LMU LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

Communication to the public in the EU Member States

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Communication to the public in the EU Member States

1. The statutory framework
2. The concept of “public”
3. The act of communication

Statutory framework in the EU Member States

Variety of ways to use copyright protected works in intangible form

1. live performance and recitation
2. secondary performance (public playing or showing in a place accessible to the public, diffusion through loudspeakers)
3. broadcasting incl. satellite and cable (re)transmission
4. making available online

=> Rights of communication to the public?

Statutory framework in the EU Member States

1. One single broad defined right of communication to the public in Belgium, France (*droit de représentation*) and the Netherlands (*openbaarmakingsrecht*)

Art. XI.165 § 1 Belgian Code of Economic Law

The author of a literary or artistic work alone shall have the right to communicate his work to the public by any process whatsoever including by way of making available to the public in such a way that anyone may access it from the place and at the time individually chosen

Art. 122-2 French Code of Intellectual Property (CPI)

Représentation shall consist in the communication of the work to the public by any process whatsoever, including public performance and broadcasting

2. Distinction between performance in public and communication to the public in UK and Italy

UK: right to perform, show or play the work in public (sec. 19 CPDA) and right to communicate the work to the public including the broadcasting right and the making available right (sec. 20 CPDA)

Italy: right of public performance and recitation (art. 15) and right of communication to the public including broadcasting and making available (art. 16)

3. Austria: three rights of communication to the public

- ✓ Right of broadcasting (§ 17)
- ✓ Right of recitation, performance and presentation (§ 18)
- ✓ Right of making available (§ 18a)

4. Germany: a single right of communication to the public (*öffentliche Wiedergabe*) + non exhaustive enumeration of five distinct rights

§ 15 Abs. 2 UrhG

(2) The author further has the exclusive right to communicate his work to the public in non-material form (right of communication to the public). The right of communication to the public shall comprise in particular

1. the right of recitation, performance and presentation (§ 19),
2. the right of making the work available to the public (§ 19a),
3. the right of broadcasting (§ 20),
4. the right of communication by video or audio recordings (§ 21),
5. the right of communication of broadcasts and of works made available to the public (§ 22).

5. Spain: one single right of communication to the public + exemplary enumeration of 9 restricted acts of communication

Art. 20 (1) Spanish Copyright Act:

> Public communication shall mean any act whereby a plurality of persons may access the work without prior distribution of copies to each of them
>
> (*todo acto por el cual una pluralidad de personas pueda tener acceso a la obra sin previa distribución de ejemplares a cada una de ellas*)

Statutory framework in the EU Member States

- ✓ Common requirement for the rights of exploitation in intangible form = exploitation must be public

- ✓ France/ Belgium = exception

  Exemption of “private and free *représentations* carried out exclusively within the family circle” (art. L. 122-5 French CPI), of “free and private communication within the family circle” (art. XI.190 3° Belgian Code of Economic Law)

The concept of public

- ✓ concept of “public” mainly discussed in cases of live performance and communication of broadcasts or communication by phonograms and videograms / public viewing or listening

- ✓ issue = whether a performance for a limited audience and/or in a private place amounts to a communication to the public

The concept of public

§ 15 Abs. 3 German Copyright Act

(3) The communication of a work shall be deemed public if it is intended for a plurality of members of the public. Anyone who is not connected by a personal relationship with the person exploiting the work or with the other persons to whom the work is made perceivable or made available in non-material form shall be deemed to be a member of the public.

Art. 12(4) Dutch Copyright Act

The expression 'recitation, playing, performance or presentation in public' includes that in a closed circle, except where this is limited to relatives or friends or equivalent persons and no form of payment whatsoever is made for admission to the recitation, play, performance or presentation.

