

**Baker
McKenzie.**



ANNUAL IP SEMINAR

Tuesday 25 April 2017

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McKenzie.**

Communication to the Public

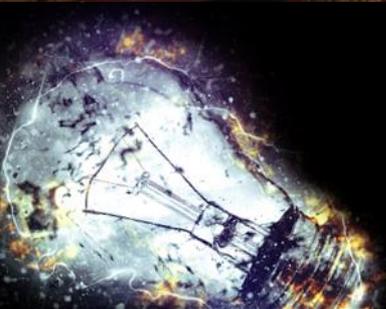
Navigating the Labyrinth

25 April 2017





Refresher: Legislation



Legislation

Article 3(1) Information Society Directive (+ recitals)
Implemented by s. 20 CDPA.

- Rightholders controls “**CTP**”
- By **wire** or **wireless** means
- Includes **making available** right
- **Interpreted broadly**, but must **strike a balance** between RH and user
- Mere “**provision of facilities**” not enough
- SatCab Directive contains a **deeming provision** for satellite broadcasts





Entering the (CJEU's) labyrinth

CJEU interpretation

Five use cases, one restricted act



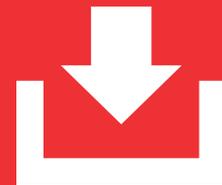
Five use cases, one restricted act

the intervention by TVC consists in a transmission of the protected works at issue which is different from that of the broadcasting organisation concerned. TVC's intervention is in no way intended to maintain or improve the quality of the transmission by that other broadcasting organisation. In those circumstances, that intervention cannot be considered to be a mere technical means.

(TVC1, [30])

”

- TVC 1 (C-607/11) [OTT streaming]
- TVC 2 (C-275/15 and AKM v Zurs (C-138/16) [retransmission exceptions]



RETRANSMISSION



Five use cases, one restricted act

- Svensson (C-466/12) [linking to authorised content]
- Bestwater (C-348/13) [embedding content]
- GS Media (C-160/15) [linking to unauthorised content]
- Filmspeler [pending]
- Pirate Bay [pending]

“... where the work in question was already available with unrestricted access on the website to which the hyperlink provides access, all internet users could, in principle, already have access to it even the absence of that intervention. ... In contrast, where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet... it is necessary to consider that the provision of that link constitutes a ‘communication to the public

(GS Media [48-49])

LINKING



Five use cases, one restricted act

the Court has already held that the operators of a café-restaurant, a hotel or a spa establishment are such users and make a communication to the public ...the Court held that the broadcast of protected works has a profit-making nature where the user is likely to obtain an economic benefit related to the attractiveness of, and, therefore, the greater number of people attending the establishment in which it makes those broadcasts **(Reha Training, [47-51])** ”



PUBLIC SPACES

- SGAE (C-306/05) [Hotel]
- Murphy (C-403/08) [Pub]
- SCF, C-135/10 [Dentist]
- OSA (C-351/12) [Spa]
- Reha Training (C-117/15) [Rehab Centre]



Five use cases, one restricted act

SUBSCRIPTION



- Airfield C-431/09. 432/09
- SBS v Sabam C325/14

the satellite package provider's intervention amounts to the supply of an autonomous service performed with the aim of making a profit, the subscription fee being paid by those persons not to the broadcasting organisation but to the satellite package provider. It is undisputed that that fee is payable not for any technical services, but for access to the communication by satellite and therefore to the works or other protected subject-matter.

(Airfield, [80])

”



Five use cases, one restricted act

- L'Oréal v eBay (C-324/09)
- Google France (C-236/08 to C-238/08)
- ECD, Art 14 / 15



UGC

in order for an internet service provider to fall within the scope of Article 14 of Directive 2000/31, it is essential that the provider be an intermediary provider ... That is not the case where the service provider, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data.

(L'Oreal v eBay, [112-113])





A way out of the
labyrinth?



Sensemaking

It's all about the facts ...

	Actual communication	To a public	Technical means	"New" public	Mens Rea	Profit	Indispensable intervention	Passivity	Knowledge
Retransmission	X	X	X	X				X	
Linking		X	X	X	X	X	X		X
Public Spaces		X	X			X			
Subscription	X	X				X	X	X	
UGC	X	X						X	X



More caselaw on the way?

Set Top boxes
Filmspeler



AG Opinion: sale of box pre-loaded with links to infringing sites = CTP

Doesn't strictly follow GS Media, focusses very carefully on facts

Torrent Service
The Pirate Bay



Connecting P2P users to download infringing material = CTP

Broad application of “indispensable intervention”





DSM and Brexit: further
change?



DSM and Brexit: further change?

DSM

Ancillary
Broadcasts



Value

Gap



DSM and Brexit: further change?

The unknown

Brexit?





What do we advise now?

What to advise now

Facts, facts, facts ...

Good?

- Everything is up for debate.
- Previous case law might not be precedent
- Why not test it?

Bad?

- Bad fact patterns make bad law.
- Danger of unintended consequences
- Acts / actors potentially caught incorrectly





Refreshments



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