Court of Justice of the European Union: Live Streaming of TV Programmes Constitutes a Communication to the Public

IRIS 2013-4:1/4

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On 7 March 2013, the Court of Justice of the European Union (CJEU) delivered a preliminary ruling in the case ITV Broadcasting and others v. TVCatchup. The judgment was issued on a request made by the High Court of Justice of England and Wales.

At national level, the case involved a dispute between ITV Broadcasting and other commercial TV broadcasters on one side and TVCatchup, another broadcasting organisation, on the other side. TVCatchup offers an Internet TV broadcasting service that allows its users to watch, via the Internet, live streams of TV broadcasts from other broadcasters. Users can only subscribe to its services and get access to content if they legally hold a TV licence to watch TV programmes in the United Kingdom. ITV Broadcasting and others initiated the proceedings before the High Court of Justice alleging that TVCatchup had infringed their copyright by communicating to the public their TV broadcasts, shows and movies without their authorisation. They claimed that national law (section 20 of the Copyright, Designs and Patents Act 1998 as applicable) and Article 3 (1) of Directive 2001/29/EC on copyright in the information society, prohibit such communication to the public.

The High Court of Justice referred preliminary questions to the CJEU to determine whether there is communication to the public, within the meaning of Article 3 (1) of Directive 2001/29/EC, in a case where an organisation other than the original broadcaster streams live broadcasts to members of the public entitled to access the original broadcast signal on their TV sets or laptops at a place chosen by them.

The CJEU first determines the meaning of “communication to the public” under Directive 2001/29/EC and then ascertains whether the TV broadcasts have been communicated to the public.

Concerning the definition of “communication to the public”, the Court notes that Directive 2001/29/EC does not define the notion. But Recital 23 of the Directive provides that the right to communication should be interpreted broadly to cover any (re)transmission of a work to the public not present at the place where the

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communication originates by wire or wireless means, including broadcasting. By virtue of Article 3 (3) of Directive 2001/29/EC, the inclusion of a protected work in an authorised communication does not exhaust the right to authorise other communications of this work to the public. As a consequence, each retransmission of a work having multiples uses must be individually authorised.

The CJEU then specifies the notion of "a 'public'" to determine if the protected works have in fact been communicated. According to the Court's case law, the term "public" as contained in Article 3(1) of Directive 2001/29/EC refers to "an indeterminate number of potential recipients", i.e., "a fairly large amount of persons". In the present dispute, the Court notes that the retransmission of the TV programmes is aimed at all residents in the United Kingdom having an Internet connection and holding a valid TV licence in that country. The Court finds that the criteria of "a public" are met in the context of live streaming of TV programmes on the Internet. As a consequence, the Court concludes that the protected broadcasts at stake, by their retransmission via live streaming, are indeed communicated to the public in the sense of Article 3(1) of Directive 2001/29/EC.

In sum, the concept of "communication to the public" must be interpreted "as meaning that it covers a retransmission of works included in a terrestrial television broadcast, where the retransmission is made by an organisation other than the original broadcaster, by means of an Internet stream made available to the subscribers of that other organisation who may receive that retransmission by logging on to its server, even though those subscribers are within the area of reception of that territorial television broadcast and may lawfully receive the broadcast on a television receiver".

Case C-607/11, ITV Broadcasting et al. v. TVCatchup, Judgment of the Court of Justice of the European Union (Fourth Chamber), 7 March 2013

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