The concept of public

Art. 20 (2) Spanish Copyright Act

Communication which takes place “in a strictly domestic environment” (un ámbito estrictamente doméstico) and is “not an integral part of or connected to a dissemination network of any kind” shall not be deemed public

No definition of public in Austrian Copyright Act -> the same as in German copyright law

« family circle » exception in Belgium and France

The concept of public

- ✓ public ≠ private
- ✓ private = within a circle of close relatives or friends
- ✓ criterion of personal relationship (between the persons to whom the work is made available or to the organizer of the communication) is decisive

  BGH 7.6.1984 *Vollzugsanstalten*: the communication may be of a public nature, even within a defined and limited audience, if the personal bond is lacking

The concept of public

- ✓ The residents of a retirement home have been considered to constitute a public in the Netherlands (Hoge Raad 9.3.1979, *Willem Dreeshuis*) and Germany (BGH 12.7.1974, *Alters-Wohnheim*) but not in Belgium (Cass. 18.2.2000, *La Douce Quiétude*: “des liens très étroits, quasi-familiaux, se tissent quotidiennement entre les pensionnaires”)
- ✓ No personal relationships between prisoners in jail

  BGH 7.6.1984 V*ollzugsanstalten*: prisoners meet accidentally and involuntary and, as a rule, do not know one another prior to confinement + continuous fluctuation + different reason for and duration of the stay => “these circumstances speak against a close mutual contact which would evoke an awareness of shared personal ties in all inmates”

The concept of public

- ✓ The patients in a sanatorium or hospital generally constitute a public (BGH 10.3.1972, *Landesversicherungsanstalt*: the patients come together by chance, they do not know each other before they come there, the period of their being together is very short, they come from different regions and have different interests; OGH 29.1.1974 – *Kurheim*:"The circle of patients within a sanatorium is not interconnected by such relationships amongst themselves or with the organiser that their gathering could be considered as part of the private sphere")
- ✓ Except for the patients in a twin room (BGH 11.7.1996 – *Zweibettzimmer im Krankenhaus*: the necessary joint stay of the patients in a relatively small room requires a particular amount of mutual consideration and trust)

The concept of public

Weddings and funeral services are generally held to be private

OGH 27.1.1998 – *Musikdarbietung bei Hochzeitsfeier* (120 invited guests, taking place in a guesthouse not closed for other persons (free access), fact that guests do not know each other irrelevant because all connected to the bridal pair)

AG Bochum 20.1.2009 - *Türkische Hochzeit* (600 invited guests, all having personal relationships to the bridal pair, large number of invited guests does not lead to the assumption that the event is public because wedding reception with several hundreds guests is not unusual in Turkish culture area)

Quantitative criterion?

- ✓ no *de minimis* threshold at national level (≠ case law of CJEU: “fairly large number”)
- ✓ one single person does not constitute a public but “several” only means at least two persons
- ✓ Number of persons to whom the work is communicated may be taken into account for assessing their personal relationship -> the larger the number of persons to whom the work is made available, the more likely the relationship is not close enough

Subjective criterion?

CJEU's case law (*Del Corso* & *PPL*) -> user has to address a receptive public directly and intentionally

French Cour de cassation 27.2.1975 – *Hairdresser's shop*:

> "The existence of the legally required criterion "public" is to be judged objectively and independently from the subjective criteria or intentions to be found in the person carrying out the performance. (…)
>
> No statutory provision makes the necessity of obtaining permission dependent upon a further requirement that the person who publicly performs the work must act with the intention of providing the work for collective use"

idem Belgian case law ("la protection ne dépend pas … des intentions de l'utilisateur")

The concept of public

Profit-making/ commercial purpose

- ✓ non conclusive indication for the existence of a copyright relevant use but no prerequisite for the right of communication to the public
- ✓ performance for commercial purposes is unlikely to be private in nature. But no negative inference -> a non-for-profit communication is not necessarily private

Reception of the CJEU's case law

OLG Frankfurt a.M. 20.1.2015

A broadcast football programme is not publicly perceived in an inn which is generally accessible for the public if the programme is in fact rendered accessible only to the members of a dart club and a group of people playing cards.

The people belonging to the dart club and the group of card players cannot be considered as "persons in general" and, thus, as a public in the sense of the CJUEs case law. It is not required that a specific personal relationship exists between the people concerned (≠ § 15 (3) UrhG). Rather, it is sufficient that the composition of the entire group remains stable. Concerning a group of up to 20 people, the small number also implies that it cannot be considered a part of the public.

BGH 18.6. 2015 - *Hintergrundmusik in Zahnarztpraxen*

Following the CJEU *Del Corso* ruling, a German dentist had cancelled his license agreement with the GEMA, arguing that the CJEU decision clearly stated that playing music at dentists waiting area was not communication to the public.

