



Designs and Copyright Review of the Year 2017

BRISTOWS

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Introduction

This is the first publication of our Designs and Copyright Review of the Year, to complement our existing publications, Patents Review of the Year and Brands Review of the Year.

Once again, developments in copyright law have been dominated by the communication to the public right, and we feature several Court of Justice of the European Union (“CJEU”) decisions which demonstrate how the right continues to evolve.

Design rights is another area where cases in the last 12 months or so (we have taken the liberty of including a couple of important cases from December 2016) have seen the various overlapping UK and Community design rights being the subject of judicial interpretation. Whilst we have also covered database rights, including those in the name of the publication was considered to be too much of a mouthful.

Copyright

Communications to the public - *Zürs.net*

In March 2017 the CJEU provided further guidance to member states regarding the ‘communication to the public’ right in *Zürs.net*¹ in the particular context of retransmission of broadcasts.

Zürs.net operates a cable network in Austria through which it transmits radio and television broadcasts, including retransmission of broadcasts by ORF, the national broadcasting organisation, and some by other broadcasters. AKM, a collecting society, sought information from *Zürs* as to the number of its subscribers connected to its network at various points in time and the content broadcasted in order to determine the appropriate fee for *Zürs*’ activities.

In proceedings before the Commercial Court in Vienna, *Zürs* claimed its transmissions were covered by an exception under Austrian Law which provides that the transmission of broadcasts via a communal antenna installation with less than 500 connected subscribers does not constitute a new broadcast. AKM considered that exception to be incompatible with EU law and so the Commercial Court referred the matter to the CJEU, seeking clarification on that point and also whether *Zürs*’ simultaneous, full and unaltered transmission of ORF broadcasts by means of cable constitutes part of the original broadcast, meaning that no authorisation was required or fees payable to AKM.

Article 3(1) of the InfoSoc Directive² provides authors with “*the exclusive right to authorise or prohibit the*

communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

The CJEU’s case law has established two key cumulative criteria for a communication to the public: (1) an act of communication; (2) to a public (either by different technical means to that of the original communication or, in the case of a transmission made using the same technical means, to a new public).

In *Zürs.net*, the CJEU noted that *Zürs*’ transmissions were made through cables which was a ‘different technical means’ to that of the initial broadcast by ORF. As such, in accordance with the CJEU’s line of reasoning concerning ‘different technical means’ in *TV Catchup*³, *Zürs*’ transmissions were an act of communication. However, the transmissions were made by *Zürs* to persons in Austria who had already been taken into account by the right holders when they initially granted ORF broadcasting rights. As such, there was no new public. On that basis, *Zürs* did not require the authorisation of the right holders in respect of its transmissions. It is interesting that the CJEU felt it necessary to consider whether or not there was a new public, since the CJEU in *TV Catch Up* had found that where there was a communication by a different technical means, there was no need to show a new public, and the communication amounted to a communication to the public.

The CJEU also addressed whether the exception under Austrian Law was compatible with EU law and specifically, Article 5(3)(o) of the InfoSoc Directive which permits exceptions and limitations to the communication to the public right in certain cases of minor importance and which already exist under national law. The CJEU noted that whilst the exception would not be relevant to *Zürs*’ transmissions of the ORF broadcasts - which were not to a new public and therefore did not require authorisation - it may nevertheless be relevant to *Zürs*’ transmissions of broadcasts by other broadcasters established elsewhere in the EU outside of Austria. These other broadcasts might constitute communications to the public, which was for the Austrian Commercial Court to decide. Given that the objective of the InfoSoc Directive is to provide a high level of protection for copyright owners, the CJEU in *Zürs.net* held that the exception under Austrian Law was precluded by Article 5(3)(o), which required a strict interpretation, because it could lead to continuous, cumulative and parallel use of a multiplicity of communal antenna installations across the whole territory.

