Kluwer Copyright Blog

Who will C More? Broadcasters, users or unauthorised website portals?

Jeremy Blum (Bristows LLP) · Monday, March 30th, 2015

On 26 March, the Court of Justice of the European Union (CJEU) handed down Case C-279/13 *C More Entertainment*, the latest decision regarding the right of communication to the public in the context of websites providing links to content. In this particular case, C More provided live broadcasts of ice hockey matches on the Internet for payment of a fee. The defendant created links on its website to the C More live broadcasts and circumvented the paywall thus allowing its users to have live access to the broadcasts.

When the case of *C More* was initially referred, the fashionable focus on the nature of internet hyperlinks was in full swing. There were already pending references for *Svensson* (discussed here) and *BestWater* (discussed here), both to do with internet linking. In a bit of an anticlimax, the Swedish Supreme Court in *C More* felt sufficient guidance had been given in *Svensson* and withdrew four questions all relating to linking, leaving only the fifth question as live. Thus, the *C More* decision is much narrower in scope than originally expected.

As a result of *Svensson*, the Swedish court concluded that the defendant's acts in *C More* infringed the right of communication to the public and withdrew the references on those questions. The links allowed a public not originally intended to receive the content. All those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation is required for such a communication to the public.

However, there was one issue remaining in *C More* relating to whether the Swedish law granting the broadcast 'communication to the public' right was compatible with the InfoSoc Directive (Directive 2001/29). The relevant Swedish legislation provided for wider protection than that mandated by Article 3(2) of the InfoSoc Directive, namely that unlike Article 3(2) the protection in Sweden was not restricted to acts of making works available 'on demand'. It was broadly a general right of communication to the public. Before I consider the judgment, I think a few comments on Article 3 might be helpful.

Article 3 sets out the right of communication to the public and right of making available to the public. Article 3(1) deals with what are referred to as Berne Convention works, that is to say literary, artistic, dramatic and musical works (including films). Article 3(1) obliges Member States

to provide a general "communication to the public right" for such works.

By contrast, Article 3(2) is dealing with "related" rights. The only right which Member States are obliged to provide for the related rights is a "making available on demand" right. Thus for the rights set out in Article 3(2) such as fixations of performances, phonograms, first fixation of films and fixations of broadcasts, the right mandated is the right to make available to the public in such a way that the public might access them from a place and at a time chosen by them (i.e. 'on demand'). Art 3(2) provides this specific right of making available on demand, but not the general right of communication to the public which is given in Article 3(1). The CJEU recognised that the 'making available' right forms part of the wider 'communication to the public'. The CJEU said in *C More* that the narrower 'making available' right in Article 3(2) requires the public to access the protected work from a place and time individually chosen by them. The key to this right is that the access is 'on demand'. The CJEU said that for transmissions broadcast live on the Internet, it was not the case that access was 'on demand'. The broadcasts by C More, being live broadcasts, did not fall within the scope of Article 3(2) as they were not on demand.

The consequence is that in order to capture the defendant's acts *C More* needed to rely on a broader right, such as that provided in Swedish law where the making available did not have to be 'on demand' and the right was more akin to the broader communication right. Thus, the question at issue, as summarised by the CJEU, was whether Article 3(2) precludes Member States from granting the broadcasters referred to in Article 3(2) an exclusive right as regards acts of communication to the public which do not constitute acts of making available to the public on demand.

The CJEU said that whilst the InfoSoc Directive sought to harmonise authors' rights of communication, it did not seek to harmonise or remove differences in scope of protection which Member States might grant to holders of rights referred to in Article 3(2). Further, broadcasts are also dealt with in Directive 2006/115 (which covers rental, lending and copyright-related rights) and recital 16 of this Directive specifies that Member States should be able to provide for more far reaching protection for owners of rights related to copyright than that required by that Directive. Further still, Article 8(3) of Directive 2006/115 provides a general right of communication to the public for broadcasts, conditional on the payment of a fee. The CJEU said that, in accordance with the recital, Member States have the option of providing protection broader than this provision.

Therefore, to paraphrase the ruling, Article 3(2) did not preclude the extension of the rights given to broadcasters provided it did not undermine the protection of copyright.

The decision could be seen as good news for broadcasters as they can potentially stop non-authorised live broadcasts. However, that is true only if the relevant Member State has implemented legislation wider than the mandatory Article 3(2) right. If the Member State has not, then it is likely that live broadcasts will not be covered by that right because they are not on demand. Interestingly, on the same day as the *C More* decision, the UK Court of Appeal handed down *ITV v TV Catch Up*[2015] EWCA Civ 204 on this issue, where the High Court had previously found that UK law was not *ultra vires* for giving broadcasters the exclusive right of communication to the public rather than the narrower 'making available on demand' right as mandated by Article 3(2). The Court of Appeal has stayed the proceedings pending a reference to the CJEU for a preliminary ruling. This case will be covered for the blog by my colleague, Theo Savvides.

It is clear that Member States cannot legislate more broadly for Article 3(1) as confirmed in *Svensson*. The communication to the public right for Berne Convention works has been harmonised and laying down a wider range of activities than that referred to in Article 3(1) would lead to legal uncertainty and the functioning of the internal market would be adversely affected. *C More* confirms that because the broadcast right has not been harmonised, nothing stops a country from applying a broader right of communication to the public for broadcasters and by implication for other non harmonised rights. The result being that there is a patchwork of different broadcasting rights in relation to 'live' broadcasts accessed online throughout different EU Member States.

From an internet user's perspective, this difference in law might be peculiar. In one Member State the website link to a live broadcast might be non-infringing because the national law only implements the mandatory Article 3(2) provision without the broader protection which e.g. Swedish and UK law have given broadcasts. However, in another, such a link would probably infringe. Perhaps, the Commission's inquiry in relation to potential unification of copyright law focusing on the Digital Single Market (with a strategy due to be delivered by May 2015) might provide the solution. In the meantime the ruling confirms that some broadcasters will be able to prevent online 'live' links to their broadcasts.

Frustratingly, despite three decisions from the CJEU, there are still numerous questions arising out of linking. For example, despite the questions posed in *BestWater*, it is still unclear whether a link to a work freely available to the public but not with the consent of the owner, would infringe. Perhaps there is a knowledge requirement by the party providing the link, as otherwise liability could be found for innocent linkers. These questions will hopefully be referred again sometime soon.

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