BGH states that it is bound by the CJEUs interpretation of EU law and thus has to interpret German law accordingly. As all decisive factors in the German case are identical to the case before the CJUE in 2012, the court deems itself bound to decide that the dentist's use of music was not communication to the public and therefore did not require payment.

3. Act of communication

3.1 simultaneous cable retransmission

3.2 transmission in hotel rooms

3.3 collective antennas serving residential buildings

3.4 linking & framing

simultaneous cable retransmission

BGH 7.11.1980, *Kabelfernsehen in Abschattungsgebieten*

Large-scale cable television system (1,2 km^2, 15.000 inhabitants), radio and TV programs are transmitted simultaneously with the broadcast made by broadcasting organizations -> transmission or reception?

The simultaneous transmission of broadcasts subject to a copyright license and royalties exclusively in areas where the transmission of the broadcasting stations is blocked from reception (by high-rise buildings) with the aid of a cable television system does not further infringe the broadcasting right

BGH 7.11.1980, *Kabelfernsehen in Abschattungsgebieten*

"By authorizing the broadcast, the copyright owner has already given his consent to the transmission for the whole area of transmission. In case of a mere simultaneous retransmission of the broadcast of the originating organization to areas, where, for technical reasons, the broadcast transmissions cannot be received directly, the assertion of additional claims based on the broadcasting right is excluded. While there is technically a new transmission, this transmission does not open a new enlarged use of the work; it does not provide access to new listeners, but is limited to the technically necessary retransmission of the broadcast to listeners who, according to the intention of the copyright owner, are to have access to his work by the broadcast transmission; for these listeners, his broadcasting right is exhausted".

simultaneous cable retransmission

BGH 7.11.1980 - *Kabelfernsehen in Abschattungsgebiet*

"It would be an approach unknown in copyright law if one would grant the copyright owner the right to derive an economic advantage from the elimination of impaired reception resulting from the construction of high-rise buildings. This must also apply when a third party closes a gap in reception in his own profit interest. This neither results in an additional different use of the work nor are the works made accessible to new additional group of receivers"

simultaneous cable retransmission

BGH 4.6.1987 - *Kabelfernsehen II*

Retransmission of programs by a wide-band cable system to 1733 apartments notably in areas of a city where outdoor antennas are prohibited

"The broadcasting right can be exhausted where an author grants to an originating broadcaster the right to transmit his work not only for the technical process of a particular transmission but for the intended audience of such a broadcast. The exhaustion of the right extends to the simultaneous cable retransmission of the program from the originating source when such retransmission is the only technical means for reaching the intended audience. This does not involve retransmission outside the service area"

rejects the argument of double compensation for the author

prohibition of outdoor antennas is irrelevant: "The claims granted to an author by statute cannot be excluded by a public-law constraint effecting commercial use of a work"

simultaneous cable retransmission

Hoge Raad 30.10.1981 - *Amstelveen*

Cable television companies, which, without authorization on the part of the authors, relay televised films simultaneously and unchanged, infringe on the copyrights in these films, even if they do not reach a new audience

A "communication publique" has an independent meaning, even for the audience within the direct-reception zone: not only for those who are located in the blind spot of a high-rise building which interferes with or obstructs direct reception, but also for the audience in general, because an improved-quality reception is usually assured and the so-called "forests of antennas" are eliminated"

"It is therefore of no consequence whether a "new audience" is reached, in the sense of an audience which is thus enabled to receive a broadcast it would otherwise have to do without"

simultaneous cable retransmission

Hoge Raad 25.5.1984 - *Amstelveen*

The fact that Amstelveen is located in the "direct reception zone", i.e. in the area where the programs retransmitted by means of cable distribution can also be received with an individual antenna is not of importance.

Art. 11bis of the Berne Convention leaves no room for an exemption of the license requirement stated here, in the sense that the requirement would not apply to the case in which the retransmission takes place in what is known as the service area.

