

# Recent rulings from the CJEU and the ECtHR impacting the media sector



Institut für Europäisches Medienrecht  
Institute of European Media Law  
Institut du droit européen des médias

**Prof. Dr. Mark D. Cole**

Director for Academic Affairs at the Institute of European Media Law (EMR),  
Professor for Media and Telecommunication Law at the University of Luxembourg

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# Gliederung

At first: Leftovers from last year

What is new from Luxembourg?

Judgments

AG Opinions

What to look out for from Luxembourg

And what about Strasbourg?

- Preliminary ruling concerning Article 3(1) of Directive 2001/29/EC
- Case facts:
  - Website of a school in North Rhine-Westphalia (Germany) gave access to presentations of pupils prepared as part of a workshop
  - One presentation included, by way of illustration, a photograph that a pupil had downloaded from an online travel portal (by referring to that portal below the photograph)
  - The photograph was posted on the online travel portal without any restrictive measures preventing it from being downloaded
  - The photographer, Mr Renckhoff, took action claiming that he had given a right of use exclusively to the operators of the portal

## ■ Talking about copyright... :

### II. Facts of the case and question referred

#### A. Facts

21. Mr Renckhoff, a professional photographer, filed a claim against the city of Waltrop and the *Land* (12) over the publication of a presentation by a pupil in the website of the Gesamtschule Waltrop, where it had been available since 25 March 2009, which, according to the order for reference, contained the photograph of reproduced in the order:



■ AG opinion on CJEU website, available for the public, contains the picture of Mr. Renckhoff.

■ Q: With consent of Renckhoff and or exclusive rightholder (travel portal)?

■ Maybe Renckhoff needs to fight for his rights again before (against?) the CJEU...

22. Below the image, which was obtained from the portal 'www.schwarzaufweiss.de' (which belongs to a digital travel magazine of the same name), the publisher made a reference to the internet site, which did not include any indication of the photograph's author. (13)

23. Mr Renckhoff claims that he had granted a simple right of use of the photograph solely to the operators of the online magazine portal. In his opinion, the appearance of the image on the school's website is an infringement of his rights (under copyright) to authorise the reproduction and communication to the public of the photograph.

# Leftovers

- C-161/17 – Renckhoff – 07/08/2018

- AG opinion: no 'making available to the public' within the meaning of Art. 3(1) under these circumstances when there is no profit motive and source is cited.
- CJEU now: The concept of 'communication to the public' must be interpreted as meaning that it covers the posting on a website of a photograph previously posted, **without any restriction** preventing it from being downloaded and with the consent of the copyright holder, on another website.
- Main argument: copyright holder is **otherwise no longer in a position to exercise his power of control** over the initial communication of that work.

# Leftovers

- T-101/17 – Apple – 27/07/2019



- **Remember:** Case is about the 2014 amendment of the German law on the funding of film production which extended obligation for levies also to VoDs established outside Germany (but also aid eligibility...). Apple contested Comm. decision authorizing this law:
  - First plea in law, alleging a violation of the Audiovisual Media Services Directive (COO and European Works support)
  - Second plea in law, alleging a violation of Article 110 TFEU for discrimination
  - Third plea in law, alleging a violation of Article 56 TFEU
  - Fourth plea in law, alleging a violation of Directive 98/34/EC (TRIS)
- as predicted in last year's forecast: dismissed as **inadmissible** because “the applicant has failed to prove that it is individually concerned”
- But: see you next year again @ ERA to discuss Appeal before the Court of Justice (C-633/18 P)



# Leftovers

- former T-873/16 – now C-132/19 –  
Group Canal

- Remember: Group Canal+ appealed the Comm. decision of 26 July 2016 making legally binding the commitments given by Paramount Pictures International Ltd and Viacom Inc., in the context of the licensing agreements on audiovisual content which they concluded with Sky.

## Antitrust/Cartel Cases

### 40023 Cross-border access to pay-TV

**Companies:** [NBC Universal](#) / [Paramount Pictures C](#) / [SKY \(UK\)](#) / [Sony Pictures Entertainment](#) / [The Walt Disney Company](#) / [Twentieth Century Fox Int Ltd](#) / [Warner Bros Entertainment UK Ltd](#)

- T-873/16: dismissed
- Now C-132/19: CJEU has to decide on appeal

# Overview

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What to look out for from Luxembourg

And what about Strasbourg?



# CJEU - C-622/17 – Baltic Media Alliance – AG opinion delivered on 28/02/2019

## ■ Case facts:

- UK registered Baltic Media Alliance, broadcasts the television channel NTV Mir Lithuania, a channel intended exclusively for the Lithuanian public and showing mainly Russian language programmes.
  - On 18 May 2016 the Radio and Television Commission of Lithuania (RTCL) adopted a measure imposing an obligation on operators broadcasting television channels to Lithuanian consumers, for a period of 12 months, to no longer broadcast the NTV Mir Lithuania other than as part of packages available for an additional fee.
  - RTCL argued that a programme broadcast in April 2016 on the channel in question contained information inciting hostility to and hatred of the Baltic States on grounds of nationality.
- **Remember** in this context Commission decision of 4 May 2018:
- Lithuanian regulator's measure to suspend for twelve months the retransmission of a Russian language channel "RTR Planeta", due to incitement to hatred, is compatible with EU law.

