

CJEU clarifies scope of 'access to cable of broadcasting services' in Article 9 of the InfoSoc Directive

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Review

CJEU clarifies scope of ‘access to cable of broadcasting services’ in Article 9 of the InfoSoc Directive

ITV Broadcasting Limited and Others v TVCatchup Limited (in administration), C-275/15, EU:C:2017:144 (*TVCatchup 2*)

In its *TVCatchup 2* judgment of 1 March 2017 the Court of Justice of the European Union (CJEU) held that the concept of ‘access to cable of broadcasting services’ within Article 9 of Directive 2001/29 (the InfoSoc Directive) must be interpreted as not permitting national legislation which provides that copyright is not infringed in the case of the immediate retransmission by cable, including, where relevant, via the internet, in the area of initial broadcast, of works broadcast on television channels subject to public service obligations.

Legal context

This reference for a preliminary ruling from the Court of Appeal of England and Wales concerned the question of compatibility with EU law of the defence contained in section 73 (now repealed) of the Copyright, Designs and Patents Act 1988 (CDPA). Section 73(2)(b) and (3) CDPA could be invoked in an action for infringement of copyright in a broadcast or in any work included in a broadcast "where a wireless broadcast made from a place in the United Kingdom is received and immediately re-transmitted by cable". More specifically, this provision stated that copyright would not be infringed "if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable and forms part of a qualifying service".

Among other things, Article 9 of the InfoSoc Directive provides that such piece of EU legislation is without prejudice to provisions concerning “access to cable of broadcasting services”. The question for the CJEU to address was whether the UK defence could be considered covered by the concept of “access to cable of broadcasting services” within Article 9 of the InfoSoc Directive.

Facts

The litigation between ITV and other broadcasters and TVCatchup is a long-standing one, which has already had an installment before the CJEU. A first reference for a preliminary ruling had indeed been made at the first instance level, when the High Court of England and Wales asked the CJEU to clarify - among other things - whether the provision of an unauthorized internet stream of a protected broadcast would amount to an act of communication to the public within Article 3(1) of the InfoSoc Directive. The CJEU answered in the affirmative in 2013 in *ITV Broadcasting Ltd and Others v TVCatchup Ltd*, C-607/11, EU:C:2013:147 (*TVCatchup 1*).

The case returned to the High Court of England and Wales, and Floyd J (as he then was) ruled (*ITV Broadcasting Ltd and Others v TVCatchup Ltd* [2013] EHC 3638 (Ch), discussed in this journal by J Curry, ‘High Court applies Court of Justice ruling and grants injunction against TVCatchup’ (2014) 9(1) *JIPLP* 19-21) that the defendant, TV Catchup, would be *prima facie* liable under the UK equivalent of Article 3(1) of the InfoSoc Directive, ie section 20 CDPA. However, the defence provided within section 73(2)(b) and (3) CDPA would be applicable, thus shielding TVCatchup from liability.

The broadcasters appealed the High Court's decision. The Court of Appeal stayed the proceedings, and sought guidance on the interpretation of Article 9 of the InfoSoc Directive. More specifically, the question referred for a preliminary ruling was whether Article 9 of the InfoSoc Directive - specifically the concept of ‘access to cable of broadcasting services’ therein - must be interpreted as covering and permitting national legislation which provides that copyright is not infringed in the case of the immediate retransmission by cable, including, where relevant, via the internet, in the area of initial broadcast, of works broadcast on television channels subject to public service obligations.

Analysis

The CJEU unsurprisingly noted at the outset (paragraph 17) that, in the absence of any express reference to the laws of the Member States, the concept of ‘access to cable of broadcasting services’ in Article 9 must be given an autonomous and uniform interpretation throughout the EU which takes into account the wording of that provision, its context and the objectives of the legislation of which it forms part. Having said so, the concept of ‘access to cable’ as used in Article 9 of the InfoSoc Directive is different from that of ‘retransmission by cable’ as used instead in section 73 CDPA: since only the latter concept designates, within the framework of the InfoSoc Directive, the transmission of audiovisual content.

In line with what Advocate General (AG) Saugmandsgaard Øe noted at paragraph 55 of his Opinion (Opinion of Advocate General in *ITV Broadcasting Limited and Others v TVCatchup Limited (in administration)*, C-275/15, EU:C:2016:649), Article 1(2)(c) of the InfoSoc Directive deals expressly with ‘cable retransmission’, and excludes from the scope of the directive the provisions of EU law (notably Council Directive 93/83 (the SatCab Directive), which the court deemed not relevant to the background national proceedings: see paragraph 21) governing that question.

Again unsurprisingly (the CJEU has consistently stressed this, including in *TVCatchup 1*), the principal objective of the InfoSoc Directive is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that - as a rule - a retransmission by cable is subject to the authorization of the relevant rightholder, unless this activity falls within one of the exceptions and limitations contained within the exhaustive list in Article 5 of the InfoSoc Directive (and – one should add – the relevant Member State whose law is applicable has transposed such exception into its own legal system). No exceptions or limitations would be applicable in the case at hand.

The court then recalled (with approval) that in his Opinion the AG had noted that the rationale of Article 9 is "to maintain the provisions applicable in areas other than that harmonised by the directive" (paragraph 26), not to defeat the EU harmonizing efforts:

"Indeed, an interpretation of Article 9 of [the InfoSoc Directive] to the effect that it permits a retransmission, such as that at issue in the main proceedings, without the consent of the authors, in cases other than those provided for in Article 5 of that directive, would run counter not only to the objective of Article 9, but also to the exhaustive nature of Article 5, and, consequently, would be detrimental to the achievement of the principal objective of that directive which is to establish a high level of protection of authors." (paragraph 27)

The CJEU concluded that Article 9 of the InfoSoc Directive, and specifically the concept of ‘access to cable of broadcasting services’, must be interpreted as not covering – and not permitting – national legislation which provides that copyright is not infringed in the case of the immediate retransmission by cable, including, where relevant, via the internet, in the area of initial broadcast. The court also noted that this applies to works broadcast on TV channels subject to public service obligations.

Practical significance

Given the UK Government’s decision to repeal section 73 CDPA, the general impact of *TVCatchup 2* in the UK is likely to be limited. From the broader perspective of EU copyright architecture, this decision is however significant, in that it is yet another reminder that greater harmonization of Member States’ copyright laws appears to be a primary concern for the CJEU.

In recent times in particular, the CJEU has appeared very vigilant when interpreting provisions in the relevant directives – notably the InfoSoc Directive – and not particularly keen to tolerate national solutions that go astray from what the relevant body of EU legislation allows Member States to do. A consistent string

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3 of copyright decisions demonstrates this trend. Favouring internal market goals above all, the CJEU has not
4 been wary to hold that certain national arrangements would be incompatible with EU law. In this sense – and
5 just to provide a couple of examples – there is probably no need to recall the (endless) series of references
6 for a preliminary ruling on national private copying exceptions and their compatibility with Article 5(2)(b) of
7 the InfoSoc Directive and, just a few months ago, the decision in *Marc Soulier and Sara Doke v Premier*
8 *ministre and Ministre de la Culture et de la Communication*, C-301/15, EU:C:2016:878. *TVCatchup 2* is
9 consistent with this jurisprudential line, and raises once again the question of whether the room left for
10 Member States' initiatives in areas harmonized by EU directives is narrower than what was believed to be at
11 the time of relevant national implementations, notably of the InfoSoc Directive.
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