The communication to the public beyond the CJEU case law: 
* A need to reconstruct the right 
View from the border(on)line cases

Alain Strowel
Professor, UCLouvain, Université Saint-Louis, Brussels, Munich IP Law Center, Avocat at the Brussels bar
alain.strowel@uclouvain.be

Question

• Scope of the ‘communication to the public’ under CJEU case law: what are the criteria?
  – Not clear, probably no consistency
  – But applications:
    • Showing in pubs (yes)
    • Providing TV/radios in hotel rooms or in patients’ rooms of a spa for listening/viewing works (yes)
    • Offering the broadcasting of phonograms in a dentist practice (no)
    • Providing a satellite package of TV channels (yes)
    • Offering an Internet TV service allowing to receive live streams of free-to-air TV broadcasts (yes)
    • Hyperlinking to a protected work or embedding video by transclusion or inline linking (yes or no)
    • etc…
Outline: the communication to the public

• Framework: 2001/29 Infosoc Directive

• Confusing interpretation by the CJEU:
  – ‘Several complementary criteria’ applied to:
    • Communication in a ‘public’ space (pubs, rooms…)
    • Broadcasting and retransmission
    • Hyperlinking
  – Conclusion: tailor-made or borderless?

• Redefining the communication to the public
  – Commission’s lack of appetite
  – Proposed reconstruction
■ Art. 3 InfoSoc Dir. 2001/29

Right of communication to the public of works and right of making available to the public other subject-matter

« 1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;
(b) for phonogram producers, of their phonograms;
(c) for producers of first fixations of films…
(d) for broadcasting organisations… »
Communication to the public

What is clear: not live performance + covers any transmission, including broadcasting:
« (23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates.
This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.
This right should not cover any other acts. »
Communication on the networks: making available

(25) It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.
Outline: the communication to the public

• Framework: 2001/29 Infosoc Directive

• Confusing interpretation by the CJEU:
  – ‘Several complementary criteria’ applied to:
    • Communication in a ‘public’ space (pubs, rooms…)
    • Broadcasting and retransmission
    • Hyperlinking
  – Conclusion: tailor-made or borderless?

• Redefining the communication to the public
  – Commission’s lack of appetite
  – Proposed reconstruction
CJEU case law

• Old cases:

• Turning point:
  – 7 Dec. 2006, C-306/05, SGAE/ Rafael Hoteles

• Decisions (since the Infopaq I turning point):
  • 22 Dec. 2010, C-393/09, BeSoft
  • 4 Oct. 2011, C-403/08 & C-429/08, Premier League
  • 13 Oct 2011, C-431/09 & C-432/09, Airfield
  • 24 Nov. 2011, C-283/10, Globus Circus
  • 15 March 2012, C-135/10, Consorzio Fonografici v. Del Corso
  • 15 March 2012, C-162/10, Phonographic Performance Ltd
  • 7 March 2013, C-607/11, TV Catch-up
  • 13 Febr. 2014, C-466/12, Svensson
  • 27 Feb. 2014, C-351/12, OSA
  • 21 Oct. 2014, C-348/13, BestWater
  • 26 March 2015, C-279/13, C-More Entertainment
  • 19 Nov. 2015, C-325/14, SBS
  • 31 May 2016, C-117/15, Reha Training
  • 8 Sept. 2016, C-160/15, GS Media
  • 16 Febr. 2017, C-641/15, Hetteger Hotel Edelweiss
  • 1 March 2017, C-275/15, TV Catchup II
  • 16 March 2017, C-138/16, AKM
  • 26 April 2017, C-527/15, Filmspeler
Showing in pub? *Premier League*

- No definition of communication to the public
- Must be interpreted:
  - broadly
  - in line with other Dir. (« unity of the EU order »)
  - in a technology neutral way
- Compatible with art. 11bis(1)(iii) Berne Conv.:
  - “Authors … shall enjoy the exclusive right of authorising: (…) (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work. »
Premier League

• Conditions for a communication to the public:
  – a communication: covers « any transmission of the protected works, irrespective of the technical means or process used » (§193)
  – « a new/additional public » (§197)
    • = « a public which was not taken into account by the authors of the works when they authorised their use by the communication to the original public »

