Max Planck Institute
for Innovation and Competition

The right to communication to the public – comments to the recent CJEU case law

GEDIPE´s Annual Conference
Current Status of Copyright and Related Rights
April 13th, 2018
Lisbon

Professor Dr. Silke von Lewinski

Overview

1. Stichting Brein vs Wullems („Filmspeler“), C- 527/15 (26 April 2017)

2. Stichting Brein vs Ziggo („Pirate Bay“), C-610/15 (14 June 2017)

3. Thoughts on ISP liability against background of DSM proposal

4. Background of reasoning of CJEU re new public and profit-making

1. Stichting Brein vs Wullems („Filmspeler“), C- 527/15 (26 April 2017)

1. Defendant: sells on websites multimedia players (i.a. „filmspeler“) with software incorporating add-ons, some of which link to websites with works made available illegally;

   It allows users to retrieve content from streaming sites and make it start playing on the TV screen via the player

2. Plaintiff: offer of such players and links is an act of communication to the public

3. Dutch court refers questions to CJEU: communication to the public? Justified by exception for “technical reproductions”?

Stichting Brein vs Wullems („Filmspeler“), C- 527/15 (26 April 2017)

CJEU:

1. Individual assessment of various criteria
2. Defendant performs act of „communication“

   a) Pre-installation of add-ons onto ‘filmspeler’ allows buyers to access works on websites; in full knowledge of consequences of his conduct

   b) Indispensable role of defendant (without add-ons, users could not easily find such sites)
3. Also: „to the public“ („new public“ not taken into account by author when he authorized initial communication); defendant knew that links would be to unauthorized works (ads!); for profit

1. Stichting Brein vs Wullems („Filmspeler“), C- 527/15 (26 April 2017)

CJEU:

BUT: „Technical reproduction“ as justification (Art 5(1), (5) InfoSoc Dir.)?

No: conditions not fulfilled (in particular: no legal use to be enabled by temporary reproduction)

Therefore: Sale/offer of media player with add-ons linking to illegal sites = communication to public

2. Stichting Brein vs Ziggo („Pirate Bay“), C-610/15 (14 June 2017)

1. Defendant Ziggo: Internet access provider; many users use TPB
2. Plaintiff: claim to order defendant to block the domain names and IP addresses of TPB
3. Dutch court: questions to CJEU: does TPB perform an act of communication to public?

   (“sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network”)

2. Stichting Brein vs Ziggo („Pirate Bay“), C-610/15 (14 June 2017)

CJEU:

1. Following its case law: any act by which user knowingly provides access to customers is „communication“
2. Is TPB a user? YES: TPB provides access to works, by indexing on TPB torrent files allowing users to locate the works and to share them within the context of a peer-to-peer network; indispensable role of user (TPB)
3. „to the public“: YES: „new public“, which was not taken into account by author: TPB was informed about unauthorized uses; also: profit-making (GSMedia: presumption of knowledge of illegality)

3. ISPs: Focus on User-Uploaded Content (UUC) on Platforms

Art. 13 and Recital 38 of Proposal for a **DSM Directive:** on ISPs "that **store and provide to the public access to large amounts of works uploaded by their users"** (for ex. platforms like youtube, social media)

1. Oblige ISPs to cooperate with right holders for ex. by **using content recognition technologies** for works identified by right holders
2. Presuppose that those ISPs **may perform acts of making available** of works uploaded by their users (corresponds to CJEU case law:
    - "**indispensable role** of user" (for ex.: operator of hotel; TPB)
    - Possible that **several actors** perform the act (for ex.: Airfield, TPB; here: consumers who upload works, platform that makes them accessible)
    - Act is more than a mere provision of physical facilities (which is not communication) – ex.: SGAE case; UUC: offer of server space vs. rendering works accessible to public

4. Background of reasoning of CJEU reg. new public and profit-making

- International Law background
- Reference to it by CJEU
- Misunderstandings by CJEU

