

Max Planck Institute
for Intellectual Property and Competition Law

Communication to the public according to the
Court of Justice of the European Union

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Communication right in EU Directives

1. Cable and Satellite Directive:

■ Article 2 Broadcasting right:

“Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works...” (plus definition, Art. 1(2)a))



Communication right in EU Directives

2. Rental Directive:

■ Article 8: Broadcasting and communication to the public

1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.



Communication right in EU Directives

2. Rental Directive:

- (Article 8: Broadcasting and communication to the public)
 2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. ...(+ par.3)



Communication right in EU Directives

3. InfoSoc Directive

■ Article 3: 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. (...)



Communication right in EU Directives

General remarks on terminology

- Different use of „communication to the public“ within EU Directives, e.g.:
 - Art. 3 InfoSoc:
 - communication to public that is not present at place where communication originates;
 - broadcasting is included
 - Art. 8 Rental Directive: includes communication to public that is present at that place



Communication right in EU Directives

General remarks on terminology (ctd)

- Different use of „communication to the public“ within EU Directives, e.g.:
 - Art. 8 Rental Directive:
 - includes communication to public that is present at place where communication originates;
 - broadcasting is not included



Communication to the public according to the Court of Justice

- Series of cases on right of communication to the public
- Several “complementary criteria” established by the Court, which “are not autonomous and are interdependant”
- They “must be applied individually and in the light of their interaction with one another, given that in different specific situations, they may be met to varying degrees.” (SCF 79)



Communication to the public according to the Court of Justice

- User must act in full knowledge of the consequences of its action (SCF 82)
- “Public”: “indeterminate number of potential listeners”, and it “implies a fairly large number of persons” (SCF 84)
- “not irrelevant that a ‘communication’ within the meaning of Article 3(1) of Directive 2001/29 is of a profit-making nature.” (SCF 88)
- communication directed to “new public” (SGAE 40-42)



Remarks on two of those criteria of the Court of Justice

■ “profit-making nature”

- “not irrelevant” (“even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature in circumstances such as those in the main proceedings”)(SGAE 44)



Remarks on two of those criteria of the Court of Justice

■ “profit-making nature”

- This is “all the more true in the case of the right to equitable remuneration” ..., given its essentially financial nature (SCF 89)
- Thus, public is “targeted” and not “merely ‘caught’ by chance” (SCF 91)



Remarks on two of those criteria of the Court of Justice

■ “profit-making nature”

- SCF: no impact on income of dentist - “Consequently such a broadcast is not of a profit-making nature, and thus does not fulfil the criterion set out in paragraph 90 of the present judgment” (SCF 99) (consequence also thereof: no “communication to the public”, SCF 100) – is it a condition according to the Court?
- If so, as it seems, it would be incompatible with international law



Remarks on two of those criteria of the Court of Justice

- “profit-making nature”

- BUT: TVCatchup, 7 March 2013:

- “However, it has acknowledged that a profit-making nature is not necessarily an essential condition for the existence of a communication to the public” (SGAE 44)



Remarks on two of those criteria of the Court of Justice

- communication directed to “new public” (SGAE 40-42)
 - based on argument from WIPO Guide to BC, on Art. 11bis(1)(iii) (public communication by loudspeaker etc. of broadcast of work), SGAE 41
 - But Guide only explains justification for separate right, does not create a condition (absent in the BC!)
 - It still looks as if Court considers it a condition (e.g.: *Première League*, 197):



Remarks on two of those criteria of the Court of Justice

“in order for there to be a ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive in circumstances such as those of the main proceedings, it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public.”



Remarks on two of those criteria of the Court of Justice

- But TVCatchup (27): “new public” was necessary in SGAE, Première League, Airfield, but different situation here:
 - In those cases: “an operator had made accessible, by its deliberate intervention, a broadcast containing protected works to a new public which was not considered by the authors concerned when they authorised the broadcast in question.”



Remarks on two of those criteria of the Court of Justice

- But TVCatchup (27): “new public”:
 - But here: “each of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public.”
 - “requirement” of a new public “relevant only in the situations on which the Court of Justice had to rule in the cases” (above)



Conclusions

- „Criteria“ of Court are not strict conditions *sine qua non*
- Future legislation: should be more careful and define everything, or explicitly refer to national law
(see argument of Austria in a proceeding: „`public` is left for national law to define“)
- If necessary: „correct“ case law of the Court by EU legislation

