



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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Copyright Update Recent Decisions and the Current State of the EU Reform Debate

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Date: 11 June 2018

Venue: Brick Court Chambers

Current shape of EU Copyright

With an increasing number of references for preliminary rulings, the CJEU is proactively shaping European copyright law in response to technological developments and trends.

The CJEU's general starting point in relation to exclusive rights (the reproduction, distribution and communication to the public rights) is to grant a high level of protection, including in the online context.

Right of reproduction

The longstanding "skill and labour" test applied by the UK courts has been called into question by the CJEU's decision in the *Infopaq* case (as clarified in subsequent case law). In that case the CJEU held that the relevant test is whether a work represents an author's own intellectual creation. When applied, the UK and CJEU tests are capable of producing different results (e.g. creation of a digital copy of an artistic work may be more likely to be considered an 'original' work under the UK test).

The infringement test applied by UK courts has also been qualified by CJEU case law. In *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch), Arnold J stated that, in order to reproduce a substantial part of a literary work, it is necessary to reproduce the expression of the intellectual creation of the author of that literary work.

Communication to the public

Due to the concise nature of the *InfoSoc Directive*, the CJEU's decisions are of crucial importance in determining the nature and scope of this right. Although the fundamental requirements are a 'communication' that is 'directed to a public', the CJEU has imposed additional criteria in response to various factual scenarios, which have resulted in a complex body of case law. For example, the CJEU has developed the concept of a 'new public', which represents a body of people who received a communication through technical means that are different to the technical means authorised by a rights holder.

The case law on linking illustrates the increasing complexity of the case law over time. In the *Svensson* case, the CJEU held that a link to authorised and freely accessible content was not a communication to a 'new public'. However, in *GS Media*, the CJEU held that, in circumstances where content is posted without the consent of the rights holder, additional considerations apply such as whether the potential infringer has a profit making intention and whether he or she knows that the content is unauthorised by the rights holder.



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The role of intermediaries

There are three main areas of CJEU scrutiny:

1. Safe harbours;
2. Injunctions; and
3. Direct (primary) liability of platforms.

The legislative framework is complex and includes:

1. The E-commerce Directive;
2. The InfoSoc Directive;
3. The Enforcement Directive (Directive 2004/48); and
4. The EU Charter of Fundamental Rights.

The CJEU plays a primary role in the development of the law on liability of intermediaries and its focus is on providing a high level of protection for rights holders. The CJEU has developed five key principles which are as follows:

1. The notion of 'intermediary' is broad.
2. Injunctions can be aimed at repressing existing infringement and preventing future infringements.
3. Injunctions must comply with various legislative sources and principles.
4. Blocking injunctions are allowed under EU law.
5. An intermediary can be directly (primarily) liable for third party infringements.

The reform debate

Reform of the European copyright framework is on its way. The European Commission has proposed a Directive on copyright in the digital single market.

Proposals include:

1. A 'value gap' proposal which aims to address the concern that online platforms do not pay a fair price for content;
2. A press publisher's right to control segments of article text and article links; and
3. Provisions governing text and data mining.

In terms of legislative progress, the Council's permanent representatives committee (Coreper) has agreed a common position on the text of the draft Directive.