Art. 11 bis (1) BC

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

Art. 11 bis (1) BC - Interpretation

- **Art. 11 bis (1) (ii) BC**:
  - Rebroadcasting (wireless, also by satellite), and
  - On-wire rebroadcasting, also by the means of streaming/e.g. on the internet
- **Condition:** the broadcasting organization in (ii) must be different from the one in (i); the initial broadcasting organization does not need an independent permission for a rebroadcast via own substations
- (Revision conference 1948: initial proposals for “new audience”; “scope of the author´s permission”, but rejected)

ECJ jurisprudence – SGAE 306/05

- **Question: is a television broadcast in hotel rooms for guests a communication to the public?**

CJEU:

Yes, pursuant to Art. 11 bis (1) BC; a hotel is a rebroadcasting organization with a new, i.e. different audience than the one of the first rendering (paragraph 40)

Then: CJEU refers to the WIPO-Guide: it is not legally binding, yet helpful for interpreting the meaning of the BC

(the ECJ did not refer to other sources)

ECJ jurisprudence – SGAE 306/05

- **ECJ - line of argument on the grounds of the WIPO-Guide (paragraphs 41, 42):**

(a) The author´s permission covers the immediate audience, i.e. a private or family circle
(b) Receiving the broadcast and making it available for a broader audience (often for remuneration) exceeds the permission
(c) Therefore the act in question is to be qualified as an independent act of rebroadcasting
(d) Hotel guests are a new audience; they only enjoy the work because the hotel makes it available to them

ECJ jurisprudence – SGAE 306/05

- **WIPO guide regarding communication by loudspeaker (Art. 11 bis (1) (iii) BC), p. 68:**

11bis.11. "(…)The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, *which may or may not be for commercial ends*."

11bis.12. "The Convention´s answer is "no". Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1) (ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, *often for profit*, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this *new public performance* of his work."

ECJ jurisprudence – SGAE 306/05

- **WIPO- guide regarding Art. 11 bis (1) (ii) RBÜ), p. 68:**

11bis.1.: "(…)What matters is whether or not a second organisation takes part in the distribution of the broadcast programmes to the public."

→ The ECJ did not consider this comment

ECJ jurisprudence – SGAE 306/05

- **Misconception of the WIPO-Guide as a basis for judgement**
- **The Guide´s approach:** simple explanation of why the BC provides for an independent right for communication by loudspeaker; *not* a condition for the application of the right

- Yet, also the ECJ in **Premier League (403/08, paragraph 197)** perceives a "new public" as a condition:

"In order for there to be a 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive in circumstances such as those of the main proceedings, it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public "

CJEU jurisprudence after SGAE 306/05

- Also in **Reha**, paragraph 45: “a (new) public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public “

- **But**: **TV Catchup** – online retransmission via live stream reaches the same audience as the initial broadcast: the ECJ probably wanted a different result and thus, created a new criterium (instead of: “different organization”)

  In this case, the user makes use of a specific technical procedure, a “new public” is thus not necessary (paragraph 39; see also GS Media 37, 38; Svensson 24)

  (→ Link to an open-accessible work is however not a new procedure)

- **But: AKM Zürs.net** (specific procedure (+), yet a “new public” was needed, instead of just a “different organization”)

CJEU jurisprudence after SGAE 306/05

- **Svensson 466/12**

(a) As long as the work is made available on the initial website, the "permission" covers all internet-users (see also GS Media 42, Svensson 24, Soulier 36):

"The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them" (Svensson, 26)

All of those users „must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication" (Svensson, 27)

CJEU jurisprudence after SGAE 306/05

(b) New public (+), if the link circumvents a restricting measure (31)

(c) New public (+), too, if the work is no longer available on the initial site, yet on another website without the copyright holder´s permission (31)

Thank you for your attention!

Contact: svl@ip.mpg.de