Kluwer Copyright Blog

Communication to the public in copyright law – the German struggle with the CJEU concept

Jan Bernd Nordemann (NORDEMANN) · Thursday, April 28th, 2016

A. Introduction and Background

In copyright law the term 'communication to the public' marks the boundary between use which has a copyright law relevance and use which does not.

The interpretation of the term within EU member states is based on various EU directives. Of note however, is that the term communication to the public has been harmonised within EU law to mean only a communication to persons not present. In some national copyright laws, however, the term has a broader meaning. Under German law, for example, a communication to the public can also be seen in a public communication to persons who are present.

In Germany, the harmonisation to mean a communication to the public not present has not led to increased legal clarity, rather it has caused considerable uncertainty. A look at recent decisions in Germany compared with recent CJEU case law illustrates the areas which have been clarified and those that remain open: CJEU *SBS Belgium NV/SABAM* (C-325/14), *German Federal Court of Justice (BGH) Hintergrundmusik in Zahnarztpraxen* (I ZR 14/14), BGH *Die Realität II* (I ZR 46/12), BGH *Ramses* (I ZR 228/14) and Regional Court of Cologne *Rehabilitationszentrum* (14 S 30/14).

When interpreting the term communication to the public, the German courts must always remain within the scope of Art. 267 TFEU – as must other national courts. Clearly, the views of different German courts as to what is *acte clair* sometimes deviate from one another, as will be illustrated in the following discussion.

B. Requirements for a communication to the public

Since the term communication to the public exhibits two cumulative criteria, namely an "act of communication" of a work on the one hand and the communication of that work to a "public" on the other (CJEU – *Belgium NV/SABAM*, para. 15), the assessment should also be carried out in a two-step format.

I. Communication

"Communication" encompasses any transmission of protected works or performance irrespective of the technical means or process employed. Any transmission, which is carried out through

specific technical means, must generally be authorised by the author of the work. Furthermore, the user must act in full knowledge of the consequences of his actions in order to provide access to the protected work to third parties, which the latter would not have without that user's intervention. This is the case for example, if a dentist plays background music in the waiting room for his patients (CJEU, *SCF*, C-135/10), or on the internet when a link is inserted to a publicly available work located elsewhere on the internet (CJEU *Svensson*, C-466/12 and *Bestwater*, C-348/13*)*. The German Federal Court of Justice (BGH), the highest German civil court, had found in its earlier *Paperboy* decision (I ZR 259/00), that links are irrelevant from a copyright law perspective.

According to the CJEU there is a restriction of the term "communication", where the specific technical means of transmission is purely technical in nature and the one making the transmission is merely a distributor "not independent in relation to the broadcasting organisation" (CJEU – *SBS Belgium NV/SABAM*, para. 32).

II. The Public

In relation to the scope of the second requirement – the "public" part of the communication – the CJEU has developed three criteria:

1. Unspecified number of potential addressees

The definition of the public is only fulfilled for an indeterminate number of potential recipients and a "fairly large number of persons" (CJEU – *SBS Belgium NV/SABAM*, para. 21).

If a communication is only aimed at individuals and specific business operators, this does not count as the "public". According to the *SBS Belgium NV/SABAM* decision of the CJEU this is the case where for example, a broadcaster sends a programme to individual licensees, in order that they can provide it to their own subscribers for a fee. In that regard, this represents quite a significant departure from the previous German practice of determining whether a public communication had occurred based not on how many people it was being addressed to, rather whether those people were personally connected to one another.

The uncertainties which exist in Germany today in determining what constitutes a "fairly large number of persons" is illustrated through a comparison of the German Federal Court of Justice (BGH) decision in *Hintergrundmusik in Zahnarztpraxen* [approx. "Background music in dental practices"] with that of the Regional Court of Cologne in the *Rehabilitationszentrum* [approx. "Rehabilitation centres"] case: Whilst the German Federal Court of Justice (BGH) was of the opinion that playing background music in dentists' waiting rooms does not reach a sufficiently large number of people at the same time or successively, the Regional Court of Cologne believed that this was in fact the case with regard to background music in dentists' practices; the court stated that in this respect, nothing different should apply than applies to the playing of music in rehabilitation centres, hotels or restaurants and public houses. The case law of the CJEU is also not entirely clear on this point. Therefore the Regional Court of Cologne in the second instance did not assume that an *acte clair* existed and exercised its right to refer to the CJEU as per Art. 267 TFEU (case no. CJEU C-117/15), while in *Hintergrundmusik in Zahnarztpraxen* the German Federal Court of Justice (BGH) as the highest civil court did assume an *acte clair*, at least with regard to background music in dentists' practices.

