Court of Justice of the European Union: AKM v. Zürs.net

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On 16 March 2017, the Court of Justice of the European Union (CJEU) delivered its judgment in AKM v. Zürs.net, concerning copyright and retransmission of broadcasts of a public broadcaster by a local cable network. The case arose following a dispute between the Austrian copyright collecting society AKM, and Zürs.net, which is a cable network operator that transmits television and radio broadcasts made initially by the Austrian national broadcaster ORF. Zurs.net had approximately 130 subscribers.

AKM requested that Zürs.net provide it with the number of subscribers connected to its cable network, and the content broadcast, and where appropriate, pay to it a fee, for making available works protected by copyright and related rights. However, Zürs.net pointed to paragraph 17(3)(2)(b) Urheberrechtgesetz (Austria's copyright law), which provides that transmission of broadcasts via a "communal antenna installation" when subscribers connected to the installation does not exceed 500 subscribers, does not constitute a new broadcast. Moreover, under the same provision, transmission of broadcasts of the national broadcasting corporation ORF using cables in Austria constitutes part of the original broadcast. Zürs.net argued that the broadcasts that it distributes cannot be regarded as new broadcasts and that it is therefore under no obligation to provide the information required by AKM. The Vienna Commercial Court decided to refer a question to the CJEU on whether the rules under Austria's copyright law concerning communal antenna installations, and transmission of broadcasts of the ORF that use cable services, was consistent with the InfoSoc Directive (2001/29/EC).

The Court first addressed the provision that transmission of programmes broadcast by the national broadcasting corporation, by means of cables, was part of the original broadcast. In particular, whether this rule was consistent with Article 3 of the Directive, which provides that authors have the exclusive right to prohibit communication to the public of their works. In this regard, the Court held that there had been no "communication to the public". The Court held that when they grant a broadcasting authorisation to ORF, the rightholders concerned are aware that the broadcasts made by that national corporation may be received by all persons within the national territory. Given that the distribution of the protected works by means of cables is carried out on the national territory and that the persons concerned have therefore been taken into account by the rightholders when they granted the original authorisation for the national

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broadcaster to broadcast those works, the public to which Zürs.net distributes those works cannot be regarded as a new public. Therefore, such a transmission is not subject to the requirement that authorisation be obtained from the rightholders under Article 3 of the Directive.

The Court then addressed the provision that transmission of broadcasts by means of a communal antenna installation, to which a maximum of 500 subscribers are connected, is not regarded as being a new broadcast. The Court held that such a provision "is likely" to attract economic operators wishing to take advantage of it, and to lead to the continuous and parallel use of a multiplicity of communal antenna installations. Consequently, this could result, over the whole of the national territory, in a situation in which a large number of subscribers have parallel access to the broadcasts distributed in that way. Such a provision could not be regarded as consistent with Article 5(3)(o), which allows an exception to Article 3, but only for "a use in certain cases of minor importance".

Judgment of the Court of Justice of the European Union in Case C-138/16 Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverlegerregistrierte Genossenschaft mbH (AKM) v. Zürs.net Betriebs GmbH, 16 March 2017

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