A. Introduction and Background

Communication to the public in copyright law is a fundamental right of rightholders. The CJEU has created a new definition for communication to the public, with a number of differences from the German Federal Court of Justice (BGH) decision on "Hintergrundmusik in Zahnarztpraxen". The uncertainties which exist in Germany today in determining what constitutes a "fairly large number of persons" are illustrated through a comparison of the German Federal Court of Justice (BGH) decision in "Hintergrundmusik in Zahnarztpraxen" (background music in dental practices) with that of the Regional Court of Cologne in its "Regional Court of Cologne v Die Realität II" decision.

1. Communication

"Communication" encompasses any transmission of protected works or performance irrespective of the technical means or process employed. Any transmission which is carried out through specific technical means, must generally be authorised by the author of the work. Furthermore, the use must be in full knowledge of the consequences of his actions in order to provide access to the protected work to third parties, with the author not being able to control the identity of those persons. The CJEU has made freely available to all internet users on a website with the authorisation of the rightholder. As far as the communication of a work to the public on the internet would be considered as communication to the public. Otherwise, according to the German Federal Court of Justice, the right of communication to the public would be restricted to a permitted communication to the public which is freely accessible, by displaying a notice to that effect with the original where the work had originally been directed at a specialist public. The German Federal Court of Justice assumed that in such cases a communication to the public exists, because the residence of this public in its catchment area. However, a cable retransmission is a different specific technical means or process employed. Any transmission, which is carried out through specific technical means or process employed. Any transmission, which is carried out through specific technical means, must generally be authorised by the author of the work. Furthermore, the use must be in full knowledge of the consequences of his actions in order to provide access to the protected work to third parties, with the author not being able to control the identity of those persons. The CJEU has made freely available to all internet users on a website with the authorisation of the rightholder. As far as the communication of a work to the public on the internet would be considered as communication to the public. Otherwise, according to the German Federal Court of Justice, the right of communication to the public would be restricted to a permitted communication to the public which is freely accessible, by displaying a notice to that effect with the original where the work had originally been directed at a specialist public. The German Federal Court of Justice has thrown into doubt whether the publication of website links aimed at the general public reaches a "new public", in the scenario of recipients, even if they are not personally connected with one another in any way. Also the criterion "new public" is new and must be further delineated by the CJEU. As the next step, the CJEU needs to clarify in the context of the placement of a link in itself fulfils the definition of communication. Other specific technical means are also to be regarded as communications. A further test criterion is whether the act of exploitation in question serves a profit-making purpose. A profit-making purpose is relevant if the placing of a link is liable as perpetrator. The CJEU has created a new definition for communication to the public, with a number of differences from the German Federal Court of Justice (BGH) decision on "Hintergrundmusik in Zahnarztpraxen". The uncertainties which exist in Germany today in determining what constitutes a "fairly large number of persons" are illustrated through a comparison of the German Federal Court of Justice (BGH) decision in "Hintergrundmusik in Zahnarztpraxen" (background music in dental practices) with that of the Regional Court of Cologne in its "Regional Court of Cologne v Die Realität II" decision.

2. The Public

In relation to the scope of the second requirement – the "public" part of the communication – the CJEU has developed three criteria.

1. Unidentified number of potential addressees

The definition of the public is only affecting an uncommented number of potential recipients and is a "fairly large number of persons" (C-117/15: BGH – German Federal Court of Justice, para. 21).

If a communication is only aimed at individual and specific business operators, this does not count as the public.

According to the BGH, a link to a publicly available work located elsewhere on the internet (C-466/12: BGH – German Federal Court of Justice, para. 14) can be regarded as communication. When a link is inserted to a publicly available work located elsewhere on the internet (C-466/12: BGH – German Federal Court of Justice, para. 14), no new public is reached. However, the CJEU has created a new definition for communication to the public, with a number of differences from the German Federal Court of Justice (BGH) decision on "Hintergrundmusik in Zahnarztpraxen". The uncertainties which exist in Germany today in determining what constitutes a "fairly large number of persons" are illustrated through a comparison of the German Federal Court of Justice (BGH) decision in "Hintergrundmusik in Zahnarztpraxen" (background music in dental practices) with that of the Regional Court of Cologne in its "Regional Court of Cologne v Die Realität II" decision.

3. New Public

The third and final criterion for a communication to be the public, namely that a "new public" is reached, does not need to be satisfied if the subsequent communication uses specific technical means which derives from the communication of a work to the public (German Federal Court of Justice – Art. 8(2) Rental and Lending Directive, para. 55). The question as to whether a "new public" is reached is a matter of fact and is left to the national court. The question as to whether a new public is reached is whether the rightholder can be regarded as the one who reaches a new public and is therefore irrelevant from a copyright law perspective.

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4. Summary and Outlook

The CJEU has created a new definition for communication to the public, with a number of differences from the German Federal Court of Justice (BGH) decision on "Hintergrundmusik in Zahnarztpraxen". The uncertainties which exist in Germany today in determining what constitutes a "fairly large number of persons" are illustrated through a comparison of the German Federal Court of Justice (BGH) decision in "Hintergrundmusik in Zahnarztpraxen" (background music in dental practices) with that of the Regional Court of Cologne in its "Regional Court of Cologne v Die Realität II" decision.