No rule in law entails that the copyright owner, in having given permission to broadcast, must be considered as having taken the service area into account and having included it in the arrangement

simultaneous cable retransmission

Specific issue of direct injection (initial transmission)

= whether a transmission of TV programmes to the public by cable should be qualified as a retransmission by cable if it is preceded by a point to point transmission between the broadcaster and the cable operator

Explanatory Memorandum, SatCab Proposal, 36: “however, there is no cable retransmission in the sense of this proposal, if the programme is merely delivered by point-to-point communication to the cable head end without being the subject of a simultaneous primary broadcast”

If there is no initial broadcast there is no retransmission by cable; and if there is no retransmission by cable no right of retransmission can be asserted by the collecting societies

Encrypted signals

Hoge Raad 19.6.2009, *Vereniging Buma / Chellomedia*

transmission by satellite to the cable distributor is not a communication to the public since the transmitted encrypted signals are meant for the cable operators but not for the general public.

"public" should be interpreted in conformity with the interpretation given by the CJEU in *SGAE* and *Lagardère* = an indeterminate number of potential viewers

Media Gateway

Hoge Raad 28.4.2014, *NORMA / Vereniging NLKabel*

The direct transmission by the broadcaster to the cable operator (which is not accessible to the public) is not a broadcast -> the subsequent distribution of the programmes by the cable operator is not a re-transmission -> no mandatory collective management in case of primary transmission by cable

-> the mandatory collective management of cable retransmission rights prescribed by art. 9 of the SatCab Directive does no longer apply, nor does the rule of art. 9.2 that the relevant collecting societies have a mandate to represent non-members

simultaneous cable retransmission

Direct injection

CA Bruxelles 25.6.1998, *Uradex*

Cable distribution following a direct injection = retransmission by cable to the public

There is no substantial difference between a retransmission following a direct injection or following a broadcast of the programme, since in both cases there is a new communication to the public by a different organisation than the broadcaster (art. 11bis (1) (2) BC)

CA Antwerpen 4.2.2013, *SABAM / Telenet*

No retransmission by cable, since no primary broadcast to the public

Telenet does not reach a new public, since the signals transmitted by the broadcaster to the cable operator is not meant for the public

Trib. com. Bruxelles 29.1.2013, *SACD / Coditel*

The direct injection should not be qualified as an act of broadcasting, but rather as a private communication. Technically, there is no longer a retransmission of a primary broadcast -> question referred to the CJEU -> *SABAM / SBS Belgium*

simultaneous cable retransmission

Technology-neutral understanding of cable retransmission?

question = whether a retransmission by other means than the traditional coaxial cable network is a “retransmission by cable” in the sense of the SatCab Directive

issue at stake = whether operators can negotiate with collecting societies or have to clear the rights on a individual basis

retransmission of a broadcast through Internet = restricted act of communication to the public (CJEU *ITV Broadcasting* -> other technical means rather than new public criterion)

UK (sec. 73 CPDA) & Austria (§17 (3) UrhG) -> exemption of cable retransmission of public service broadcasting channels (BBC, ORF)

simultaneous cable retransmission

Austria -> technical-neutral wording of the retransmission right, which is not restricted to the transmission via cable or micro-wave system ("Leitung") and thus also covers streaming of a TV programme via UMTS mobile signal

OGH 26.8.2008 *UMTS-Mobilfunk I*

The normative purpose of exempting cable companies from the individual challenges in acquiring rights, if they only transmit radio programmes unaltered and simultaneously, applies to cable operators as well as to mobile network operators.

The comprehensive and content-wise unaltered transmission of the ORF television programmes in the national territory by means of streaming via a UMTS mobile network (which is marginally time-delayed only for technical reasons) is deemed a part of the original broadcast pursuant to Sec. 17 para 3 of the Austrian Copyright Act.

simultaneous cable retransmission

Austria

OGH 24.2.2009 *UMTS-Mobilfunk II*

OGH 22.11.2011 *UMTS-Mobilfunk III*

The separate payment for a simultaneous, comprehensive and unaltered transmission of an ORF television programme in the national territory by means of streaming via a UMTS mobile network resulted in a double burdening of the consumer and – correspondingly – a potential multiple compensation for the author for the same performance.

By granting of the right for initial transmission, the author has received such amount, which he deemed appropriate as compensation for the enjoyment of his work by the recipient (who can only receive the programme once at a time).

simultaneous cable retransmission

UK

***ITV Broadcasting Ltd v TVCatchup Ltd* [2013] EHWC 3638 (Ch)**

Online streaming falls within the meaning of retransmission 'by cable' under sec. 73 CPDA. However, retransmission via cable "does not include transmission to mobile devices via a mobile network".

