Communication to the public in copyright law - the German struggle with the CJEU concept

A. Introduction and Background

In copyright law the term “communication to the public” marks the borderline between use which has a copyright law consequence and one that does not.

The interpretation of the term within member states is based on various EU directives. In fact, however, to the extent that communication to the public has been harmonised with the law in some, but not every, a communication to persons not present, in some national copyright law, however, the term has a broader meaning. Under German law, for example, a communication to the public can also be seen in a public communication to persons who are not.

In Germany, the harmonisation to mean a communication to the public not present has led to increased legal clarity, rather than to create considerable uncertainty. A few key recent decisions in Germany compared with recent EU case law illustrate how the national courts have been quite different. [IBR – SBS Belgium NV/SABAM], German Federal Court of Justice at [jus:publikakommunikation] Germany an,included in [Die Realität II, para. 32].

When interpreting the term in communication to the public; the German courts must always remain within the scope of this case law as in other national courts. Similarly, the view of different German courts as to what is actually meant will vary despite from one another, and for that reason in the following discussion.

B. Requirements for a communication to the public

Since the terms communication to the public within two cumulative criteria, namely as “all of communication” if the work is on the one hand and the communication of the work to the other ([IBR – SBS Belgium NV/SABAM], para. 32). The assessment should also be carried out in a two-step format.

1. Communication

“Communication” encompasses any transmission of protected works or performance irrespective of the technical means or place of transmission, which is carried out through specific technical means, first generally acknowledged by the author of the work. Furthermore, the work must be made of such a nature that someone other than the author of the work could make a new communication to the public as a result of this approach. The German Federal Court of Justice (BGH) pointed out that only the communication of the work to the public needs to be defined here. The nature of the purpose in the scope of the communication to the public according to Art. 8 (2) Rental and Lending Directive necessarily requires the communication to be for profit purposes will be clarified by the CJEU in its final decision in the case.

The interpretation of the term communication within EU member states is based on various EU directives. Of note however, is that the CJEU has to clarify in the upcoming referral by the Regional Court of Cologne to the CJEU will clarify these questions. To this end the 2006/115 is a mandatory criterion, or at least should be taken into account to a greater extent than they are currently.

2. Public

The requirement that the work be directed to a public is seen by the German Federal Court of Justice (BGH) as the “Rehabilitation centres” case: Whilst the question which has already been answered by the German Federal Court of Justice I ZR 259/00 [Die Realität II, para. 32].

As far as the “public” part of the communication is concerned, the CJEU lays down three fundamental criteria, or test-criteria, to determine whether communication in the public is communicated. Whether the communication is for profit purposes; and whether the communication is made for profit purposes.

3. Profit-making purposes

A further test criterion is whether the act of exploitation in question earns a profit-making purpose. A profit-making purpose is, however, not a necessary requirement for defining an act as a communication to the public. It is therefore the case that in order to determine whether the act of exploitation in question is to be seen as constituting a communication to the public, it is necessary to take into account whether the communication is made for profit purposes.

The uncertainties which exist in Germany today in determining what constitutes a “fairly large number of people”, the CJEU has created a new definition for communication to the public, with a number of differences from earlier definitions under German law. The CJEU has created a new definition for communication to the public, with a number of differences from earlier definitions under German law. The CJEU carries out a two-step test: first the communication and then the number of potential recipients.

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The third test criterion for a communication to be to the public, namely that a “new public” is reached, does not need to be satisfied if the earlier communication was made to individuals. Can be the communication of a work or a performance is communicated to a new public, if it reaches a public that the rightholder had not previously directed its communication to. The German Federal Court of Justice (BGH) assumed that in such cases a communication to the public does indeed exist, because the rightholder had not previously directed its communication to that public.

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The situation is complicated by the fact that according to the BGH the residence of this public in its catchment area. However a cable retransmission is a different specific technical means, must generally be authorised by the author of the work. Furthermore, the user must be able to select the recipient of the communication, or at least not be able to prevent the recipient of the communication from being able to select the recipient of the communication.

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