• Plus: whether the communication is « of a profit-making nature » (§204-206)
  • Here yes: in order to benefit, to attract more consumers
  • Towards an economic reasoning in copyright law?
SCF v. Del Corso

- The CJEU not only interprets but applies the criteria (to a private dental practice):
  - deliberate act of the dentist
  - communication: not to an indeterminate group, but to ‘determinate circle of potential recipients’
  - number of persons is insignificant, very limited
    - patients in succession, but ‘they do not generally hear the same phonograms’
  - dentist ‘cannot either expect a rise in number of patients … or increase of the price of the treatment’: no profit-making nature!

- ‘Broadcasting of phonograms is in no way part of dental treatment’ (§98)!
SCF v. Del Corso: related right

• Here: Art. 3(2) Infosoc for producers: provides a ‘making available’, not a ‘communication to the public’ right
  – No ‘interactive on-demand transmissions’ here

• The CJEU had reformulated the question with reference to Art. 8(2) of the Related Rights Dir.:
  – “MS shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposed … is used for broadcasting by wireless means or for any communication to the public”

• Distinction between:
  – Art. 3(2) Infosoc:
    • Exclusive and preventive right
  – Art. 8(2) of the Related Rights Dir.:
    • Compensatory right to be exercised a posteriori

• Thus ‘individual’ interpretation of ‘communication to the public’ in context of Related Rights Dir.
Phonographic Performance Ltd

- Collecting society for phonogram producers complains about Irish law which exonerates hotels to pay the equitable remuneration for the use of phonograms in hotel bedrooms

- CJEU: communication to the public in the sense of Art. 8(2) Related Rights Dir.
  - Thus there is an obligation to provide for an equitable remuneration

- Economic reasoning of CJEU: “the hotel operator derives economic benefits from that transmission which are independent of those obtained by the broadcaster or the producer of the phonograms” (§51)
  - Requirement of ‘a profit-making nature’ (more important for a right of equitable remuneration)
Reha Training (Gr. Ch.)

• About the broadcast of television programmes by means of television sets that the operator of a rehabilitation centre

• A guideline for interpretation:
  – « account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another » (§35)
Outline: the communication to the public

• Framework: 2001/29 Infosoc Directive

• Confusing interpretation by the CJEU:
  – ‘Several complementary criteria’ applied to:
    • Communication in a ‘public’ space (pubs, rooms…)
    • Broadcasting and retransmission
    • Hyperlinking
  – Conclusion: tailor-made or borderless?

• Redefining the communication to the public
  – Commission’s lack of appetite
  – Proposed reconstruction
Airfield

• Airfield operates a satellite broadcasting service. It offers a ‘bouquet’ of TV programs that are free or encrypted.

• Airfield has agreement with broadcasters for the supply of broadcast channels and pays them
  – Initial broadcasters providing signals for:
    • (i) “indirect” transmission, where signals are transmitted, via a fixed line, to Airfield for uploading in encrypted form to satellite,
    • (ii) “direct” transmission where signals transmitted directly to satellite by initial broadcaster, then received by Airfield, which decodes, then rescrambles, then beams up to satellite

• Arguments of parties:
  – Collecting societies: additional act of rebroadcasting of TV programs by Airfield
  – Airfield: no rebroadcasting, but technical intervention

• CJEU: Airfield activities = “communication to the public by satellite” (for both indirect and direct retransmission)
Airfield

• Justification for communication to the public:
  – Airfield makes the work accessible to a new public
    • Does more than providing the ‘physical facilities for enabling or making the communication’ (§ 74; rec. 27): the satellite package provider encrypts the communication (from broadcasters), provides decoding devices
  – The intervention of the package provider = to bring together different channels in one new audiovisual product
    = additional service for making a profit (§80)
TVCatchup I

- Offers Internet access on mobile devices/PC to live streams of free-to-air TV broadcasts to UK users who have a valid TV licence. Funded by ads.