# CJEU - C-622/17 – Baltic Media Alliance – AG opinion delivered on 28/02/2019

## ■ AG opinion:

- **AVMSD does not preclude** the adoption by a Member State of a measure **imposing an obligation** to broadcast or retransmit a foreign television channel only **in packages available for an additional fee**, in order to restrict the dissemination by that channel to the public of that State of information inciting hatred.
- Measures such as the obligation to include channels in specific packages do not hinder the retransmission or reception as such of the channels concerned. Those channels can, if the specific rules are observed, still be broadcast and consumers can legally view those channels, provided that they subscribe to the appropriate package.
- RTCL's justified and proportionate measures were compatible with the freedom to provide services (Art. 56 TFEU); Lithuania has, by means of a reasonable measure, legitimately sought to protect the Lithuanian information area from Russian propaganda in the context of the information war to which the Baltic States are subject.

# CJEU - 142/18 – Skype – judgment of 05/06/2019

- Picture Puzzle: Can you spot the difference by comparing the picture?



- Solution:** There is none...

# CJEU - 142/18 – Skype – judgment of 05/06/2019

## ■ Case facts:

- Skype provides SkypeOut which allows users to make calls from a terminal to a fixed or mobile telephone line using the Internet Protocol (IP) and, more specifically, the technique called 'Voice over IP' (VoIP). SkypeOut does not, however, allow users to receive calls from those using Belgian telephone numbers. SkypeOut is an 'over the top' (OTT) service — a service available on the internet without the involvement of a traditional communications operator.
- The Institut belge des services postaux et des télécommunications (IBPT) requested Skype to comply with its obligation to notify as electronic communications services (in the meaning of the Framework Directive)

# CJEU - 142/18 – Skype – judgment of 05/06/2019

- CJEU ruling: a software publisher of a feature offering a VoIP which allows the user to call a fixed or mobile number covered by a national numbering plan from a terminal via the public switched telephone network (PSTN) of a Member State constitutes an 'electronic communications service' within the meaning of the Framework Directive (2002/21/EC), provided that, **first**, the software publisher is **remunerated** for the provision of that service and, **second**, the provision of that service involves the **conclusion of agreements** between that software publisher and telecommunications service providers that are duly authorised to send and terminate calls to the PSTN.

# CJEU - C-298/17 – France Télévisions – judgement of 13/12/2018

- **Case:** CSA gave formal notice to FT that it should comply with the French transposition of Art. 31 of the Universal Service Directive (2002/22) (must carry) by not opposing the live streaming by Playmédia, on its website, of programmes produced by FT.
- **Questioning:** Is a streaming provider to be regarded as "electronic communications networks used for the public distribution of radio and television broadcasting channels" - and therefore **subject to carry obligations**
- **Ruling:** **No**, not alone on the fact that the undertaking offers live streaming of tv programmes online. **But** Directive 2002/22 **does not preclude MS imposing** such must carry obligations on providers like FT.

# CJEU - C-119/18 – Telefónica – judgment of 21/03/2019

- CJEU: Directive 2002/20/EC must be interpreted as meaning that an annual financial contribution, such as that at issue in the main proceedings, imposed on telecommunications companies operating in Spain and having a greater geographical coverage than that of an autonomous community, for the purpose of participating in the financing of public broadcasting, does not fall within the scope of that directive.



# What is new from Luxembourg?

## ... concerning ISPs?



- Uber Spain – C-434/15 – 20/12/2017: when a **sharing platform** is **more than** an **intermediary**
- Barcelona taxi drivers: *Uber* = unfair competition because it operates without transport authorisations
- *Uber* claims it is electronic intermediary under E-Commerce Directive, not a transportation service
- CJEU: criteria / test for when a “sharing economy” platform can(not) be considered an ISP
  - 1) Indispensable role of platform: *Uber* more than ISP if its transport service depends on it
  - 2) Control over the service: Uber determines fares, vehicle quality, conduct of drivers... has control
- *Uber* = no ISP but transportation service

# What is new from Luxembourg? ... concerning ISPs?

- C-390/18 – AIRBNB – AG opinion delivered on 30/04/2019: Uber test applied and refined
- France: does Airbnb (Ireland) need a French professional license for property mediation activities
  - 1) Indispensability: Airbnb does not create new offer; short term accommodation market exists already
  - 2a) No decisive control over the “material content” service: price / lettings conditions defined by hosts
  - 2b) payment service + enforcement of user standards based on ratings/comments do not confer control
- Clarification: criteria 1 not sufficient to confirm ISP status; criteria 2 (control) decisive
- AG Recommendation: *Airbnb* is an ISP

# What is new from Luxembourg? ... concerning ISPs?

## **UBER & AIRBNB: drawing the playground limits for „pure“ online platforms**

- UBER - sets limits for ISPs integrating with downstream “material content” service
- Airbnb – possible guidance for permissible degree of involvement in downstream service
- *VSP implications/questions:*
- Is video sharing “market” (in)separable from ISPs?
- VSPs/AVMSD: are there other platform activities that could confer decisive control? new AVMSD Art 28b
- lack of decisive control: does it infer no actual knowledge of illegal information (Art 14(1) ECD)?

