

Overview of pending and recent rulings by the CJEU and ECtHR in Media Law issues



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Overview

I. Introduction

II. Update „leftovers“ 2016

III. What else is new from Luxembourg?

IV. What to look out for from Luxembourg...

V. And what about Strasbourg?

Introduction



- CJEU (=Luxembourg) – ECtHR (=Strasbourg)
 - and actually missing: national courts / comparative perspective
- Media Law in a broad sense
 - Interconnected media, IP, IT (e-commerce), Data Protection, Commercial Practices, but also institutional, principal values, foreign competencies issues
- Focus on Luxembourg, Strasbourg especially relevant for fundamental media freedom issues
- Here: flashlight rather than in-depth studies of judgments

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CJEU: GS Media C-160/15

- Dutch website linking to an Australian filesharing website with (unauthorized) previews of forthcoming “Dit is Britt” photos in Playboy
- Eternal question of „communication to the public”
 - according to Art. 3 (1) Directive 2001/29/EC
 - long list of previous case-law
 - e.g. after Opinion GS Media RehaTraining (C-117/15)
- For specific question of links to “illegal” websites CJEU presents on 8.9.16 criteria to consider
 - Provided for or without pursuit of financial gain?
 - Did linking person know or should have reasonably known illegality of target website?



As we are already at "CttP"...

- The saga about CttP has further continued...
- **CJEU *Stichting Brein/Wullems* C-527/15**
 - Collecting society and seller of multimedia player
 - "filmspeler" as hardware enabling access to copyrighted work (in an unauthorized manner) and for viewing on TV screen
 - in the advertising the "illegal sources access" was emphasized
- Court states on 26.4.17 that
 - hardware with add-ons in the specific case = **communication**
 - **public** = large amount of people and potentially very wide for sametime access → "indeterminate number"
 - **"new"** public = if others than were foreseen by copyright holders plus profit-making nature
 - In addition: temporary reproduction in streaming as in case at hand does not satisfy condition of exempted reproduction for merely technical reasons (Art. 5 (1))

And more to come on “CttP”...



- Currently awaiting CJEU **Stichting Brein/Ziggo** C-610/15
 - AG Szpunar’s opinion on 8.2.17
 - Identifies significant difference to preceding decisions because not secondary communication but here breach is original communication
 - Confirms cttp has taken place, but by whom? User or PirateBay (PB)?
 - Both, as PB is “necessary and deliberate” if they do not react to notice
- Important second question
 - ISPs can be addressed under Art. 8(3) Directive 2001/29/EC with a blocking order
 - Subject to proportionality et al.

As if that were not complicated enough...another aspect



- CttP also relevant in other contexts
- CJEU **AKM v Zürs.net** C-138/16 (16.3.17)
 - exception for TV broadcasts via local cable network with max. 500 subscriber treshold
 - “simultaneous, full and unaltered transmission of programmes by means of cable” = cttp?
 - question of “new” public? in case of additional programmes yes
 - although one communal antenna not problematic, the (potential) accumulation is
- CJEU **VG Rundfunk v Hotel Edelweiss** C-641/15 (16.2.17)
 - Rental and Lending Rights Directive 2006/115/EC also contains CttP
 - Protection of broadcasting organization limited regarding hotel rooms (≠ CttP against payment of entrance fee)



We are still wrapping up...

- There were two major IT-related issues open:
CJEU *McFadden* C-484/14 (15.9.16)
 - Shop operator offers free WiFi/WLAN w`out PW protection (“open”)
 - Question of direct / indirect („Störerhaftung“) liability or exemption
 - In principle granting of injunctions against free wifi operator possible
 - But: operator decides on technical means to achieve obligation, possibly reduced to single possibility of password-protection (and avoiding anonymity)
- **CJEU *Patrick Breyer* C-582/14 (19.10.16)**
 - Dynamic IP address registered by online service on access to website = personal data under Directive 95/46/EC
 - Under condition of identifiability together with ISP data
 - But: narrowing “legitimate interest” exception of Art. 7(f) as was the case in German law is not possible

