

# LAW CATCHES UP WITH FREE TV STREAMING SITES

01 March 2017 | London  
Legal Briefings

---

ITV & Others v TVCatchup: CJEU Rules S.73 CDPA defence not applicable to online streaming of live broadcasts.

The CJEU has issued its ruling on the latest question referred to it in the long-running dispute between ITV (and others) and TVCatchup, as to whether Article 9 of the InfoSoc Directive permits the UK to retain the defence contained in section 73 of the Copyright, Designs and Patents Act 1988 (which permits retransmission of a broadcast by cable to users in the area to which the original broadcast was made). As such, TVCatchup cannot legally provide live streaming of free-to-air broadcasts via the internet in the UK.

The decision confirms the protections afforded to copyright holders and originating broadcasters in the UK. It will likely lead to public service broadcasters seeking payment of retransmission fees from cable operators, in the future.

## **Business impact**

- Many businesses are dependent upon s.73 CDPA to prevent their retransmission of broadcast works from amounting to copyright infringement. The latest decision in these lengthy proceedings will be very important to the broadcasting industry and to consumers of broadcast programming.
- The decision confirms that s.73 CDPA cannot provide an exception to copyright infringement in the context of the InfoSoc Directive, which accords with the government's proposal to abolish the defence via the Digital Economy Bill (which is still before Parliament).
- The CJEU has re-confirmed the right of originators to control how, when and where their

material is transmitted or re-transmitted (even where recipients are legitimately permitted to receive the original broadcast), thus putting control in the hands of the original broadcaster.

- The decision will be welcomed by originating broadcasters in combatting illegal streaming of broadcast content online. It likely also opens the door for public service broadcasters to seek payment of retransmission fees from cable operators.

## **Background**

These were copyright proceedings brought by ITV Broadcasting Limited and other UK commercial television broadcasters ("ITV") against TVCatchup Limited ("TVC"), which operated a live streaming service of free-to-air broadcast television programmes over the internet so that users could watch live television on their computers, tablets, and smartphones. The material streamed included programmes and films in which ITV owned the copyright. In order to take advantage of the streaming service, users had to create an account and agree to certain terms, confirming that they held a valid TV licence and that they would restrict the use of TVC to their country of residence.

TVC's service was supported by advertisements which were shown before the live stream of each broadcast. Any advertisements that formed part of the live stream were shown unaltered. Since further advertisements surrounded TVC's live stream, TVC was in direct competition with ITV.

ITV alleged that TVC infringed its copyright in two categories of work: broadcasts and films. The latest CJEU reference related to the alleged infringement by TVC having communicated such copyright works to the public.

Following a reference from the High Court, the CJEU held that the concept of "communication to the public" within the meaning of Article 3(1) of the Information Society Directive (2001/29/EC) (the "InfoSoc Directive") includes "live" streaming of TV content to licensed recipients, such that TVC's live streaming of UK free-to-view terrestrial television broadcasts infringes authors' rights to control communication to the public, within the meaning of Article 3(1). The High Court implemented that ruling in respect of the streaming of non-public service broadcast channels, but held that TVC could continue to stream public service broadcast channels, under protection of the exception under s.73 CDPA, which could cover retransmission over the internet (although not to mobile devices).

Following appeals by both sides and interventions from the UK government and Virgin Media, the Court of Appeal ("CA") took the view that s.73 should be interpreted in the context of Article 9 of the InfoSoc Directive (a "saving provision" which permits Member States to retain provisions in their national copyright legislation), notwithstanding the purpose of the InfoSoc Directive to harmonise EU law. The CA referred a question to the CJEU to determine whether the s.73 exception could be retained, on the basis that it falls within Article 9, together with a number of questions concerning the meaning of "cable" in that Article.

## **The decision**

The CJEU agreed with the Advocate-General's opinion that Article 9 of the InfoSoc Directive does not allow exclusions from harmonised EU law, since this would run counter to the rights established by the InfoSoc Directive and to the exhaustive nature of the exceptions and limitations included within Article 5. Any such exclusions would be detrimental to the achievement of the Directive's principal objective, to establish a high level of protection for authors. Article 9 is simply concerned with allowing Member States to maintain provisions in their national law which are relevant to areas other than those which have been harmonised (e.g. patent rights, trade marks and rights to confidentiality). As such, the s.73 defence cannot fall within the scope of Article 9, as it provides for an exception to the core exclusive right of communication to the public.

The CJEU noted that Article 1(2)(c) of the InfoSoc Directive deals expressly with "cable retransmission", such that the absence of this concept from the scope of Article 9 was deliberate. In short, the CJEU found that the words "access to cable of broadcasting services" in Article 9 should not be construed as providing a defence to copyright infringement. Retransmission by means of an internet stream is not, as a rule, permitted, unless it falls within the scope of Article 5 (which was not the case in respect of TVC's services).

The CJEU also noted that the concept of "access to cable of broadcasting services" in Article 9 must be given an "autonomous and uniform interpretation" throughout the EU, which takes into account the wording of that provision, its context and the objectives of the legislation of which it forms part: the term "access to cable" being different from the concept of "retransmission by cable" (since only the latter concept designates the transmission of audiovisual content).

This decision accords with the UK government's proposal to abolish s.73 CDPA via the Digital Economy Bill, which is still under consideration by the House of Lords.

## **Brexit**

It is doubtful whether the UK would seek to retain s.73, even though with the approach of Brexit, it may be open to the UK to delay abolition of s.73 and to rethink this provision. Post-Brexit, although UK copyright law would be free to develop independently of the rest of the EU, there would be strong commercial drivers for the UK to maintain close harmonisation of copyright law, especially around digital content, interoperability and enforcement.

## **KEY CONTACTS**

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**JOEL SMITH**  
PARTNER, LONDON

+44 20 7466 2331  
Joel.Smith@hsf.com



**VICTORIA HORSEY**  
SENIOR ASSOCIATE,  
LONDON

+44 20 7466 2701  
Victoria.Horsey@hsf.com

---

## LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

---

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE**

Close

© HERBERT SMITH FREEHILLS LLP 2021