The sec 73 defence is not compatible with Art. 5(3)(o) of the Directive 2001/2

***ITV Broadcasting Ltd v TVCatchup Ltd* [2015] EWCA Civ 204**

Court of Appeal upheld the High Court's decision on this point and referred the case to the CJEU for a second time (C-275/15)

Does 'cable' have a technologically specific meaning, restricted to traditional cable networks operated by conventional cable service providers or a technologically neutral meaning which includes functionally similar services transmitted via the internet ?

simultaneous cable retransmission

Germany -> technology-specific approach of § 20b UrhG

LG Hamburg 8.4.2009 - *Zattoo*

The simultaneous and unaltered retransmission of TV programs via the Internet Protocol does not constitute cable retransmission pursuant to sec. 20b Copyright Act.

Mandatory collective management = exception that has to be construed in a narrow sense

transmission in hotel rooms

France

Cass. Civ. 23.11.1971, *Le Printemps*

"Since a hotel room has to be regarded as a private room, the receiving of works from the repertoire of the SACEM by the guests of the hotel "Le Printemps" was covered by the license granted to the radio station and there is no room for further license"

Cass. Civ. 6.4.1994, *CNN*

"Although each guest only occupies a room of his own, the aggregate of all guests of the hotel forms a public to which the hotel management transmits TV program in the course and for the purpose of its commercial activities"

Cass. Civ. 14.1.2010, *Hotel Franklin Roosevelt / SACEM*

"les clients de l'hôtel, bien qu'occupant les chambres individuelles à titre privé, constituent un public"

transmission in hotel rooms

Austria

OGH 16.11.1971, *Hotel-Rundfunkvermittlungsanlage*

"It is decisive whether the reception is made in a private sphere or in public. (…) the hotel guests remain within their private spheres, just as if they were enjoying the broadcasts in their own homes"

OGH 17.6.1986, *Hotel Video*

The transmission of video films from a 'central hotel video equipment' to the individual hotel rooms does not fall within the scope of the cable retransmission right but constitutes public performance. It is irrelevant for the publicity of the performance that the enjoyment of the works takes place within the private sphere of the individual hotel guests.

OGH 16.6.1998, *Thermenhotel I*

"there is a difference between the reception of broadcasts in a hotel room and in communal rooms, to the extent that the hotel keeper only makes available facilities in the hotel room, leaving it to the individual hotel guest to make use thereof. In contrast, if broadcasts are communicated in communal rooms, the communication is as a matter of principle independent of whether the individual person actually wishes such communication"

OGH 31.8.2010, *Thermenhotel II*

the CJEU's case law (*SGAE* and *ODSS*) has to be applied

-> the transmission of television signals by the manager of a hotel to TV sets located in single guest rooms of the hotel is a copyright restricted act of communication to the public irrespective of the technical means used to transmit the signal

Greece

Cass. 4.11.1980, *AEPI / Fokas Electra Palace*

"toute exécution musicale dans un hôtel, c'est-à-dire un lieu accessible au public, où des clients se renouvellent sans cesse (…) doit être considérée comme une exécution publique; le fait que cette retransmission ait lieu dans les chambres des clients ne lui enlève en aucune façon son caractère public (dès lors) qu'elle s'adresse à un nombre indéterminé de personnes n'ayant pas de relations personnelles avec l'hôtelier"

transmission in hotel rooms

Sweden

Cour suprême 27.3.1980, *STIM / Hôtel Mornington & Hôtel Wellington*

Appareils radio installés dans les chambres et reliés à une installation centrale + chambres équipées d'un récepteur de télévision qui n'est relié à aucune installation centrale

La transmission d'œuvres musicales par les installations centrales de rediffusion à destination des appareils de radio situés dans les chambres constitue une exécution publique: "Le fait que les clients de l'hôtel soient individuellement libres de décider si et dans quelle mesure ils souhaitent profiter de l'exécution et que ceci ait lieu séparément dans l'intimité de leurs chambres n'affecte pas cette conclusion.

