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Recent developments in online copyright infringement (2020)

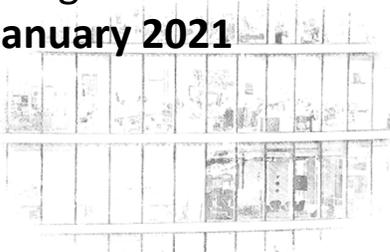
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Recent developments in online copyright infringement (2020)

The law as stated during this webinar is up to date as of **20 January 2021**



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Agenda

1. Trends in piracy
2. Communication to the Public
3. Platform liability and obligations
4. Right of Information
5. Damages



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1. Piracy Trends

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Piracy trends

EUIPO Observatory Study (Nov '19), EUIPO Report re Online Copyright Infringement in the EU (Dec '20):

- piracy focuses on most recently created content
- decrease in access to pirated content 2017-18
- BUT still average internet user pirates content 9.7 times a month (2018)

COVID-19 Impact?

- FACT-UK (May '20): links to illegal streaming sites detected doubled Feb-April '20
- MUSO: last week in March cf last week of Feb'20 film piracy increases: 43% UK, 66% Italy, 41% US
- UK Policy & Evidence Centre (Aug '20): numbers of illegal streamers of TV/ film had *declined* compared to pre-lockdown, but music/ videogames had increased (3/6%)



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2. Communication to the Public

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C-263/18 Nederlands Uitgeversverbond v. Tom Kabinet Internet BV



Offering second-hand e-books for sale:

- Communication to the public; or
- Distribution right?

The supply by downloading, for permanent use, of an e-book is not covered by the right of distribution to the public (art. 4.1 Infosoc Directive), but by the right of communication to the public (art. 3.1) - exhaustion is excluded

- Two cumulative criteria
 - i. act of communication of a work: the making available of the work to anyone who is registered with the reading club's website, no matter if the person avails himself of that opportunity;
 - ii. the communication of that work to a public: based on the number of persons who may have access, at the same time or in succession, to the same work
- Exhaustion: to be reserved for the distribution of tangible objects. Application to e-books may jeopardize rightholders' appropriate reward, as dematerialized digital copies do not deteriorate with use.

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C-753/18 STIM and SAMI v. Fleetmanager and NB



By making available to the public vehicles equipped with radio receivers, vehicle rental companies are not carrying out an 'act of communication' to the public for the purposes of the Article 3(1) of the of the Infosoc Directive:

- indispensable **role played by the user** and **deliberate nature of his/her intervention** ("*that user makes an 'act of communication' when he/she intervenes, in full knowledge of the consequences of his/her action, to give customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the broadcast work, or would be able to do so difficulty*" [32])
- **Mere provision of physical facilities ≠ actual act of communication** (recital 27)
- No longer a requirement for car rental companies to pay a fee for use of sound recordings to avoid an infringement of copyright.

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C-637/19 BY v CX



Article 3(1) of Directive 2001/29/EC to be interpreted as meaning that the concept of 'communication to the public' **does not cover the transmission by electronic means of a protected work to a court**, as evidence in judicial proceedings between individuals

- Communication/distribution (see **Nederlands Uitgeversverbond and Groep Algemene Uitgevers**, C-263/18)
- Two criteria:
 - i. communication: YES, the transmission of a protected work to a court by e-mail has occurred
 - ii. protected works to be communicated to an indeterminate number of recipients: NO, the communication was intended for a **defined and limited group of professionals** exercising their functions to satisfy a public interest

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C-392/19 VG Bild-Kunst v Stiftung Preußischer Kulturbesitz (AG opinion)



AG opinion: framing ≠ inline linking

- embedding in a webpage of works from other websites by means of automatic links (**inline linking**) is a ‘communication to a new public’ and therefore requires authorisation from the rights holder
 - **new public** = public of a website other than that on which that initial making available of the works took place
- embedding by means of clickable links (**framing**) does not require authorisation, as this will have been given by the rights holder when the work was initially made available
 - even where that embedding circumvents technological protection measures against framing adopted or imposed by the rights holder
 - **public is the same** = public of the website targeted by the link

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Communication to the Public: **Wheat v Google** (UK High Court)

- C was operator of freely available news website
- C complained of G presenting in search results links to websites which inline linked to his ©-protected images on his site
- C accepted that inline linking does not (i) involve any reproduction; or (ii) of itself infringe
- QUESTION: was G’s use of cached images/ links, to enable internet users to access C’s content via third parties’ inline linking websites, communication to the public?
- HELD: no communication to the public infringement by G:
 - images were freely accessible on C’s website so no “new public”;
 - internet= single technical means so no different technical means.



