

Kluwer Copyright Blog

Looking for the edge of Article 3 InfoSoc Directive and finding it twice – in a car and in the court

Kacper Szkalej (Lund University) · Wednesday, November 25th, 2020

By now everyone in the world must have heard of Sweden, especially European copyright lawyers. This post concerns two recent preliminary rulings from the CJEU, both at the request of Swedish courts. As both involved the communication to the public right, and both led the CJEU to pronounce the infrequently heard incantation that Article 3 InfoSoc Directive must be interpreted as *not* covering the circumstances of the case, it is opportune to consider the two cases together in one post. In chronological order, therefore, I first deal with *C-753/18 STIM and SAMI v Fleetmanager and Nordisk Biluthyrning* and then with *C-637/19 BY v CX*.

STIM and SAMI

The question in the case and a short history of car radio

In the well-known year of 1886 Carl Benz submitted a patent for a motor car at the Imperial Patent Office in Berlin. In 1930 Galvin Manufacturing Corporation, better known as Motorola, introduced the first commercially successful car radio, while two years later in 1932 the Berlin company Ideal, better known by its metaphorical name Blaupunkt, created the first European car radio, and in 1933 Manchester-based Crossley Motors offered the first factory fitted car radio. Like international and European copyright law, vehicle audio technology has continued to develop over the course of the twentieth century, and today it forms part of car telematics, telecommunication, in-vehicle security, handsfree calling, navigation, and remote diagnostics systems. In Europe it is crucial for the proper functioning of TIS (traffic information services); on which see for example Commission Delegated Regulation 2015/962 in light of Directive 2010/40/EU. These developments are also the context for the present case.

Grounded in two joined cases before the Högsta domstolen (Swedish Supreme Court) the essential question before the CJEU was, having regard to the above history, whether the car rental industry engages in a copyright-relevant act, and in particular a communication to the public, when it rents out cars with radio receivers that embody a 90 year old tradition and compromises in car design (see to that effect [para 26 of the judgment](#)).

The CJEU's judgment

The joined cases at national level were governed by slightly different facts, relating on the one hand to a right of remuneration for communication to the public under Article 8(2) Rental Rights

Directive and on the other to the right of communication to the public under Article 3(1) InfoSoc Directive (see [the previous post](#) and paras 13-17 of the judgment for a more detailed description). The CJEU therefore commenced by remarking that since the EU legislature did not express a different intention, the expression ‘communication to the public’ as used in Article 3(1) InfoSoc Directive and Article 8(2) Rental Rights Directive were to be interpreted as having the same meaning (referring to *Phonographic Performance*, paras 49-50 and *Verwertungsgesellschaft Rundfunk*, para 19). Recognising that the expression must be interpreted consistently with equivalent concepts present in international copyright law, taking into account the context in which those concepts are found (referring to *FAPL*, para 189 and *SCF*, paras 51-56), the Court repeated the well-known phrase, settled in case law, that ‘communication to the public’ includes two cumulative criteria, an ‘act of communication’ of a work to a ‘public’. To determine the existence of a communication, the Court first stressed that it was necessary to carry out an individual assessment ‘in light of a number of complementary criteria, which are not autonomous and are interdependent’. It went on to select the so-called “deliberate intervention approach”, which focuses on the indispensable role of a user in giving access to protected subject-matter by an act of (deliberate) intervention without which recipients might not be able to enjoy a broadcast at all or only with difficulty (paras 31-32). Arguably the choice of approach is not surprising since the case did not concern acts of transmission as such, being instead carried out by broadcasting organisations (as noted by Advocate General Szpunar at para 23).

