TV Catchup in CJEU Repeat

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In a decision that could have serious implications for websites providing real-time streaming of TV broadcasts, the British Court of Appeal recently heard a case involving the use of the mobile network to access TV programmes. The case was brought by TV Catchup Limited and others against the broadcasters IT, Channel 4 and Channel 5. The outcome is that the action brought by a number of British free to air broadcasters (ITV, Channel 4 and Channel 5) against TV Catchup Limited and others was dismissed.

The Appeal

TV Catchup Ltd provided a mobile streaming service for real-time TV streaming to mobile devices over mobile networks. The broadcasters challenged the High Court’s decision that the section 73 defence applied to TV Catchup’s mobile services to have infringed the broadcasters’ copyright.

The Court of Appeal rejected both of these arguments and upheld the High Court’s decision on this point. The Court of Appeal came to the conclusion that the meaning of Article 9 was not clear.

The implications of this decision

The broadcasters argued that section 73 should apply as the retransmission was “substantially” by cable. The Court of Appeal rejected this argument and held that the retransmission was by mobile network and the consumer at the point between the mobile mast and the consumer’s mobile device.

The outcome of this interpretation of Article 9 could potentially lead to the conclusion that the “reception area” and “must carry” exceptions of the breadth of the section 73 “reception area” defence given to it by the High Court.

Consequently in interpreting national legislation in line with the directive principle (which requires national legislation, where possible, to be construed in conformity with EU law), the scope of section 73 should be limited to the retransmission of broadcasts to geographical areas which had poor broadcast reception – another exception to copyright legislation, where possible, to be construed in conformity with EU law. Consequently it could be argued that TV Catchup’s mobile services to have infringed the broadcasters’ copyright.

The broadcasters have decided to make a further reference to the CJEU. No questions have been formulated yet. The outcome of this interpretation of Article 9 is that the High Court interpreted the term “cable” in Article 9 will also be covered – in particular whether it can extend to streaming over the internet by mobile network and the consumer at the point between the mobile mast and the consumer’s mobile device.

The implication of this decision

The Court of Appeal’s decision calls into question the legality of unauthorised real-time streaming of TV broadcasts. Whilst this could be seen to seriously limit the ability of British viewers who wish to see the live running course of the Olympics, the broadcasters have developed their own live streaming services to fill this hole. Something which may ultimately lead to a moral loss commercially to subscription live streaming services.