

Kluwer Copyright Blog

TV Catchup in CJEU Repeat

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In a decision that could have serious implications for websites providing real time streaming of free to air broadcasts, the English Court of Appeal has recently handed down its Judgment in the case of *ITV Broadcasting Limited and others v TV Catchup Limited and others* [2015] EWCA Civ 204. The outcome is that the action brought by a number of British free to air broadcasters (ITV, Channel 4 and Channel 5) against TV Catchup, an internet TV streaming service, has been referred to the Court of Justice of the European Union (the “CJEU”) for a second time.

Background

Readers may remember that this case has already been referred to the CJEU ([Case C-607/11](#)), who held that the concept of communication to the public within the meaning of the Information Society Directive – Directive 2001/29 (the “Directive”) covered the unauthorised retransmission of a broadcast by way of internet streaming, even when subscribers to the internet streaming service were within the area of reception of the original broadcast and could, therefore, lawfully receive the original broadcast on their television sets.

Despite the CJEU’s guidance, the English High Court found that TV Catchup’s streaming service over fixed line internet had not infringed the broadcasters’ copyright in their broadcasts. This was because, in the High Court’s view, TV Catchup had a defence under [section 73](#) of the Copyright Designs and Patents Act 1988 (the “CDPA”) to the broadcasters’ claims of copyright infringement.

Section 73 provides that copyright in a wireless broadcast by the UK free to air broadcasters made from a place in the UK is not infringed to the extent that the broadcast is received and immediately retransmitted by “cable”, if and to the extent that the original broadcast is made for reception in the area in which it is retransmitted by cable (the “reception area” defence).

In the High Court’s view, streaming over fixed line internet connection fell within the definition of “cable” for the purposes of section 73. However, the High Court held that the meaning of the term “cable” in section 73 did not extend to streaming services to mobile devices over mobile networks. Consequently it found TV Catchup’s mobile services to have infringed the broadcasters’ copyright.

The Appeal

Both sets of parties appealed the High Court's decision.

The Broadcasters' appeal

The broadcasters challenged the High Court's decision that the section 73 defence applied to TV Catchup's internet streaming services.

The broadcasters claimed that the term "cable" has a uniform and precise meaning in EU law of "a dedicated cable system operated by traditional cable operators" which meant that the High Court was wrong to extend it to internet streaming over fixed line communications. They argued that the section 73 defence provided in English law could only be permitted under EU law if it fell within Article 9 of the Directive. 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 which would continue to apply following the implementation of the Directive. The broadcasters argued that the phrase "access to cable of broadcasting services" in Article 9 of the Directive did not extend to and, therefore, did not permit an exception of the breadth of the section 73 "reception area" defence given to it by the High Court. Consequently in interpreting national legislation in line with the *Marleasing* principle (which requires national legislation, where possible, to be construed in conformity with EU law), the scope of section 73 should be limited to the retransmission of broadcasts on traditional cable systems operated by conventional cable programme providers.

One aspect of the broadcasters' appeal led to discussion of whether the "reception area" defence was covered by Article 9 at all. The broadcasters argued that Article 9 was limited to cable access to retransmit broadcasts to geographical areas which had poor broadcast reception – another exception to copyright provided for in section 73 of the CDPA (and referred to as the "must carry" exception in this case). The outcome of this interpretation of Article 9 could potentially lead to the conclusion that the "reception area" does not comply with EU law on any interpretation.

The Court of Appeal came to the conclusion that the meaning of Article 9 was not clear. Consequently they have decided to make a further reference to the CJEU. No questions have been formulated yet. However, it seems likely that they will cover the scope of Article 9 of the Directive and in particular whether it covers both "reception area" and "must carry" exceptions. It also seems likely that the scope of the meaning of the term "cable" in Article 9 will also be covered – in particular whether it can extend to streaming over the internet by fixed line communication.

TV Catchup's appeal

TV Catchup appealed the High Court's finding that section 73 did not extend to live streaming to mobile devices via mobile networks. TV Catchup sought to draw a distinction between their transmission to the mobile mast (which was wholly via "cable") and what they termed as a private communication between the mobile network and the consumer at the point between the mobile mast and the consumer's mobile device. Alternatively they argued that section 73 should apply as the retransmission was "substantially" by cable.

The Court of Appeal rejected both of these arguments and upheld the High Court's decision on this point.

The implications of this decision

The Court of Appeal's decision calls into question the legality of unauthorised live streaming of TV broadcasts. Whilst this could be seen to severely limit the ways the British viewer can watch TV, over the long running course of this litigation, the broadcasters have developed their own live streaming services to fill the hole. Something which may ultimately deal a mortal blow commercially to subscription live streaming services.

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