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Something new: live-stream

■ **CJEU *ITV Broadcasting* C-275/15**

- Not CttP (that has already been decided in the very same proceedings) but retransmission of cable programmes by internet live streaming
- TV Catchup picked up without authorisation (free-to-air) broadcasts and offered them via their internet-based service
- Question of retransmission exception (cable) applicable to other forms of “forwarding” signal

■ **Court states on 1.3.17 that**

- Areas exempted from Directive 2001/29/EC (Art. 9), here: access to cable of broadcasting services, do not allow for national law to diminish rights of authors
- Includes also PSB that were intended for the same area where online service is accessed

The UCP-aspects

- Unfair Commercial Practices Dir. 2005/29/EC
- **CJEU Canal Digital Danmark C-611/14**
 - Marketing of CDD of TV programme packages in TV and online
 - Claim that not all relevant pricing information was given
- Court states on 26.10.16 that
 - Context of advertising to be taken into account for establishing whether omission is misleading (esp. limitations in time and space)
 - But: final price split into different elements and only some of them mentioned still constitute “misleading” information
- **CJEU Vanderborght C-339/15 (Opinion 8.9.16)**
 - Online advertising of dental care offer contrary to strict Belgium law
 - AG suggests to rely on E-Commerce Directive 2000/31/EC
 - Restriction in line with Directive and fundamental freedoms

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A long list...

■ AVMSD-related

- **Netflix v Commission** T-818/16 (appl. 13.1.17) and **Apple v Commission** T-101/17 (appl. 31.3.17) for Annulment of Commission Decision (EU) 2016/2042 SA.38418
- German Film Support Act giving potential support whilst requiring levy (based on turnover made in Germany and if not subject to levy in home country) from on-demand service providers not established in Germany if addressing German customers
- Necessity of triggering information obligation for the draft law?
 - TRIS (Directive (EU) 2015/1535 (former 98/34/EC)
 - cf. e.g. **G.M./M.S.** C-303/15 (13.10.16) gambling rules in specific case not subject to notification obligation

...still continuing...

■ Another „establishment“ question

- CJEU **Google Ireland / Italy v AGCOM** C-322/15 (8.9.16)
- Extending obligation to disclose specific information re. advertising activities to companies with HQ outside of Italy
- Inadmissible by Order due to lack of information

■ Frequencies

- CJEU **Persidera** C-112/16 (AG Kokott Opinion 30.3.17)
- “fundamental importance of media pluralism and integrity in a free, democratic society cannot be emphasised enough at the present time” (!)
- Transition from analogue to digital television and frequency assignment
- Needs to follow fair and non-discriminatory allocation (no advantages for big market players) except for legitimate objects

... and for DP even longer

■ Data Protection

- CJEU Rigas Satiksme C-13/16 (Opinion 26.1.17)
 - Obligation / possibility for national rules on handing over data (by police authorities) to enable civil proceedings
- CJEU Tele 2 Sverige C-203/15 (21.12.16)
- But still pending another one: CJEU Criminal proceedings against K. C- 475/16 (appl. lodged on 17.8.16)
 - data retention rules after CJEU cases
- CJEU Wirtschaftsakademie/ULD C-210/16 (lodged 14.4.16)
 - Establishment issue and examination powers of DPA
- CJEU Digital Rights Ireland II T-670/16 (lodged 16.9.16)
 - Privacy Shield claimed to be illegal
- CJEU Schrems II C-498/16
 - the „class action“ case

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Just one from a wide selection



- ECtHR Magyar Helsinki Bizottsag v Hungary (Appl. No 18030/11, GC 8.11.16)
 - Access to information case by an NGO
 - Criminal Defence research project and request for information on names of public defenders
 - „data journalism“
 - Art. 10 includes „right of access to information“ if linked to use of freedom of expression
 - Matter of public interest and needed specific names and not anonymized
 - Even though personal data concerned outright refusal to grant access not necessary in democratic society



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