It is possible to discern a trend from the various recent CJEU judgments towards finding retransmitters

¹ C-138-16
² Directive 2001/29

³ C-607/11

responsible for having made a communication to the public requiring the authorisation of the right holder. For example:

- In *Airfield*⁴, a case involving ‘communication to the public’ by satellite under the Satellite and Cable Directive, the CJEU considered the possibility that there could be a single act of communication to the public by satellite which was indivisible as between the broadcasters and the professional distributors but concluded that the satellite package provider (the ‘intervening’ party) required authorisation on three bases, namely: (1) it was more than merely an intervention limited to the mere provision of physical facilities for enabling or making a communication because it constituted an intervention “without which [the package provider’s] subscribers would not be able to enjoy the works broadcast”, effectively making the protected works accessible to a new public; (2) its intervention amounted to the supply of an autonomous service performed with the aim of making profit, the subscription fee being paid by those persons not to the broadcasting organisations but to the satellite package provider; and (3) it brought together a number of channels from various broadcasting organisations in a new audio-visual product, the satellite package provider deciding upon the composition of that package.
- In *SBS*⁵, a case involving direct-injection broadcasting, SBS, located in Belgium, transmitted programme-carrying signals to professional distributors via a “private line”. This was the first step of what the CJEU described as a “two-step process”. The professional distributors then sent the signals to their subscribers so that those subscribers could view the programmes on their television sets (step two). The CJEU concluded that the signals transmitted by SBS were transmitted to specified individual professionals without potential viewers being able to have access to those signals. It was not disputed that these professional distributors “such as those in question do not in any event make up part of such a public”. As such, there was only one “public”, namely that consisting of all the subscribers to each particular professional distributor. In those circumstances, SBS would not have made a communication to the public and as the intervention by the professional distributors was more than just a technical means, the communication to the public was made by the professional distributors rather than by SBS.

Broadening the ‘Communications to the Public’ Right: *Stichting Brein v Jack Frederik Wullems (Filmspeler)* – Case C-527/15

In April 2017 the CJEU handed down judgment in the case of *Stichting Brein v Jack Frederik Wullems*. This represented another important instalment in the long line

of CJEU judgments to consider the ‘communication to the public’ right under Article 3(1) of Directive 2001/29/EC (the “InfoSoc Directive”). The CJEU was asked by the Midden-Nederland District Court to answer a number of questions regarding the interpretation of Article 3 and also Article 5 (concerning the exception to copyright infringement for *temporary* acts of reproduction) of the InfoSoc Directive, in the context of sales of a multimedia player which provided access to websites on which copyright protected works were made available without the consent of the right holder.

The judgment extends the ‘communication to the public’ right beyond the position taken in the *Svensson*⁶ and *GS Media*⁷ cases (which dealt with the posting of hyperlinks on a website). The judgment should allow right holders to prevent the sale of a *physical device* which facilitates access to unlawful online streams of copyright works, even where the seller of the device is not responsible for the existence of the unlawful streams and does not initiate any unlawful transmission.

Case Background

The claimant in the main proceedings was Stichting Brein, a Dutch foundation for the protection of the interests of copyright holders. On the other side was Jack Wullems, an individual selling multimedia players on various internet sites including his own www.filmspeler.nl.

Wullems’ Filmspeler device carried pre-installed add-ons (software – in this case software that was freely available on the internet) which contained hyperlinks to streaming websites. Therefore, the device allowed purchasers, using their remote control and a ‘user-friendly’ interface, to play files from streaming websites on their TV set. Some of these streaming websites operated without the authorisation of the copyright holders, and marketing collateral for the player made clear that this was an attraction of the device.

In July 2014 Stichting Brein brought an action against Mr. Wullems, submitting that by selling the Filmspeler device he was making a ‘communication to the public’ in breach of the Dutch law on copyright and law of neighbouring rights. Mr. Wullems submitted in reply that the streaming (performed by the users of the Filmspeler device) of copyright works from an illegal source was covered by the temporary copying exception to infringement contained in Article 5(1) of the InfoSoc Directive.

The Dutch court considered that in order to decide the case it required guidance from the CJEU on the interpretation of both Article 3(1) and Article 5(1) of the InfoSoc Directive. Therefore, the Dutch court stayed its proceedings and referred four questions for a preliminary

⁴ C-431/09 and C-432/09
⁵ C-325/14

⁶ C 466/12
⁷ C 160/15