L'installation des récepteurs de télévision avait pour but explicite de mettre les œuvres à la disposition du public et que, du point de vue pratique, la différence entre cet acte et la transmission à l'aide d'un système central de rediffusion est négligeable -> cet acte est également une exécution publique pour laquelle l'autorisation de l'auteur est exigée

Germany

BGH 17.12.2015 - *Königshof*

A copyright relevant act of communication to the public requires a transmission of protected works by the user. Accordingly, for example the operator of an hotel undertakes an act of communication when forwarding the TV signals via a distribution device to the TV sets in the guest rooms. The mere provision of equipment which enables a communication does however not constitute an act of communication. The hotel operator who only equips the guest rooms with TV sets, which allow the receipt of television programmes via an indoor antenna, does not communicate the TV programme

Austria

statutory license -> exemption of communal antenna facilities in § 17(3)(2), which are seen as mere reception devices, except if they exceed a certain scope in terms of the number of connected participants (500) or spatial dissemination (location of reception facilities on contiguous plots of land and no part of the facility uses or crosses a public right of way, or the antenna is more than 500 meters from the location of the reception facility or the location of the closest reception facility)

UK

exemption of collective antennas within the direct reception zone (sec. 73 CPDA)

Hoge Raad 24.12.1993, *Small Cable Network*

Collective reception of TV programmes by means of small collective antenna systems = communication to the public

"It is not up to the courts to fix a quantitative criterion such as a certain number of subscribers, on the grounds of which the service provided by certain collective antenna systems could be exempt from the obligation to obtain the copyright owner's permission, as such a quantitative criterion would be arbitrary"

French Cass. Civ. 1.3.2005, *Parly II / SACEM*

"contrairement à l'antenne individuelle, l'antenne collective permet la télédiffusion d'œuvres protégées auprès d'autant de foyers qu'en comporte la résidence concernée; le syndicat avait ainsi réalisé une représentation des œuvres audiovisuelles par communication à un public constitué de l'ensemble des résidents dont la collectivité excède la notion de cercle de famille, peu important l'absence d'intention lucrative ou la propriété indivise des antennes mises en place"

France: since 2006, new provision exempting collective antennas in residential buildings:

‘L'autorisation de télédiffuser une œuvre par voie hertzienne comprend la distribution à des fins non commerciales de cette télédiffusion sur les réseaux internes aux immeubles ou ensembles d'immeubles collectifs à usage d'habitation installés par leurs propriétaires ou copropriétaires, ou par les mandataires de ces derniers, à seule fin de permettre le raccordement de chaque logement de ces mêmes immeubles ou ensembles d'immeubles collectifs à usage d'habitation à des dispositifs collectifs de réception des télédiffusions par voie hertzienne normalement reçues dans la zone’ (art. L. 132-20 4° CPI)

BGH 17.9. 2015 *Ramses*

No infringement of the right of cable retransmission in case of a joint antenna system for a building with 343 apartments -> no communication to the public as the targeted group within the building is definable by their characteristic of all being inhabitants.

BGH strictly relies on CJEU's case law, according to which a communication to the public requires the addressing of an indefinite number of people. This is not the case if the communication is directed to a specific audience or even a private group of people, which is broader than the criterion of "personal connection" of the German Copyright Act.

BGH 17.7.2003 *Paperboy*

No act of making available because it is the owner of the website to which the link is made who decides whether the work remains available to the public -> no control over the availability of the work by the person setting the hyperlink

BGH 16.5.2013 *Die Realität I*

The integration of a work available on another website by way of embedding/framing into another website could be seen as an act of 'making content one's own' and this in turn might be seen as a new act of communication to the public, even if no new technical means and no new public was involved

OGH 20.9.2011 *Vorschaubilder*

Only the person who has the original or a copy of a work can make that work available to other persons in a way that allows him to control access to the work

A person who only provides a link that can be used to view the work at its original location only facilitates access to a file included in the source website without making that work available himself in the sense of § 18a UrhG; he does not control access as the file can be deleted without his intervention

BGH 9.7.2015 *Die Realität II*

Framing is only permitted with regard to content that was primarily communicated to the public with the right owner's consent -> infringement of the right of communication to the public if first upload without such consent

Hoge Raad *GeenStijl/ Sanoma*

refers preliminary questions to the CJEU related to linking to a source that is freely accessible online, but communicated to the public without the copyright holder's consent (C-160/15 – *GS Media BV/ Sanoma*)