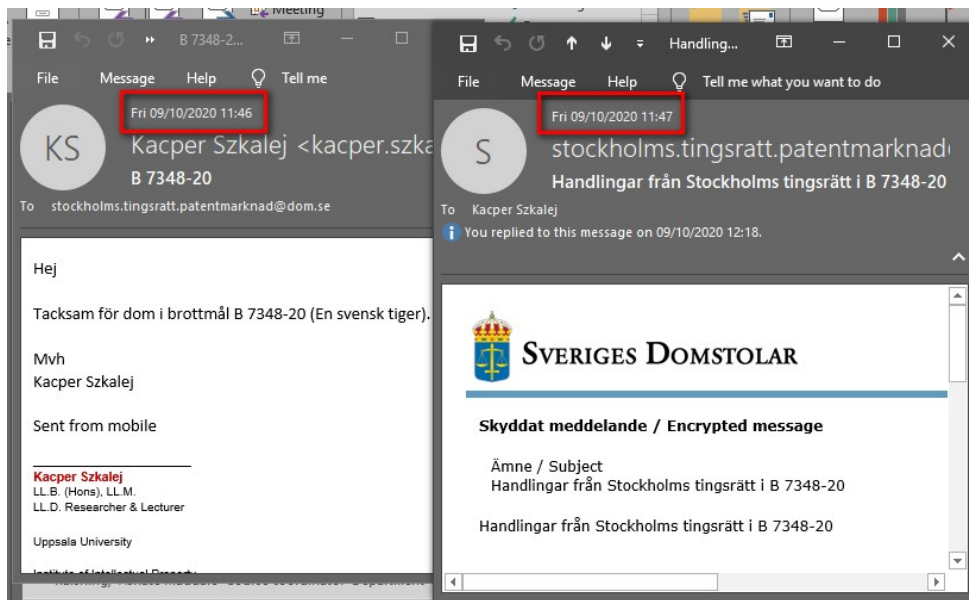
Subsequently the Court made reference to recital 27 InfoSoc Directive, which reproduces the Agreed Statement to Article 8 WCT, according to which ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this directive’. With exquisite conciseness it posited ‘That is so in the case of the supply of a radio receiver forming an integral part of a hired motor vehicle, which makes it possible to receive, without any additional intervention by the leasing company, the terrestrial radio broadcasts available in the area in which the vehicle is located’. The Court thus concurred with the assessment made by the AG, who, in distinguishing the case from earlier case law, had additionally made the observation that to constitute a communication to the public, the user’s intervention must concern the protected subject-matter itself, i.e. the content of the communication (para 33). The AG considered this to be an implicit requirement in all the rulings of the Court that had found a communication to exist (para 26).

Not finding a communication to the public at all, the Court thus held that Article 3(1) InfoSoc Directive and Article 8(2) Rental Rights Directive must be interpreted as meaning that the hiring out of motor vehicles equipped with radio receivers does *not* constitute a communication to the public within the meaning of those provisions (para 39, operative part).

BY v CX

Circumstances and a remark on the questions referred

In broad terms the question in the second case, which was referred by the Patent and Market Court of Appeal (PMÖD), was whether sending an e-mail to a court with a protected photograph as evidence in the case before it constituted a copyright-relevant act directed to the public. The national case originated from a defamation case before another court between two private parties each of whom submitted as evidence material taken from the other's website. One party subsequently sued for copyright infringement and the other party counter-sued...



Expeditious handling by a Swedish court

Most practitioners will see that the case is at the intersection of the age-old tradition of submitting evidence to court in order to support a claim, and a 25 year old tradition of digital copyright exclusivity (I symbolically approximate it to the [first email sent by a sitting Prime Minister to a sitting President](#)). But from the perspective of national law intricacies, the case also concerns a [255 year old tradition of public access to documents held by the state](#) (*see generally here*), which – unlike in some Member States – is not currently contingent on any meaningful red tape except the advancement of a simple request to access the specified documents. Against a broad, long-standing and constitutionally-entrenched freedom of information and the traditional broad interpretation of exclusive rights to ensure a high level of protection, a Swedish court cannot err when it asks itself whether the scope of the exclusive rights is so broad that it may even include the submission of evidence to it. From the moment of its reception, such evidence is indeed available to an indeterminate number of people whose identity, affiliation, and reasons for access or use are, as a

point of departure, irrelevant. Additionally, any request must be handled expeditiously (sv. *skyndsamt*; 2 Ch. 15 § and 16 § Freedom of the Press Act). Forced by the circumstances to combine principles of interpretation of copyright exclusivity and an abundant amount of case law with the bedrock of Swedish constitutionalism, public policy, and the reason why there is no real word for ‘privacy’ in Swedish, PMÖD decided to stay the proceedings and ask the CJEU whether the term ‘public’ in Articles 3(1) and 4(1) InfoSoc Directive has a uniform meaning, and whether, essentially, a court can fall within the scope of the ‘public’ within the meaning of those provisions (para 18). Humbly explaining the constitutional context to the CJEU (para 8 of the reference), and perhaps a bit too generally to unambiguously reveal its assumptions or relevant national intricacies, the Court also asked, in essence, whether national law on access to public documents has any relevance for the assessment.

The CJEU’s judgment

As the evidence was submitted by e-mail, the CJEU started by reducing the issue to the communication to the public right, following its judgment in *Tom Kabinet* which clarified the scope of Article 4(1). The Court then recalled the cumulative nature of the communication to the public right and instantaneously ticked off the ‘communication’ requirement by considering the transmission of a protected work by electronic means to a court as evidence in judicial proceedings as an act by which a user gives access to protected works with full knowledge of the consequences of that action and thus an act of communication (paras 23-24).

