication to the public not present where the communication originates. It includes, but is not limited to, broadcasting and access on demand."

ITV Broadcasting Ltd & Ors v TV Catch Up Ltd, [2010] EWHC 3063 (Ch) (25 November 2010)

http://www.bailii.org/ew/cases/EWHC/Ch/2010/3063.html

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