- Two conditions:
  - Communication: covers any transmission/retransmission
    - Not a “mere technical means to ensure/improve reception of the initial transmission in its catchment area” (§28-30)
  - A public: indeterminate number of potential recipients (cumulative effect) + large number
    - No need to enquire whether “new” public when two retransmissions using different means of transmission
      - other cases: SGAE, Premier League, Airfield

- Criterion: “not irrelevant” that “profit-making nature”, but “not necessarily an essential condition” (§44)
SBS

• Involves ‘direct injection’ by SBS:
  − When broadcaster sends signals to distributors, without the signal being accessible to the public + cable distributors sends to their subscribers

• In this case:
  − Communication by SBS: yes
  − But to a public?
    • Need of an indeterminate number of recipients
    • Distributors are not a public, and subscribers cannot constitute an additional public
  − But possible that a distributor is not independent from broadcaster (and offers just a technical intervention), then subscribers = a public with regard of communication by broadcaster
AKM v. Zürs.net

- Involves cable retransmission by small communal antenna (130 subscribers) of Zürs.net
- Q1: initial broadcast by the national broadcaster (ORF) might be received by all persons in Austria
  - No new communication if original authorisation obtained by broadcaster takes into account all those persons
- Q2: Austrian law exempting small installations of less than 500 subscribers
  - This exemption is not compatible with the exceptions (art. 5(3)(o) for minor cases)
  - The communal antenna allows to access the broadcasts of other broadcasters (than ORF), thus communication to the public
    - Those recipients are not taken into account
BeSoft (or BSA)

• Why no communication to the public in case of TV broadcasting of the Graphical User Interface of computer games
  – When a GUI is displayed, television viewers receive a communication ‘solely in a passive manner, without the possibility of intervening’ (§57)
    • The viewers cannot use the interface >> the players
  – No communication because the viewers cannot ‘have access to the essential element characterising the interface’ (§57) = interactivity

• Additional condition → confusion
Outline: the communication to the public

• Framework: 2001/29 Infosoc Directive

• Confusing interpretation by the CJEU:
  – ‘Several complementary criteria’ applied to:
    • Communication in a ‘public’ space (pubs, rooms…)
    • Broadcasting and retransmission
    • Hyperlinking
  – Conclusion: tailor-made or borderless?

• Redefining the communication to the public
  – Commission’s lack of appetite
  – Proposed reconstruction
Svensson

• Retriever operates a paid monitoring service. Its customers receive a list of clickable links (linked-to article displayed on a pop-up window). Svensson consented to initial online publication of articles (freely accessible on newspaper’s website)

• Two conditions for CJEU:
  – Communication: covers the provision of clickable links as transmission
    • As they afford users direct access to the works (§19)
  – A new public because “same technical means” (Internet)
    • Here: no new public because unlimited access to linked-to site
      – That the users can be confused about the origin of the linked-to article (unfair aspect) is not relevant
Svensson + BestWater

- No communication to the public in case of hyperlinking (because no new public), but:
  - **Svensson**: if no TPM circumvention
    - « where a clickable link makes it possible for users … to circumvent restrictions put in place by the site on which the protected work appears » then « new public » (§31 Svensson)
    - Thus direct liability (<> TPM circumvention)
  - **BestWater**: if authorization of the linked-to content
    - “in so far the copyright owners have authorized this (i. e. the first) communication” (§18 BestWater) on the linked-to site
    - Thus, in the absence of a first authorization, there is direct liability by communicating to the public

- Effect: hyperlinking could constitute direct infringement (<> violation of TPM or indirect liability)
Scope of copyright is defined by three separate blocks:

- Direct infringement
- TPM protection
- Indirect liability
## Scope of copyright: direct liability + indirect liability + TPM protection

<table>
<thead>
<tr>
<th>Direct liability</th>
<th>Indirect liability</th>
<th>TPM protection</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EU harmonization</strong></td>
<td><strong>Not harmonized at EU level</strong></td>
<td><strong>EU harmonization</strong></td>
</tr>
</tbody>
</table>
| • Right of reproduction  
  • Right of distribution  
  • Right of communication to the public | • Relationship of the third party with the user (‘control’)  
  • Extent of the third party’s involvement (‘promotion’)  
  • Knowledge of infringement  
  • Intention of third party  
  • Ability to prevent or deter infringement  
  • General due care obligation | • Against circumventing acts  
  • Against preparatory acts (manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of circumventing devices) |

