Court of Justice of the European Union: New Media Online v. Bundeskommunikationssenat

IRIS 2015-10:1/3

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On 21 October 2015, the Court of Justice of the European Union (CJEU) delivered its judgment in *New Media Online v. Bundeskommunikationssenat*, which was a preliminary reference from an Austrian court, asking whether a newspaper's website containing video is covered by the EU's Audiovisual Media Service Directive. The Court disagreed with Advocate General Szpunar's recent opinion in July 2015, which had held that neither a newspaper's website with audiovisual material, nor any section of such a website, is an "audiovisual media service" under the Directive (see IRIS 2015-8/3).

The case concerned the Tiroler Tageszeitung Online (Tiroler Tageszeitung newspaper's website), which was operated by the Austrian company New Media Online. The newspaper's website had a "video" section, which included a catalogue of around 300 videos, varying in length from several seconds, to several minutes, and included its own material, user-generated videos, and local television material. In 2012, the Kommunikationsbehörde Austria (the Austria's communications regulator) held that the video section of the website was an "on-demand audiovisual media service" under the Bundesgesetz über audiovisuelle Mediendienste (Austrian law transposing the EU directive). The ruling was appealed to Verwaltungsgerichtshof (Austria's Supreme Administrative Court), and in 2014, that court referred two questions to the EU Court of Justice for a preliminary ruling.

The first question was whether the concept of a "programme" under Article 1(1)(b) of the AVMS Directive includes short video clips made available on a newspaper's website. The Court recalled that a programme was defined "as a set of moving images ... constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting." It then noted that the definition did "not contain any requirement relating to the length of the set of images concerned", and television broadcasting also offered "programmes of short length." Moreover, "the purpose of the directive" was to apply "the same rules to actors competing for the same audience", and prevent on-demand services "such as the video collection at issue" from "engaging in unfair competition with traditional television." In this regard, the Court held some of the newspaper's videos containing local news "compete with" regional radio

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broadcasters; while the videos relating to cultural, sporting and recreational repots “compete with music channels, sports channels and entertainment programmes.” The Court thus concluded that a “programme” under the AVMS Directive’s Article 1(1)(b) includes “under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips.”

The second question was what criteria are to be used to assess the “principal purpose” of a newspaper website which makes videos available, under Article 1(1)(a)(i) of the Directive. The Court held that “assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper” must examine “whether the service offered in the videos subdomain has form and content which is independent of that of the written press articles of the publisher of an online newspaper. If so, that service falls within the scope of Directive 2010/13. If, on the other hand, that service appears to be indissociably complementary to the journalistic activity of that publisher, in particular as a result of the links between the audiovisual offer and the offer in text form, it does not fall within the scope of that directive.”

Importantly, the Court stated that the assessment “is a matter for the referring court,” although the Court did say that “it appears” from the evidence that “very few press articles are linked to the video clips at issue,” and a “majority of those videos can be accessed and watched regardless of whether the articles of the electronic version of a newspaper are consulted.”

Judgment of the Court (Second Chamber) in Case C-347/14 New Media Online GmbH v. Bundeskommunikationssenat, 21 October 2015

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