

## Volume 13, Issue 2, Spring 2013

**Court:** Court of Justice of the European Union, Fourth Chamber

**Case:** ITV Broadcasting Ltd. and Others v. TV Catchup Ltd.

**Date:** 7 March 2013

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*Background:*

ITV Broadcasting (“ITV”) and the other claimants are commercial television broadcasters in the United Kingdom (“UK”) who receive funding from the advertising contained in their broadcasts.<sup>1</sup> Under UK law, the claimants hold a copyright in their broadcasts and the content of these broadcasts, including shows, films, and other programming.

TVCatchup is a service that streams live television broadcasts over the internet. The service is accessible on computers, Apple mobile devices, and Android and Blackberry mobile phones. TVCatchup streams only publicly available programming from free-to-air broadcasts, not paid programming from cable or satellite services. Its terms of service require that end users hold a valid UK television license and use TVCatchup only within the UK, so TVCatchup’s users are otherwise legally entitled to watch via television the programming that they receive through TVCatchup. TVCatchup can verify users’ locations and refuse service to non-compliant users. Each valid individual user establishes a “one-to-one” connection with TVCatchup’s servers that provide the user with the requested programming; TVCatchup itself does not broadcast data or send data to groups of users.

Additionally, TVCatchup receives funding from “pre-roll” advertising that users must watch before viewing the stream and from “in-skin” advertising that occurs elsewhere on the webpage. The service does not alter the original commercials contained in the streaming content.

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<sup>1</sup> The full list of claimants is as follows: ITV Broadcasting Ltd., ITV 2 Ltd., ITV Digital Channels Ltd., Channel 4 Television Corp., 4 Ventures Ltd., Channel 5 Broadcasting Ltd., and ITV Studios Ltd.

*Applicable Law:*

Article 3(1) of European Union (“EU”) Directive 2001/29 grants authors the “exclusive right to authorise or prohibit any communication to the public of their works”; § 20 of the UK Copyright, Designs, and Patents Act of 1988 includes this language also. Recital 23 of the Preamble to Directive 2001/29 provides that this right of the author “should be understood in a broad sense covering all communication to the public not present at the place where the communication originates.”

*Procedural Posture:*

ITV sued TVCatchup in the High Court of Justice of England and Wales, Chancery Division (“High Court”), for breach of copyright in its broadcasts and films. The claimants alleged that TVCatchup’s streaming services were a communication of copyrighted works to the public in violation of the Copyright, Designs, and Patents Act § 20 and of EU Directive 2001/29 article 3(1). The High Court stayed the proceedings, concluding that the existing case law from the Court of Justice of the European Union (“Court” or “ECJ”) was unclear as to whether the streaming broadcasts constitute a ‘communication to the public’ pursuant to Directive 2001/29 article 3(1). Then, the High Court certified two questions to the ECJ for a preliminary ruling: (1) whether third-party services like those provided by TVCatchup fall within a “communication to the public . . . by wire or wireless means” pursuant to Directive 2001/29 article 3(1); and (2) whether the answer to the above questioned affected if the third party is commercial in nature or in direct competition with the original broadcaster.

*Analysis:*

Initially, the Court noted that the EU enacted Directive 2001/29 to provide a “high level of protection of authors.” To accord with Recital 23, the Court must broadly interpret the phrase ‘communication to the public.’

First, the Court clarified the communication prong of Directive 2001/29. The text of the statute is not exhaustive, and if Article 3 is read in conjunction with Recital 23, it follows that the author’s right of communication covers both the initial transmission of a work *and* any subsequent retransmission. TVCatchup argued that its services were a means to “ensure or improve reception,” which is not a ‘communication’ within the meaning of Article 3(1). However, because the legislature

intended to regulate all instances of transmission of a copyrighted work, the copyright holder must be authorized each transmission by a “specific technical means.” Articles 2 and 8 of Directive 93/83 further support this conclusion. When a work is simultaneously broadcast over more than one medium, Articles 2 and 8 require the author’s permission for each individual transmission. Therefore, any retransmission of a broadcast is a ‘communication’ pursuant to Directive 2001/29 article 3(1).

Second, the Court examined the public prong of Directive 2001/29. For the purposes of Article 3(1), ECJ case law defines ‘public’ as “an indeterminate number of potential recipients” that implies a “fairly large number of persons.” Under this definition, the one-to-one nature of the connections between TVCatchup and its users is irrelevant; the salient factor is whether a sufficiently large number of people can establish these one-to-one connections. The Court rejected TVCatchup’s argument that Article 3(1) requires the retransmission to reach a “new public” not encompassed by the original broadcast. Because TVCatchup targeted anyone in possession of a television license in the UK, its streaming services were aimed at a large and indeterminate number of potential recipients. Thus, the service was communicated to the ‘public.’

Lastly, the Court interpreted the statutory language of Directive 2001/29 article 3(1). It held that the commercial nature of a retransmission can be a factor in assessing whether a ‘communication’ has occurred, but commerciality is “not necessarily an essential condition.” Similarly, the Court also held that determinations of a ‘communication to the public’ are not influenced by whether the retransmitting entity is in direct competition with the initial broadcaster.

*Holding:*

The Court’s preliminary ruling concluded that: (1) TVCatchup’s streaming services were retransmissions that constituted communications to the public pursuant to Directive 2001/29 article 3(1); (2) this determination is not influenced by the commercial nature of TVCatchup; and (3) this determination is not influenced by TVCatchup’s direct competition with ITV. The underlying case at the High Court can now proceed.