

UK defence to unauthorised retransmission of broadcasts ruled incompatible with EU law.

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The CJEU has handed down a [decision](#) which is likely to land a fatal blow to the online streaming service TVCatchUp in their long running saga with free-to-air broadcasters.

Background

As we reported back in 2015, this reference to the CJEU by the UK Court of Appeal followed an appeal by the claimant broadcasters against the High Court decision, which allowed TVCatchup's ("TVC") unauthorised live-streaming of TV shows over the internet.

Whilst the High Court acknowledged that this was *prima facie* copyright infringement under Article 3(1) of the Information Society Directive (Directive 2001/29 – the "InfoSoc Directive") by communication to the public^[1], the decision to ultimately allow TVC's activities centred on the defence under section 73 of the Copyright Designs and Patents Act 1988 ("CDPA"). This exception, amongst other things, permits the immediate retransmission of free-to-air broadcasts by cable, if it is done so within the area of initial broadcast (also known as the "reception area" defence)^[2].

Reference to the CJEU

The claimant broadcasters challenged the first instance ruling, with the Court of Appeal subsequently taking the view that the section 73 CDPA defence should be interpreted in light of Article 9 of the InfoSoc Directive. It therefore referred a number of questions relating to Article 9 to the CJEU.

Article 9 qualifies the exclusive right of communication to the public by making clear that it is without prejudice to provisions concerning, amongst other things, access to cable of broadcasting services.

Of the five questions referred, the CJEU only answered one, which focused on the concept of "access to cable of broadcasting services", and whether this applies to national legislation [such as s73 CDPA] which:

- requires cable networks to retransmit certain broadcasts or
- permits the retransmission by cable of broadcasts where the retransmissions are simultaneous and limited to areas in which the broadcasts were made for reception or where the retransmissions are of broadcasts on channels which are subject to certain public service obligations.

Noting that the concept of "access to cable of broadcasting services" must be given autonomous and uniform interpretation throughout the EU and taking into account the wording of that provision, its context and the objectives of the legislation of which it forms part, the CJEU made the following observations:-

1. That the term "access to cable" is a different concept to that of "retransmission by cable", since only the latter designates the transmission of audio-visual content.
2. That the InfoSoc Directive already contains a provision for 'cable retransmission' at Article 1(2)(c) which explicitly excludes from the scope of the InfoSoc Directive the provisions of EU law governing cable retransmission.
3. That the principle objective of the InfoSoc Directive is to establish a high level of protection for authors, allowing them to obtain appropriate reward for the use of their works, including on the occasion of communication to the public. The CJEU observed that it had had this principle in mind when giving a broad interpretation to "communication to the public" in Article 3(1) InfoSoc, following an earlier referral by the UK High Court in the same case.
4. In the absence of any consent from the author, retransmissions should not be permitted unless they fall within the exhaustive list of exceptions and limitations set out at Article 5 of the InfoSoc Directive. Since it was accepted that the retransmission at issue did not fall within the scope of these exceptions, in the CJEU's view allowing such retransmissions would run counter to both the exhaustive nature of Article 5 and, more broadly, the principle objective of Article 9 i.e. the high level of protection for authors.

The CJEU therefore concluded that the concept of "access to cable of broadcasting services" does not cover and does not permit national legislation which provides that copyright is not infringed in the case of immediate retransmission by cable (including via internet) of free to air broadcasts within the area in which it was initially broadcast.

Conclusion

The case will now revert back to the English Court of Appeal who will have to take a position on whether the English legislation can be construed consistently with EU law as explained by the CJEU.

Whilst the decision is of course relevant to the respective parties in the dispute, it is perhaps limited in significance (at least in the UK) by the fact that the section 73 CDPA defence is due to be repealed through the Digital Economy Bill, which is currently before the UK parliament.

[1] Following a referral by the UK High Court, the CJEU confirmed that the retransmission by means of an internet stream by TVC constituted a "communication to the public" under Article 3(1) InfoSoc Directive.

[2] S73(2)(b) and s73(3) CDPA 1988