The situation is complicated by the fact that according to the BGH *Ramses* decision, a communication to the public can be ruled out depending on the group of people, even if the

relevant (specific) group comprises a relatively high number of people. That case concerned the retransmission of cable broadcasts to 343 homeowners. It is not clear from the CJEU decisions to date whether there might be a quantitative limit after all.

2. Profit-making purposes

A further test criterion is whether the act of exploitation in question serves a profit-making purpose. A profit-making purpose is, however, not a mandatory requirement for defining an act as a communication to the public (German Federal Court of Justice (BGH) – *Hintergrundmusik in Zahnarztpraxen*, para. 38). The question as to whether it is possible that a communication within the meaning of Article 8 (2) Rental and Lending Directive necessarily requires the communication to be for profit purposes will be clarified by the CJEU in its referral decision in the *Rehabilitationszentrum* case.

3. New Public

The third test criterion for a communication to be to the public, namely that a "new public" is reached, does not need to be satisfied if the subsequent communication uses a specific technical means which differs from that of the original communication. In such cases, every communication of the work must, as a rule, have the authorisation of the author.

A work or a performance is communicated to a new public, if it reaches a public that the rightholder had not contemplated when they authorised its use by way of the initial communication to the public. An internet link to a permitted communication to the public, which is freely accessible, is not deemed to be reaching a new public and is therefore irrelevant from a copyright law perspective. What is unclear in respect of internet links however, is whether they do reach a new public if the communication to the public which it links to has been unlawfully effected. In its *Die Realität II* decision, discussed in a previous article here, the German Federal Court of Justice (BGH) assumed that in such cases a communication to the public does indeed exist, because a new public would be reached. The consequence of the case law of the BGH is furthermore that the provider of the link is liable as perpetrator.

According to the German Federal Court of Justice (BGH) a new public is not reached if a cable retransmission is broadcast to a community of homeowners because the original transmitting party would have considered the residence of this public in its catchment area. However a cable retransmission is a different specific technical means, so the communication to the public cannot be ruled out on this point.

C. Summary and Outlook

The CJEU has created a new definition for communication to the public, with a number of differences from earlier definitions under German law. The CJEU carries out a two-step test: first the communication and then the respective public. Since the CJEU's *Svensson* decision, the new factor for German copyright lawyers is that the placing of a link in itself fulfils the definition of communication. Other specific technical means are also to be regarded as communications.

As far as the "public" part of the communication is concerned, the CJEU examines three requirements: an indeterminate number of potential recipients; whether the communication is for profit-making purposes; and whether it reaches a new public. The term "public" is apparently not satisfied when there are a small number of recipients, even if they are not personally connected

with one another in any way. Also the criterion “new public” is new and must be further delineated by the CJEU. As the next step, the CJEU needs to clarify in the GS Media/Sanoma case (C-160/15) the question which has already been answered by the German Federal Court of Justice (BGH) in its *Die Realität II* decision, as to whether links to unlawful communications to the public are always deemed to reach a new public. However, other questions also remain open, for example whether the publication of website links aimed at the general public reaches a “new public”, in the scenario where the work had originally been directed at a specialist public. The German Federal Court of Justice threw up an additional question in its *Die Realität II* decision, namely whether rightholders may be able to restrict the ability of others to link to a work copyright-free, by displaying a notice to that effect with the original communication to the public. Otherwise, according to the German Federal Court of Justice, the right of communication of a work to the public on the internet would be *de facto* exhausted as soon as the work was made freely available to all internet users on a website with the authorisation of the rightholder. As far as the third criterion is concerned, the profit-making purposes test, the CJEU must itself clarify whether profit-making purposes in the scope of the communication to the public according to Art. 8 (2) Rental and Lending Directive 2006/115 is a mandatory criterion, or at least should be taken into account to a greater extent than they are in the scope of communication to the public according to Art. 3 (1) Copyright Directive 2001/29. The upcoming referral by the Regional Court of Cologne to the CJEU will clarify these questions. To this end the opinion of the Advocate General has already been presented (C-117/15), so a CJEU decision can be expected later this year.

This entry was posted on Thursday, April 28th, 2016 at 8:07 am and is filed under Case Law, Communication (right of), Digital Single Market, European Union, Germany, Infringement
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.