The Ten Commandments of Communication to the Public: A Brief Review of CJEU Case-law

Kluwer Copyright Blog
May 29, 2017

Patricia Mariscal (Elzaburu)

Please refer to this post as: Patricia Mariscal, 'The Ten Commandments of Communication to the Public: A Brief Review of CJEU Case-law', Kluwer Copyright Blog, May 29 2017, http://copyrightblog.kluweriplaw.com/2017/05/29/ten-commandments-communication-public-brief-review-cjeu-case-law/

In recent years, the Court of Justice has issued a growing number of decisions in response to questions referred for a preliminary ruling on the concept and delimitation of the right of communication to the public in the European Union. CJEU case-law on the topic is currently overwhelming.

The particular features of each of the increasingly numerous and complex techniques used raise genuine interpretative uncertainty among the Member States, who try and fit them into a concept –communication to the public– that is supposedly harmonised. Meanwhile, the Court of Justice seems to be tying itself in knots in an effort to respond to all the questions sent its way and, at the same time, maintain a solid, clear and coherent line of interpretation. However, the truth is that a glance over the judgments that the Court has given over the last ten years reveals case-law that has been cobbled and patched together, rendering the right of communication to the public a cumbersome and ambiguous concept. Successive CJEU decisions have added on so many exceptions, exceptions to exceptions, specifications, nuances and new concepts that doubt has now been cast on the existence of a unified and standardised concept of this right.

A clear example of this situation is the broadcasting of works in public places. In 2006, the CJEU ruled, in *SGAE v Rafael hoteles* (C-306/05), that the placing of television sets in the rooms of a hotel constituted an act of communication to the public by the hotel, since the communication did not take place in a strictly domestic location. In the grounds for its decision, the CJEU took account, among other issues, of the "cumulative" effect of the successive clients occupying the rooms, which meant that they could be considered overall as being a "new public".

Six years later, in *SCF v Del Corso* (C-135/10), the Court of Justice nevertheless considered that the broadcasting of phonograms in a dental practice did not constitute an act of communication to the public. Unlike communication in hotel establishments, the public of a dental practice would be comprised of a much smaller group of people, who were clearly not there to listen to music –which would be a fortuitous act imposed on them– but to receive a medical service.

The same issue cropped up again in the CJEU with regard to public communication in spa establishments (*Osa*, C-351/12) and rehabilitation centres (*Reha Training*, C-117/15), to which the Court applied the doctrine established in the *SGAE* case. Paragraph 63 of the *Reha Training* judgment reflects and substantially sums up the Court's reasoning: "*the broadcasting (...) insofar as it is intended to create a diversion for the patients of a rehabilitation centre, such as that at issue in the main proceedings, during their treatment or in the waiting time, constitutes the supply of additional services which, while not having any medical benefit, does have an impact on the establishment's standing and attractiveness, thereby giving it a competitive advantage*."

All this just goes to show what a vast range of cases there are regarding the public communication of works, which forces the CJEU to constantly recast and specify the concept and scope of this right.

An exercise in abstraction has led to this humble commandments proposal, which merely aims to compile some of the guidelines and interpretative principles established by the CJEU throughout the past years.

1. The concept of communication to the public must be understood in the broad sense. This basic premise, reiterated by the CJEU time and time again, implies that the elements of which public communication is comprised, namely, the concept of communication *per se* and the concept of public, possess a *catch-all* nature. This extensive interpretation is perhaps best reflected in *ITV Broadcasting* (C-607/11) and *SGAE v Rafael Hoteles*. Therefore, any exception to the right of communication to the public will be analysed in accordance with restrictive criteria (see *AKM v Zürs.net,* C-138/16).

2. The concept of communication to the public does not vary depending on who the rightholder is. The CJEU has pointed out on various occasions that the concept of communication to the public provided in Directive 2001/29/EC and in Directive 2006/115 must have the same meaning and must therefore be assessed in accordance with the same criteria (see *Reha Training* and *Verwertungsgesellschaft*, C-641/15).

3. The communication includes all transfers of protected works, irrespective of the means or technical process used. As can be inferred from CJEU case-law, the "communicator" does not even need to perform the act directly; it will suffice for that party to supply the means enabling the recipient of the communication to access the works. A clear example of this is *PPL* (C-162/10), where the CJEU considered that an act of communication to the public was being carried out by a hotel which made equipment for listening to music, along with phonograms to be listened to on that equipment, available to its clients.

4. The public at which the communication is directed refers to an unspecified number of potential recipients who may access the work simultaneously or "cumulatively". Conversely, it must be understood that specific persons are not considered part of the public (see *SBS Belgium*, C-325/14).

5. The public must be new. In order for an act of communication to the public to take place, the public for which the work is intended must be new, in the sense that it had not been taken into account by the rightholder when he or she had made the original communication. The concept of new public, outlined for the first time in *SGAE v Rafael Hoteles,* acquires particular significance in the wake of the *Svensson* judgment (C-466/12), where the CJEU considered that the act of placing links on the Internet to content that had been made available to the public with the rightholder's consent did not constitute an act of communication to the public. The same applies to embedded or inline links (*Bestwater*; C-348/13). In the analogue domain, the notion of "new public" has recently been applied in *AKM v Zürs* to enable the transmission of television programmes that had previously been broadcast by a national free-to-air broadcaster through a local cable network.

6. The act of communicating and the existence of a public are two cumulative requirements. The most recent judgments call for both elements –communication and public– to be present in a cumulative manner.

7. The role of the person who carries out the communication must be essential in order for the public to be able to access the work. Such intervention is no longer essential where the communicator is acting as a mere technical intermediary whose job is, for instance, to ensure or improve the broadcasting and/or reception of the works among the public that had already been targeted by the original communicator (see *SBS Belgium*).

8. The communication must contribute a certain "value" to the main activities of the communicator. One of the aspects that the CJEU has taken into consideration in order to classify an act as such is the fact that it contributes a competitive advantage or added value to the communicator's business or main activities. This is the case with hotel establishments and spa and rehabilitation centres.

9. Knowledge of the unlawfulness of the conduct and the intention of making a profit are relevant factors when links direct to content that has not been authorised by the rightholder. In accordance with the Court's findings in *GS Media* (C-160/15), and as recently confirmed in *Filmspeler* (C-527/15), an act of communication to the public will be deemed to occur where the linker has, or may have, knowledge of the unlawful nature of the linked content. Such knowledge is presumed where the linker's activities are profit driven.

10. Will it continue...? It can be inferred from the above points and guidelines that the Community concept of communication to the public has been shaped –or specified and expanded, if you will– through the CJEU's findings in response to questions referred to it by the various Member States, questions largely prompted by the emergence of new communication techniques and the development of existing techniques.

Those findings raise the question as to whether there is an unequivocal Community concept of communication to the public, comprised of a set of elements and requirements that apply regardless of the technique employed or whether, by contrast, it is the particular features of the various forms that communication may take which determine whether additional requirements are necessary or whether some do not apply.

This whole case-law experience raises uncertainty as to the stability and permanence of the Community concept of communication to the public, particularly as regards whether or not it is sufficient for the purpose of tackling potential disputes arising in respect of forms of exploitation that have not yet been considered. The fundamental issue is whether we now have enough interpretative elements to confront any dispute arising out of the public communication of works, or whether the very concept of communication to the public is liable to be questioned and redesigned every time new forms of exploitation are submitted to the CJEU for examination. In that case, an extension of these 'ten commandments' will be necessary.