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CJEU: no “communication to the public” when programme-carrying signals are not accessible to the public, *SBS Belgium NV v. SABAM*

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Article 3(1) of Directive 2001/29/EC (the Infosoc Directive) must be interpreted as meaning that a broadcasting organisation does not carry out an act of “communication to the public” when it transmits its programme-carrying signals exclusively to signal distributors without those signals being accessible to the public (the “direct injection” technique). This judgment by the European Court of Justice of the European Union (CJEU) on 19 November 2015 in the case *SBS Belgium NV v. SABAM* was in response to a preliminary question from the Brussels Court of Appeal.

The facts of the case were as follows: a dispute had arisen between the commercial broadcasting organisation SBS Belgium and the copyright administration society SABAM. SBS uses the “direct injection” technique to broadcast its programmes. In this two-step process, SBS transmits its programme-carrying signals via a private line exclusively to signal distributors such as Belgacom, Telenet and TV Vlaanderen. Then, depending on the distributor, the signals are transmitted by satellite, cable or xDSL line. The general public has no access to the signals transmitted by SBS. They receive the signals only when the distributors send them to their subscribers, so that they can watch TV programmes.

The question in the present case was whether this “direct injection” transmission-process can be considered a “communication to the public” within the meaning of Article 3 of the Infosoc Directive. SABAM argued that this was the case, and that SBS needed the authorisation of the copyright holders. SABAM requested payment of a sum of money as compensation. According to SBS however, no remuneration was payable by *them*, since only the distributors and other organisations of the same type make a “communication to the public”. Therefore, the distributors would be responsible for the payment of the equitable remuneration. The Brussels Commercial Court agreed with SABAM, however, and ordered SBS to pay close to a million euros in copyright fees.

SBS appealed to the Brussels Court of Appeal, which decided to refer a preliminary question to the CJEU. The CJEU ruled that Article 3(1) of the Infosoc Directive, “*must be interpreted as meaning that a broadcasting organisation does not carry out an act of communication to the public, within the meaning of that provision, when it transmits its programme-carrying signals exclusively to signal distributors without those signals being accessible to the public during, and as a result of that transmission, those distributors then sending those signals to their respective subscribers so that they may watch those programmes, unless the intervention of the distributors in question is*

just a technical means, which it is for the national court to ascertain.”

This CJEU judgment proves, once again, that it is not always clear whether acts of making audiovisual content available fall within the scope of the right of communication to the public defined in the Infosoc Directive. Over the years, the CJEU has developed **certain criteria** to assess whether there has been a communication to the public, as defined by the Infosoc Directive: the identity of the “user”, the definition of the “public”, the profit-making nature of communication to the public and the concept of “new” public. Taking a closer look on how some of these criteria are examined in the *SBS Belgium v. SABAM* case:

The Court started with referring to its previous case-law (including the *Svensson* case) on the right of **communication to the public**. The Court recalled that the concept of “communication to the public” includes two cumulative criteria, namely, an “act of communication” of a work and the communication of that work to a “public”. With regard to the **act of communication**, the Court ruled in the present case that since an “act of communication” refers to any transmission of the protected works, irrespective of the technical means or process used, the transmissions here must be considered to constitute “acts of communication”.

With regard to **the public**, however, the Court pointed out that it is apparent from the Court’s case-law (i.e. the *SGAE* case and the *ITV Broadcasting and Others* case) that the term “public” refers to an indeterminate number of recipients, potential television viewers, and implies, moreover, a fairly large number of persons. No such public existed in this case, since the works transmitted by the broadcasting organisation SBS are communicated to specified individual professionals. Given the cumulative nature of the criteria, there was therefore no “communication to the public” in the case at hand.

However, the Court continued, in some cases – when the onward transmission is purely technical in nature, the subscribers of the broadcasting organisation could be regarded as the “public”, with the result that that organisation would actually make a “communication to the public”. This was a matter for the national court to determine.

In cases such as *Premier League*, *Del Corso* and *Phonographic Performance (Ireland)*, we saw a flexible interpretation of an intervention by **the user**. According to the CJEU, the ‘user’ (i.e. the person using a means of communication) carries out an act of communication when she intervenes to give her customers access to protected works via broadcasting. In the present case, however, the Court seems to interpret the notion of such an intervention more restrictively. Only when the transmission is purely technical, does room exist for an intervention by the user. However, how could one prove whether a transmission is purely technical or not, and as a result, whether a communication to the public exists or not? Since authors can only claim a fair compensation for the use of their works in the case of a communication to the public, this lack of transparency will make it difficult for authors to know where they can claim their money.

With regard to the notion of **new public**, the Court refers to this notion only once, by saying that distributors do not in any event make up part of a public, unlike entities such as the hotels which were the subject of the cases giving rise to the judgments in *SGAE* and *Phonographic Performance (Ireland)*. Therefore, the subscribers cannot be considered to be a “new” public which was not covered by the original act of communication made by the broadcasting organisation. The Court fails to explain, however, whether and when such a “new public” could exist in the case at hand.

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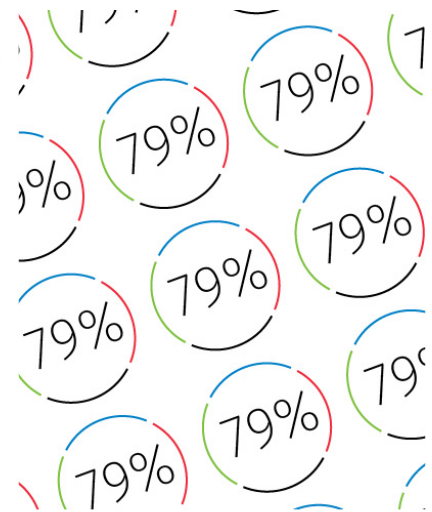
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