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High Definition, Standard Definition and Copyright

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In April 2021, the Austrian Supreme Court referred two questions of principle to the CJEU concerning the activity of a satellite TV package provider (Austrian Supreme Court, 4Ob195/20k). On 22 September 2022, the Advocate General provided his opinion on the case.

The questions referred can be summarised as follows:

1. Is Article 1(2)(b) of the Satellite Broadcasting and Cable Retransmission Directive to be interpreted as meaning that a satellite package provider performs an act of exploitation merely in the State in which the programme-carrying signals are input so that his participation cannot lead to an infringement of copyright in the State of reception?
2. If question 1 is answered in the negative: Is the concept of 'communication to the public' to be interpreted as meaning that separate permission from the holder of the rights, including in respect of high definition content, is required, although the same works are already made available in poorer standard definition quality via free TV?

This reference for a preliminary ruling is based on the following facts:

In return for payment, the defendant offers programmes from numerous broadcasting companies in Austria bundled into different packages (satellite packages) via satellite in high definition (HD) and standard definition (SD) in encrypted form. It provides its customers with access keys to these packages with the consent of the broadcasting organisations. The input of the respective programme-carrying satellite signals into the communication chain (uplink) is mainly carried out by the broadcasting organisations themselves and under their responsibility. A stream is sent containing the entire programme in HD quality. The stream is received via SAT reception equipment within the broadcast area. In the process, the stream is split and the individual programmes become accessible to the user via a terminal device. If programmes have been encrypted with a code, they must be decoded by the reception system in order to be used. The

broadcast packages are “created” by combining the access keys. The packages contain both pay and free TV programmes. The latter can be received by anyone in Austria via satellite in standard definition quality.

With reference to the ECJ decisions C-431/09, C-432/09, Airfield, and C-325/14, SBS Belgium, the lower courts dismissed the claim for an injunction to stop the retransmission of the satellite signal in Austria, but largely upheld the claim for an injunction to stop the satellite transmission of the programme signals in question directed at Austrian territory, as well as the corresponding request for information. As a result, they concluded that the defendant would reach a new public with its high definition broadcasts because the target audience of the defendant’s satellite packages would go beyond the audience that the individual broadcasting companies serve with their standard definition offerings. Apart from that, the defendant would not only act as a technical service provider in relation to the broadcasting companies, but in an autonomous position, because it would decide itself on the composition of its packages and thus create its own additional offer for end customers.

The Supreme Court came to the conclusion that CJEU case law did not provide clear guidance on how to resolve the present case.

Against the background of the factual findings of the lower courts on the technical process of transmitting the encrypted broadcast signal, which amounts to a mere “carrying” of the defendant satellite package provider with the uniform broadcast signal of the respective broadcasting company, it cannot be said in the present case that the activity of the defendant is equivalent to the downstream operation of an independent broadcasting network. If the package provider, in the context of its activity as a subscriber, merely participates in the original satellite transmission in addition to the broadcasting organisation, it cannot be qualified as a “retransmitter” for this reason alone. The decision to be made in the present case therefore depends on the question of whether the defendant, by participating in the satellite broadcast alongside the respective broadcasting company for the purpose of making the satellite package available to its Austrian customers, has actually carried out an act of exploitation in the receiving state. The previous ECJ decisions C-431/09, C-432/09, Airfield, C-403/08, C-429/08, Premier League and C-325/14, SBS Belgium, as well as the decision C-62/79, Coditel I, which was issued before the Satellite Directive, do not provide an answer to these questions, so they cannot support the decisions of the Austrian lower instances.

Apart from this, the Supreme Court also had substantive reservations about the legal opinion of the lower courts: in the opinion of the Supreme Court, there are good reasons for locating not only the act of use of the broadcaster actually responsible for the satellite broadcast exclusively in the uplink state, but also that of the satellite package provider. According to the decision of the CJEU in Airfield, the package provider, in the course of its activity, merely participates in the original, uniform and sole satellite transmission alongside the broadcasting company. However, if the broadcasting organisation and the satellite package provider are (co-)responsible for a single act of broadcasting, it can be assumed that both have to obtain the consent of the respective right holder, if necessary, where the input of the satellite signal takes place. In the case of a failure to obtain consent, however, a possibly unlawful exploitation would take place exclusively in the broadcasting state. However, according to the Supreme Court, this result is not without doubt therefore it has referred the first question to the CJEU.

If the first question referred is to be answered in the negative, the question arises as to whether the package provider in the country receiving the satellite signal performs a necessary act of

exploitation in the sense that it reaches a new public. The Supreme Court was unsure that this is the case given that that the works in question can be received by everyone in Austria in standard definition anyway, whereas the protected works are exclusively made available to the subscribers of the defendant in better high definition quality, and because the defendant, which creates an independent, self-assembled package offer for end customers, does not act as a mere technical service provider in relation to the broadcasting companies, but in an autonomous position. For this reason, the Supreme Court asked the second question referred for a preliminary ruling.

In his opinion, the Advocate General proposed to answer the first question referred for a preliminary ruling by stating that such a satellite package provider is not obliged to obtain the authorisation of copyright and related rights holders for communication to the public by satellite in the Member State where the protected work thus transmitted is available to the public.

In response to the second question referred, the Advocate General stated that in his opinion the concept of new public would in principle not be applicable to the present case, especially since a high definition broadcast would probably not be a mere retransmission of standard definition content, and rightholders can limit their consent to the broadcast of certain picture qualities. The fact that standard definition content is already available would therefore not exempt the exploiter from obtaining consent to broadcast the corresponding high definition material. In this context, the Advocate General also points out that the picture quality also has an influence on the experience of the musical works embedded in the picture material. This is relevant in so far as the applicant is an Austrian collecting society which administers music rights but not image rights. However, due to the fact that the concept of the new public is not supposed to be applicable anyway, the Advocate General refrained from proposing an answer to the second question referred.

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