But right of adaptation: not harmonized (exists at national level)
Convergence of copyright blocks - confusion of CJEU

Direct infringement

Protection of TPM

Indirect liability

‘Europeanisation’ of indirect liability
GS Media

- Links to photos illicitly put online
- The profit-making nature of the act of transmission:
  - Higher importance: “*it is relevant that a ‘communication’ (...) is of a profit-making nature*”
    - Positive (<> double negation previously: « it is not irrelevant » but again double negation in *Filmspeler (April 2017)*)
  - Enhanced role of the circumstances:
    - When link posted for “the pursuit of financial gain” ➔ presumption of knowledge as to the illicit nature of the linked-to content ➔ commercial transmission = communication to the public
- Economic parameter more central
- Full confusion between direct and indirect liability
The GS Media effect

Towards the erosion of the distinction between infringement and indirect liability because of the need to harmonize?

AG Szpunar in Ziggo (access provider <-> blocking to The Pirate Bay): the view that it involves indirect liability of TPB "would, however, mean that liability, and ultimately the scope of () copyright (), would depend on the very divergent solutions adopted under the different national legal systems. That would undermine the objective of EU legislation"
Filmspeler

• Defendant sells a media player (hardware) comprising addons with hyperlinks to sites allowing the streaming of images and sounds without the authorization of copyright holder
  – Various acts constituting a direct infringement and/or contributing to infringement (not only hyperlinks)

• Communication: the sale of the player offers users direct access to the works
  • Not the mere provision of physical facilities for enabling a communication (here real intervention in full knowledge)

• To a new public (if knowledge that illicit work)
• Full confusion between direct and indirect liability, distribution and communication to the public
Outline: the communication to the public

• Framework: 2001/29 Infosoc Directive

• Confusing interpretation by the CJEU:
  – ‘Several complementary criteria’ applied to:
    • Communication in a ‘public’ space (pubs, rooms…)
    • Broadcasting and retransmission
    • Hyperlinking
  – Conclusion: tailor-made or borderless?

• Redefining the communication to the public
  – Commission’s lack of appetite
  – Proposed reconstruction
Does the Infosoc Dir. enable the harmonisation by the CJEU case law?

« The most important effect of the (Infosoc) Directive, at least with respect to the scope of the economic rights, is that it enables the ECJ to clarify some fundamental concepts of copyright law on a step-by-step basis »

« If the court takes this task seriously, copyright law could become a model for a future European private law methodology which combines broad statutory definitions familiar to Continental lawyers with the careful analysis of precedent known from common law »

Ansgar Ohly (2011)
Conclusion 1: gaps in the harmonization

• Silent on the performance right: striking difference between communication *inter absentes* v. *inter praesentes*!
  – Gap partly closed by the Berne Convention

• No clear delineation between broadcasting and making available

• Full communication to the public for the authors, only making available for related rights holders: justified?
  – Full v. partial harmonisation

Conclusion 2: varying criteria

• Parameters for the CJEU:
  – Any (re)transmission: technological neutrality
  – Two main conditions:
    • An « act of communication » : «indispensable role » of the user (action or intervention)
    • A « public »: quantitative criterion (minimum)
  – Two additional parameters:
    • A «new public »: broadening the audience
    • The user motive: «profit-making nature » = to attract consumers (“relevant/not irrelevant”)
  – Three parameters have an economic dimension:
    • For-profit motive + public + new audience
  – Thus, CJEU inclines towards economic view
Economic criterion for communication to the public + copyright subject matter

- Old ruling on the specific subject matter of copyright: *Phil Collins v Imtrat*, C-92/92 and C-326/92
  - The specific subject matter of copyright and related rights is « to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. Copyright and related rights are also economic in nature, in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties.»
Scope defined by the economic rationale: Premier League