<imgsrc="https://websiteA.com/path/to/image.jpg">



<imgsrc="https://websiteA.com/path/to/image.jpg">

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3. Intermediary liability and obligations

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C-682/18 Frank Peterson v Google LLC, YouTube LLC, YouTube Inc and C-683/18 Elsevier Inc. v Cyando (AG Opinion)



AG opinion: as EU law currently stands, online platform operators, such as YouTube and Uploaded, are not directly liable for the illegal uploading of protected works by users

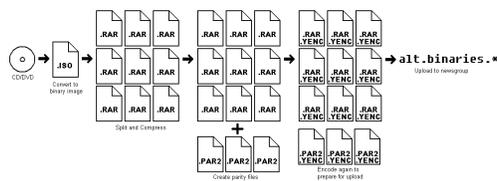
- Opinion based on Directives 2000/31, 2001/29 and 2004/48 (Directive 2019/790 not yet applicable)
- Operators do not carry out an act of '*communication to the public*'; they are **intermediaries providing physical facilities** to users: any primary liability to be borne solely by users
- **Exemption from liability if no active role** (knowledge of/control over the information in question).
- Rightholders to obtain, under EU law, **injunctions against those operators**, which can impose obligations on the latter

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C-442/19 Stichting Brein v News-Service Europe (reference only)



- Subject matter of the main proceedings (Netherlands): liability of News-Service Europe BV ('NSE'), a **former Usenet services provider**, for the distribution via Usenet of protected works without the consent of the rightholders, whose interests Stichting Brein represents
- Usenet is a worldwide platform for exchanging messages and consists of a series of **discussion groups**. It is used, among other things, for distributing messages containing **images, sound or software**
- Customers of NSE were, for example, internet service providers (who included access to Usenet in their package of internet services) or resellers (who sold subscriptions to consumers that gave direct access to the NSE servers). In both cases, the consumer was enabled to download content from the NSE servers.

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C-442/19 Stichting Brein v News-Service Europe (reference only)

Questions referred

1. Has an operator of a platform for Usenet services (as NSE has been) [...] made a communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC (OJ 2001 L 167, p.10; 'the Copyright Directive')?
2. If the answer to question 1 is in the affirmative: does the finding that the operator of a platform for Usenet services has made a communication to the public within the meaning of Article 3(1) of the Copyright Directive preclude the application of Article 14(1) of Directive 2000/31/EC (OJ 2000 L 178, p.1; 'Directive on electronic commerce')?
3. If the answer to question 1 or 2 is in the negative (and recourse to the exemption under Article 14(1) of the Directive on electronic commerce is therefore possible in principle): has the operator of a platform for Usenet services [...] played an active role that would in some other way preclude reliance on Article 14(1) of the Directive on electronic commerce?
4. Can the operator of a platform for Usenet services who has made a communication to the public and who is entitled to rely on Article 14(1) of the Directive on electronic commerce be prohibited from continuing the infringement, or can an injunction be imposed on it that goes beyond what is stated in Article 14(3) of the Directive on electronic commerce, or is that contrary to Article 15(1) of the Directive on electronic commerce?

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ITALY - Court of Cassation, decisions n. 7708 e 7709, RTI v. Yahoo!

- Distinction Between active and passive hosting providers:
 - Active if it carries out any of the following activities: *filtering, selection, indexing, organization, cataloguing, aggregation, evaluation, use, modification, extraction or promotion of content, operated through a business management of the service, adoption of a technique to evaluate users' behavior to increase their engagement*
- Liability regime:
 - Active hosting: it is responsible according to the general rules of tort law (no safe harbor ex art. 14 of Directive 2000/31/EC;
 - Passive hosting: not responsible for the unlawful content stored if
 - i. it is not aware that the information/content/activity is unlawful; and
 - ii. as soon as it become aware of the unlawfulness of the information/content/activity, upon communication of the competent authority, it removes it or block access to it.



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Case-law of the Court of Milan

- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 3874/2019
- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 8692/2019
- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 12744/2019
- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 17274/2019
- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 19582/2019
- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 20475/2019
- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 22787/2019
- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 22372/2019
- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 23892/2019
- Lega Calcio e Sky / Telecom, et al., Trib. Milano – R.G. 1952/2019
- etc. etc.

