

Court of Justice of the European Union: Scope of the Exception for Ephemeral Recordings

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On 26 April 2012, the Court of Justice of the European Union (CJEU) delivered a judgment in the case of DR, TV2 Danmark A.S. v. NCB-Nordisk Copyright Bureau.

The applicants at national level are DR, a public radio and television broadcasting organisation, and TV2 Denmark, a commercial public television broadcasting organisation. TV2 and DR broadcast radio and television programmes produced both in-house and by third parties under specific agreements.

The defendant in the main proceedings is Nordisk Copyright Bureau (NCB), a company that administers the rights to record and copy music for composers, songwriters and music publishers in a few Nordic and Baltic States. The dispute at national level relates to the scope of the exception for ephemeral recordings. NCB considered that the exception for ephemeral records also applies to records produced by third parties commissioned by a TV producer. The plaintiffs disagreed, claiming there is no difference between the programmes made by the production company's own team and those made by third parties, as this distinction is irrelevant under the Danish Copyright Act.

The Østre Landsret (Danish regional court), before which the proceedings were brought, requested a preliminary ruling to the CJEU concerning the interpretation of Article 5(2)(d) and recital 41 in the preamble to Directive 2001/29/EC.

First, the national court asked the CJEU whether the expression 'by means of their own facilities' contained in Article 5 (2)(d) of Directive 2001/29/EC should be interpreted according to national law or European Union law. According to the CJEU, directive 2001/29/EC does not refer to national law and recital 41 clarifies this term. Therefore, this term must be interpreted in a uniform way throughout all EU countries.

The second question is whether the 'own facilities' of a broadcasting organisation also includes facilities of parties that act on behalf and under the responsibility, or parties that act on behalf or under the responsibility. There is a divergence in translation of recital 41; both sentences are used in different versions. The CJEU decided that not the formulation but the purpose and context are important. Therefore, recital 41 can be explained as parties that act on behalf or under the responsibility of the broadcasting organisation.

The last question the national court asked is which criteria are used to determine whether recordings made by a broadcasting organisation with the facilities of a third party falls within the exception of ephemeral recordings. According to the CJEU, acting 'on behalf of' supposes a direct and immediate link between the two parties, precluding all independence on the part of the third party. That link must be unambiguously recognisable as such to outsiders. Acting 'under responsibility' means the broadcasting organisation can be held accountable for all actions by the third party concerning the reproduction of the work, especially by the authors (right sholders). It is irrelevant who made the final artistic or editing decisions in terms of content.

Domstolens Dom (Tredje Afdeling), 26. april 2012

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Case C-510/10, DR, TV2 Danmark A/S v NCB- Nordisk Copyright Bureau, judgment of the Court of Justice of the European Union, 26 April 2012

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