The CJEU and communication to the public: where will it all end?

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Communication to the public from first principles

(1) A communication uttered by someone;

(2) Made to a group of persons accurately described as “the public”.

Further questions

(1) Did the communication include the whole or part of the copyright work?

(2) Was the communication with the consent of the copyright owner?

Why so many references?

- Failure to keep separate the restricted act and the issue of consent
- Allowing the definition to become multi-factorial
- Straying from the proper role of the court under Article 267 CJEU.

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…

3. The rights referred to in paragraphs 1 … shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

“Communication”

- Must be construed broadly;
- Any transmission irrespective of the technical means used: *FAPL* para 193;
- e.g. where a hotel proprietor gives customers access to the works via television sets by distributing signal to rooms, with full knowledge of the position;
- Irrespective of whether they do access the works: *SGAE* paragraph 43;
- But not just a technical means to improve reception.

“The public”

- The public refers to an indeterminate number and “fairly large” number of potential recipients: *SGAE* at para 37,38;
- The cumulative effect of making works available successively may be taken into account: *SGAE* at para 39;
- Whether “one-to-one” or broadcast: *TV Catchup* at 34

Interpretation of Article 3

- Clear that it is not a “first communication” right.
- No exhaustion.
- Everything which satisfies the definition should be a communication to the public.
- No need to say a communication is to a “new public”.
- Where does this requirement come from and when does it apply?
- Three cases of importance: *SGAE, ITV* and *Svensson*

Case C-306/05 *SGAE v Rafael Hoteles*
The requirement for a new public

- Hotelier distributes signal to guests in hotel bedroom and TVs in public parts.
- Hotelier communicates the works to the public.
- When the author authorises a broadcast of a work he considers only direct users: that is owners of TV sets who watch either personally or in their own private or family circle.
- Thus the clientele were a new public.
- Why was this relevant?
- Principle: or finding of fact?

Case C-607/11 *ITV v TV Catchup*
No new public required

- TVC received wireless transmissions and send out on internet;
- All subscribers are entitled to receive the broadcasts;
- No new public;
- But a new public notrequired;
- Why not?

CJEU explain…

- In cases like *SGAE* there was:
  - Making accessible protected works
  - By deliberate intervention
  - To a new public
- By contrast in this case there was:
  - Transmission of works in a terrestrial broadcast
  - Making available those works over the internet
  - Using a different means of transmission
  - The transmission is intended for the public

Case C-466/12 *Svensson v Retriever Sverige*

- The latest word from the CJEU.
- Clickable links provided to a copyright work on another website where work freely accessible.
- Provision of clickable link was an act of communication because it provided means of direct access to the work.
- The communication was to a group which satisfied the definition of public.
- No infringement.
- Why Not?

CJEU's reasoning

- Settled case law that "in order to be covered by the concept of communication to the public" must also be directed to a "new public" i.e. one not taken into account by the copyright owner when it authorised the initial communication;
- Applied where the communication was by the same technical means as "the initial communication".
- And the work was "freely accessible" on the internet.

CJEU's reasoning (cont)

- Since there was no new public, the authorisation of the copyright owner was not necessary "for such a communication to the public"
- But: "The Directive must be interpreted as meaning that the provision of a clickable link to works freely available on another website does not constitute an act of communication to the public as referred to in [Article 3]".

CJEU's reasoning (cont)

- But there will be a communication to the public:
  - where the link circumvents restrictions on the site on which the protected work appears: then users become a new public
  - (and) e.g. where the work is no longer available on the site on which it was initially communicated or available on that site only to a restricted public while being accessible on another internet site without the copyright owner's authorisation.

Conclusion

- If the communication is not to a new public, it will not be an infringement because, although it is a communication to the public it belongs to an excepted class of communications which do not require the consent of the copyright owner: *Svensson*
- The excepted class of communications which are not to a new public does not include communications which are not to a new public but which use different technical means from the original communication: TV Catchup (but ? *SGAE*).

Observations

- Is the “new public” just a vehicle for a form of exhaustion (not allowed) or implied licence?
- Why build this in to the concept of communication to the public rather than recognise a separate defence of consent?
- Incorrect analysis to confuse restricted act with issue of consent
- Will lead to many references as each factual situation giving rise to consent will have to be finessed into the concept of communication.

The multifactorial definition

- The CJEU seem to have regard to a number of factors when deciding whether something is a communication to the public.
- The role of these factors is not entirely clear, given the definitions of “communication” and “public.”
- Yet their existence will prompt requests for guidance as to their application.

The *SGAE* factors

- The hotelier had done more than merely provide technical means;
- The hotel had intervened "in full knowledge of the consequences" (? relevance)
- The hotel intervened "with the aim of obtaining some benefit" (?relevance)
- Why was it not enough to say that distribution was "communication" and the guests in the hotel were "public"?

The assessment of the factors is for the national court

- The CJEU's approach gives it a much greater rôle than if it was only deciding on "communication" and "public" – namely "new public" and "the factors"
- But the assessment of these factors is surely for the national court
- Or is it?

Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso*

- Complaint by collecting society for phonogram producers about the playing of background music in a dental surgery.
- Arose under a different Directive 92/100 now codified as 2006/115/EC.
- A more restricted right than that provided for authors.
- So, said the Court, a different interpretation of communication to the public was necessary.

SCF v Del Corso (cont)

- The assessment required consideration of several complementary criteria which were not autonomous and were interdependent.
- It was for the national court to make an individual assessment (paragraph 80 of the judgment).

The criteria

- The role of the user: without his intervention, in full knowledge etc, the customer cannot get access.
- Definition of public as person in general not restricted to particular individuals belonging to a private group.
- The number of members of the public indicates a *de minimis* threshold.
- Cumulative effect of numbers is relevant.
- "Not irrelevant" that a communication is of a profit making nature (particularly for the phonogram right)
- The public which is the subject of the communication is both targeted by the user and receptive in one way or another to the communication and not merely caught by chance.

And so..

- Paragraph 93, (despite what is said in paragraph 80) “it must nonetheless be held that the Court has all the evidence necessary to the case in the main proceedings to assess whether there is such an act of communication to the public”.

The decision on the facts by the CJEU

1. True it was the dentist intervened in much the same way as the hotelier in SGAE
2. The customers were a determinate, not an indeterminate group of people, in contrast to SGAE. "Other people do not as a rule have access to treatment by that dentist". They were not persons in general.
3. The number of persons present in the practice at any given time was limited, even though there was a succession of persons.
4. The music played was likely to have little impact on his practice as a dentist.
5. Dental patients visit the dentist with the sole objective of getting dental treatment. They have access to phonograms by chance and without any active choice on their part according to time of arrival at the practice and the length of time they wait and the nature of the treatment they undergo. So it cannot be presumed that the patients were receptive to the broadcast
6. The broadcast was not profit making in nature.

Observations

- Most unlikely that the European legislature did mean to give a different meaning to "communication to the public" in this Directive.
- The definition of the public was adequate to dispose of the case in principle.
- This multifactorial approach to what amounts to a communication to the public is undesirable.
- Moreover, if it is correct, it is all the more undesirable that the assessment of the factors should be undertaken by a court with no jurisdiction to make factual findings.

Conclusion

- The EPO jurisprudence has not brought clarity into what should be a relatively simple area
- Its approach has itself increased the need for further references, as its doctrine of the new public and its multifactorial approach will inevitably lead to difficulties in practice.