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Reha and rehabilitating the meaning of 'communication to the public'.

Jeremy Blum (Bristows LLP) and Katey Popova (Bristows) · Thursday, June 23rd, 2016

The CJEU has recently ruled on yet another case seeking to determine the meaning of 'communication to the public', this time in the context of broadcasting television to patients in a rehabilitation centre (*Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), C-117/15*). Readers will be aware that similar questions have already been asked in the context of a café, a hotel and a spa where there was found to be a communication to the public (*FAPL, C-403/08 and C-429/08*; *SGAE, C-306/05*; and *OSA, C-351/12*), and a broadcast in a dental centre where there was not *(SCF, C-135/10*). One would think the law was becoming clearer but different nuances arise which require repeated consideration by Europe's highest court, and in the online context the case law is still unsettled as discussed below.

The Regional Court, Cologne referred a number of questions to the CJEU which arose out of a dispute between Reha, which runs a rehabilitation centre and GEMA (a collecting society). Reha had set up televisions broadcasting programmes in two waiting rooms and a training room. GEMA brought proceedings against Reha for unpaid royalties in relation to those programmes arguing that the broadcasts constituted a 'communication to the public'.

The CJEU summarised the referred questions as follows:

- Is the question of whether such a situation constitutes a 'communication to the public' to be determined with regard to both or only one of Art.3(1) of the Copyright Directive (2001/29/EC) and Art.8(2) of the Rental Directive (2006/115/EC) (the **Provisions**)?
- Is the existence of such communication to be determined with regard to the same criteria?
- Is such broadcasting an 'act of communication to the public' within the meaning of one and/or the other of those provisions?

The CJEU held that the Copyright Directive's provisions had to apply without prejudice to the Rental Directive unless otherwise provided, which it did not. The CJEU noted that the articles of the two directives in question pursue different objectives. However there was no evidence that the EU legislature wanted to confer a different meaning on 'communication to the public' and in the opinion of AG Bot both provisions had the same trigger: 'communication to the public'. The CJEU therefore held that in a case where broadcast programmes potentially affected not only copyright but also the rights of performers/producers, both provisions had to be applied and 'communication to the public' given the same meaning and assessed in accordance with the same criteria.

The court confirmed that two cumulative criteria are required, as previously set out in case law and confirmed recently in *SBS Belgium* (*C-325/14*) namely, an '*act of communication*' of a work and a communication of that work to a '*public*'.

In summarising its previous case law, the CJEU confirmed that an *'act of communication'* is any transmission of the works, irrespective of the technical means or process. With respect to a public, the CJEU said this requires an indeterminate number of potential recipients, generally implying a fairly large number of persons. Additionally a '*new public'* is required which is a public not taken into account by authors of the protected works when authorising their use. The court emphasised the role of the user in giving access to the works to the new public and that in the absence of the intentional intervention of the user, the 'new public' would not be able to enjoy the broadcast works although physically in the broadcast's catchment.

Although not conclusive, the profit making nature of the use is not irrelevant. If the user obtains an economic benefit then there is a profit making element to its use.

Applying these criteria, the CJEU held that Reha had communicated the broadcasts to the public. It held that Reha's patients were a public as they were a group not too small or insignificant and a new public, particularly as the main proceedings involved a dispute about royalties and, in principle, the patients could not have enjoyed the works without Reha's targeted intervention.

The CJEU had previously held that a broadcast had a profit-making nature if the user was likely to obtain an economic benefit relating to its attractiveness and therefore a greater number of customers (*FAPL*). In this instance it held that there was a profit-making nature to the broadcasts as they intended to create a diversion for patients, which constituted additional services and gave Reha a competitive advantage.

The CJEU noted that it had previously held that a cafe-restaurant, hotel or spa made a communication to the public if it had intentionally broadcast protected works to its clients, as the public in such establishments was targeted. The CJEU held that these situations were directly comparable to the main proceedings. But it contrasted the situation in the main proceedings with that of a dentist's waiting room as it considered that the dental patients did not place importance on the broadcast and therefore this did not increase the attractiveness of the practice.

Given the earlier CJEU rulings, this decision is not surprising. However, in fairness the *SCF* decision regarding the broadcast of radio to dental patients did provide some uncertainty as to how this particular case would be determined. It seems that the CJEU has started to emphasise the two step approach to determining 'communication to the public', as previously the court had not emphasised a stepped approach although the concepts were clearly expressed.

Furthermore, in this case, the court said that an act of communication refers to any transmission. This begs the question, what if there is no transmission *per se* but the mere possibility of one as was the case in *Svensson* (*C-466/12*) and other hyperlink cases? Was the court in Reha intending to step back from the approach in *Svensson* where it said a hyperlink constitutes an act of communication and does not actually need to be accessed? Perhaps more will be revealed in *GS Media* (*C-160/15)* once the CJEU opines. The AG already suggested in those proceedings that hyperlinks do not make protected works available to a public but merely facilitate the finding of those works. Given that the intervention of the user is not critical for the work to be accessed; the AG considered there was no act of communication. Perhaps the CJEU in Reha were signalling

their intent for the future, or possibly this is reading too much into the language of the decision. Hopefully we will find out shortly in *GS Media*.

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