• Interpretation in light of the (conflicting?) objectives of the Infosoc Dir.: « to establish a high level of protection of authors allowing them to obtain an appropriate reward for the use of their works » (§186)
  – Rec. 9 and 10
  – = « reasonable in relation to the economic value of the service » (§109) > `< the specific subject-matter of the IP does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration ... only appropriate remuneration for each use of the protected subject » (§108)
Outline: the communication to the public

• Framework: 2001/29 Infosoc Directive

• Confusing interpretation by the CJEU:
  – ‘Several complementary criteria’ applied to:
    • Communication in a ‘public’ space (pubs, rooms…)
    • Broadcasting and retransmission
    • Hyperlinking
  – Conclusion: tailor-made or borderless?

• Redefining the communication to the public
  – Commission’s lack of appetite
  – Proposed reconstruction
Definition of communication to the public was on the EU agenda

• 2015 Communication from the Commission (Towards a modern, more European copyright framework, 9/12/2015, point 4):
  – « 4. Achieving a well-functioning marketplace for copyright (...) an important aspect is the definition of the rights of communication to the public and of making available. These rights govern the use of copyright-protected content in digital transmissions. Their definition therefore determines what constitutes an act on the internet over which creators and the creative industries can claim rights and can negotiate licences and remuneration. »
Previously on the agenda

• Communication from the Commission (*Towards a modern, more European copyright framework*, 9/12/2015, point 4):
  
  « 4. Achieving a well-functioning marketplace for copyright (...) There are contentious grey areas and uncertainty about the way these concepts are defined in EU law in particular about which online acts are considered ‘communication to the public’ (and therefore require authorisation by the right holders) and under what conditions. These questions create on the one hand uncertainty in the market and, on the other, put into question the ability of these rights to transpose into the online world the basic principle of copyright that acts of exploitation need to be authorised and remunerated. »
Draft dir. on copyright in DSM (14/9/2016)

• No codification of communication to the public

• But Art. 13(1) + recital 38: refers to
  – "information society providers that store and provide large amounts of works":
    – Leaked draft report at EP: scope limited to platforms that are « actively and directly involved in the making available of user upload »
    – platforms should: « take measures to ensure the functioning of the agreements concluded with rightholders for the use of their works » or « prevent the availability on their services of works (...) identified by rightholders »
Outline: the communication to the public

• Framework: 2001/29 Infosoc Directive

• Confusing interpretation by the CJEU:
  – ‘Several complementary criteria’ applied to:
    • Communication in a ‘public’ space (pubs, rooms…)
    • Broadcasting and retransmission
    • Hyperlinking
  – Conclusion: tailor-made or borderless?

• Redefining the communication to the public
  – Commission’s lack of appetite
  – Proposed reconstruction
Copyright mismatch in the digital era (digital machine)

All-encompassing reproduction right:

- the numerous temporary copies (for ex. on the RAM memory)
- the transitory and cache copies on the Internet servers and routers
- the non-transitory copies made by the Content Delivery Networks (CDNs)
- the copies made for indexing data
- the copies for text & data mining
- the copies for checking mistakes and plagiarism, etc.
Rather: “the answer to the machine is in the mechanics of copyright”
Reconstruction of the communication to the public

• >> right of reproduction: more to be done
• Re the communication to the public right:
  – The communicative dimension (the « public ») is already embedded in the notion
  – Some economic parameters in CJEU case law
  – *Light touch fix*: strengthen the economic analysis (by adding a double market test?)
Reconstruction by adding the double market analysis

• Impact on the market of the work
  • Fair use Art. 107 © Act: « the effect of the use upon the potential market for or value of the ©ed work »
    – Whether « competing substitute » and deprivation of « significant revenues » (> < « some loss of sales »)

• Impact on the market of the user’s service
  • See Reha Training: when impact on the « standing and attractiveness » of the service, « thereby giving it a competitive advantage »
  • Test: value extraction that can be passed in the price

• For the « border(on)line cases only!

• Objective economic analysis (> < « profit-making nature » of the user’s act)
Alain Strowel
M: ++32/475/80 21 25 / alain.strowel@uclouvain.be