As for the second requirement, the public, the Court recalled that the concept refers to an indeterminate number of potential recipients which implies a fairly large number of persons (para 26) and observed that the concept ‘indeterminate number of potential recipients’ refers to making a work perceptible in any appropriate manner to persons in general, without being restricted to specific individuals belonging to a private group. With that in mind, the CJEU then construed the communication in the present case as occurring to ‘a clearly defined and closed group of persons holding public service functions within a court’ as opposed to an indeterminate number of potential recipients (para 28) [for what it’s worth, perhaps this insight is aligned with the Dutch Court’s concern in *Tom Kabinet*; paras 60, 65, 69]. This led the Court to hold that the communication was not made to ‘persons in general’ and thus to draw the awaited conclusion that a transmission by electronic means of a protected work to a court, as evidence in legal proceedings between individuals, cannot be regarded as a communication to the public within the meaning of Article 3(1) InfoSoc Directive (para 29, making reference to *SBS*, paras 23-24).

The Court subsequently reached for the end of the InfoSoc Directive to make clear that national rules on access to public documents are irrelevant because access to such documents is granted by the court (not the parties) to those who request such access under national rules and procedures, which are not affected by the InfoSoc Directive according to Article 9 (para 30). It is, however, apt to emphasise that even if such national rules would not preclude the application of the communication to the public right, the CJEU clearly arrived at its conclusion with reference to the individual, internal, components of the relevant right; not the possible cap set by Article 9.

Towards the end of its judgment, the Court finally reflected on the relevance of fundamental rights, considering its construction of the scope of the communication to the public right as enabling the maintenance of a fair balance of interests between copyright exclusivity and the public interest, including users (para 31, referring to *Pelham*, para 32). Recalling the formula that enables a balancing act to occur, namely that it is not apparent from its own case-law or Article 17(2) of the

Charter of Fundamental Rights that the right to intellectual property is inviolable and must therefore be guaranteed absolutely, the Court reiterated that Article 17(2) must be weighed against other fundamental rights, such as the right to an effective remedy [and fair trial] guaranteed in Article 47 of the Charter. According to the Court, such a right would be ‘seriously compromised’ if a rightholder were able to oppose the disclosure of evidence to a court on the sole ground that the evidence contains protected subject-matter (para 33).

Concluding remarks

Once is a chance, twice is coincidence, but three times is a pattern. In the aftermath of the seminal *Svensson* judgment it must now be clear to anyone that Swedish courts have the equation to identify those cases that let the CJEU demarcate the edge of the communication to the public right (and on another occasion they asked expressly; *C More*, para 21). Arguably, these are exactly the type of cases that are needed in a European copyright law framework that has gone as far as to consider the sale of devices a communication to the public (*Filmspeler*), to awkwardly make the scope of this right contingent upon knowledge (*GS Media*), and even to expressly engrave in a Directive who is communicating protected content to the public and what they need to do about it (Art. 17(1) *DSM Directive*; see however *Joined Cases C?682/18 and C?683/18*). Baffled by the true scope of an exclusive right that is constantly litigated in Luxembourg and the plentiful examples of when the right applies but barely any of when it does not apply, it is not really a surprise that claimants are led to think that they can find copyright in rental cars or in the court. Set in seemingly banal and perhaps annoying factual circumstances, both rulings remind, and demonstrate in as little as around 15 paragraphs each, that there is a limit to the communication to the public right and that that limit is also reached by the finite scope of the concepts that make up the right, without the additional support of a copyright limitation. In the second case, by deciding not to ask about the limitation in Article 5(3)(e) *InfoSoc Directive*, but meticulously pointing out that the potential application of the national limitation that implements Article 5(3)(e) is relevant only after the existence of a copyright-relevant act (see [para 6 of the reference](#)), PMÖD let the CJEU seize the opportunity to cast light on the exclusive right as such and demonstrate that fundamental rights may also have a role to play in construing the exclusive rights. Therefore, and by way of final remark, whilst this potentially settles the case before PMÖD, should Swedish courts receive the opportunity to consider copyright and evidence again, the CJEU’s straightforward assessment pertaining to Article 47 of the Charter will hopefully also find application with regards to the remaining exclusive rights to ensure a harmonious development of national case law. And, if there should ever be a need, to enable the construction of the national limitation in accordance with Article 5(3)(e) in such a way that the right and balancing mechanism embedded within it can find concrete expression (*Funke Medien*, para 58, 70 and *Spiegel Online*, para 43, 54).

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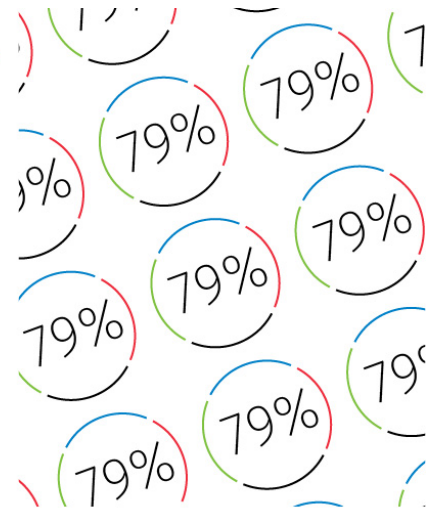
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