MERE CONDUIT

CACHING PROVIDERS

HOSTING PROVIDERS

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European Commission - IP action plan to support the EU's recovery and resilience



Brussels, 25.11.2020
COM(2020) 760 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

Making the most of the EU's innovative potential
An intellectual property action plan to support the EU's recovery and resilience

5 KEY FOCUS AREAS:

1. Upgrade the system for IP protection
2. Incentivise the use and deployment of IP, notably by SMEs
3. Facilitate access to and sharing of intangible assets while guaranteeing a fair return on investment
4. Ensure better IP enforcement
5. Improve fair play at global level

*"the Commission is focusing on supporting the [...] implementation of the two newly adopted directives on the modernisation of the EU's copyright framework [...] A crucial part of this work concerns the **implementation of Article 17 of the Copyright Directive**, which sets out a specific legal regime for the use of copyright-protected content by user-uploaded content sharing platforms. The Commission [...] **will soon issue guidance to support Member States in implementing this provision** *"*

* resulting from the EC's extensive dialogue with stakeholders

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Implementation of the Directive (EU) 2019/790 ('Copyright Directive')



- Adopted
- Post consultation
- Current consultation
- Unkown

- **France** is the first to implement the Copyright Directive in July 2019
- **UK** is not obliged to implement it and the Government confirmed it does not intend to do so
- **Italy** voted against the Copyright Directive. The Senate approved **Legge di delegazione europea 2019-2020**. The Bill has passed to the Chamber of Deputies and assigned to the Commission on European Affairs, which in December 2020 has concluded its examination and will soon issue a report.

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4. Right of Information

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Right to Information: **Constantin Film v YouTube** (CJEU C-264-19)

- Art 8 IP Enforcement Directive: commercial scale providers of services used to infringe (and certain other persons) may be ordered to provide certain information on origin/ distribution networks of infringing goods/ services
 - Information includes “names and addresses” of manufacturers, suppliers, etc
- C sought disclosure from Y of e-mail addresses, IP addresses and mobile numbers of persons who uploaded infringing copies of films
- QUESTION: what is meant by “addresses”?
- HELD: “address” is limited to physical address
- IMPACT:
 - Art 8 right of limited practical use for fighting piracy
 - BUT member states (and UK) can implement additional rights to obtain information re IP infringements, eg UK’s *Norwich Pharmacal* disclosure



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Right to Information: **Mircom v Telenet** (AG Opinion, C-597/19)

- Mircom had license to pursue P2P downloaders/ sharers of certain adult films
- M applied for an order requiring T (internet provider) to disclose contact details for subscribers who had downloaded films/ uploaded parts of films
- AG Opinion (17.12.20):
 - Infringement:
 - downloading amounts to infringing act of reproduction
 - P2P users make works accessible, and therefore make them to the public, even though they only upload a small fragment at a time
 - Right to information:
 - may not be available to a copyright troll that has licence but no intention to exploit, nor to sue, but only issue threatening letters (potential abuse of rights)
 - “just and proportionate” requirement – should examine how applicant operates, and whether there’s reason to believe it would use info improperly



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Right to Information: proposed KYBC obligation on Service Providers

- Digital Services Act proposals include concept of Know Your Business Customer (expanding Art 5 E-Commerce Directive)
- Lobbying by copyright holders and others for concept of KYBC to:
 - be broad enough to apply to online service providers in general
 - be granular enough to capture critical information- eg e-mail address
 - include limited due diligence checks to ensure data is reliable
 - have meaningful sanctions for non-compliance



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5. Damages

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Damages: UK IPO Consideration of Statutory Damages

- UK IPO consultation re UK IP enforcement framework closed 9.11.20
 - included proposed introduction of a statutory damages regime for IP claims in the UK
 - statutory damages regimes normally involve fixed damages per infringement, leading to higher total damages awards
- Pre-Brexit, the introduction of a statutory damages regime within the UK might have been blocked by the EU Enforcement Directive
- EU-UK TCA mirrors Enforcement Directive requirement that infringers should pay damages on basis of “actual prejudice suffered”- uncertain whether a statutory damages regime would comply or not



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Questions?



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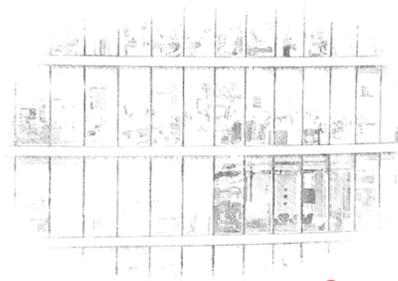
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Intellectual Property webinars Q4 2020

- Jurisdiction and IP (2020)
- Copyright and linking on the web (2020)
- IP protection for new technologies (2020)



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