# What is new from Luxembourg?

## ... concerning ISPs?



AG Opinion in C-18/18 – Glawischnig-Piesczek  
– delivered on **04/06/2019**

- Austrian Green politician asking Facebook to remove defamatory comments, and **identical/equivalent comments** in Austria and **worldwide**
- CJEU to rule on scope of monitoring obligations
- AG: FB can be ordered to prevent identical information by all users and equivalent information by the same user;
- worldwide removal is not precluded (defamation not regulated under EU law)

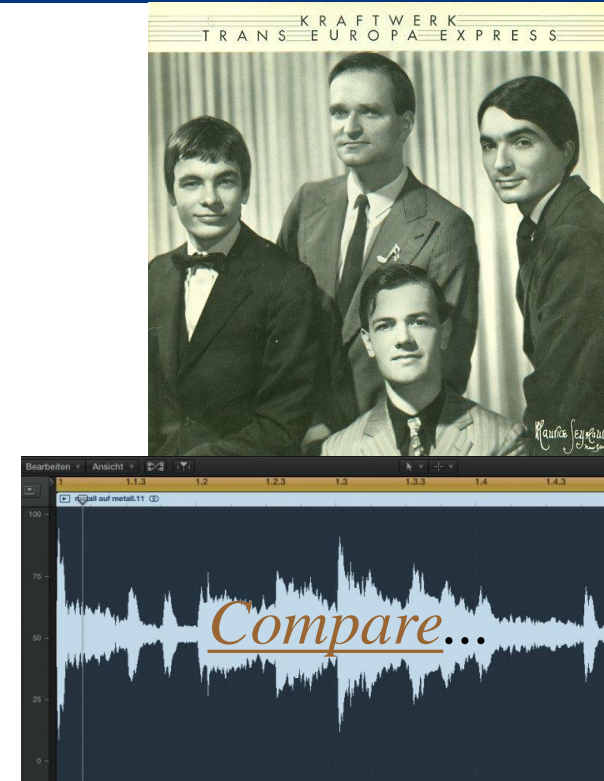
# What is new from Luxembourg?

## ... dealing with copyright?

- C-469/17 – Funke Medien („Afghanistan papers“) – AG opinion delivered on 25/10/2019
- Case facts: Funke Medien, operating the website of the Westdeutsche Allgemeine Zeitung, published several confidential reports of the German Ministry of Defence although a former application for access to these reports was refused on the ground that disclosure could have adverse effects on security-sensitive interests of the federal armed forces. Ministry relied on copyright.
- AG: either **inadmissible** or **Article 11 EU CFR** must preclude MS from invoking copyright under Art. 2(a) and 3(1) of Dir. 2001/29/EC in order to prevent communication to the public of confidential documents emanating from that MS in the context of a **debate of public interest**.

# What is new from Luxembourg? ...dealing with copyright?

- C-476/17 – Pelham
- In 1977 German avant-garde electronic music group Kraftwerk publishes "Metall auf Metall" (Trans Europe Express)
- In 1997 German musical artist (Hip-Hop) Sabrina Setlur (producer: Moses Pelham) uses a **two-second** sample from "Metall auf Metall" in one of her songs "Nur Mir" as a continuous rhythmic element
- Case went through all instances in Germany
- AG opinion delivered on 12/12/2018: sampling infringes the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction within the meaning of Art. 2(c) of Directive 2001/29/EC



# What is new from Luxembourg? ... dealing with copyright

- Mentioning only briefly:  
CJEU C-516/17 – Spiegel Online / Volker Beck
  - Case facts: applicant is author of an article dealing with sensitive and controversial questions of criminal policy published in a in 1988. In this publication, the editor changed the title of the manuscript and shortened one sentence in the text. Since 1993 at the latest, the author has completely distanced himself from this article and made the document available to various newspaper editors as proof that his manuscript had been altered. However, he did not agree to the publication. Despite a German newspaper published the texts claiming that the author had been deceiving the public for years because the essential content of his manuscript had not been falsified in the 1988 edition. The author complained relying on copyright.
  - AG: violation of the authors rights.



# What is new from Luxembourg?

## ... dealing with state aid?

- C-492/17 – Rittinger – judgment of 13/12/2018:  
Case concerned the German public broadcasting fee which was contested by the applicant. CJEU found that there had been no breach of the notification requirement under State aid law (no “new” SA).
- C-114/17 – Spain v Commission – judgment of 20/09/2018: By its appeal Spain sought to have set aside the judgment of the General Court (T-808/14) by which it had dismissed its action for annulment of a Commission decision against Spain in the context of Spanish authorities in the deployment of digital terrestrial television in remote and less urbanised areas. CJEU dismissed appeal.

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# What to look out for from Luxembourg

## ■ C-719/18 – Vivendi

- Reference for a preliminary ruling from Italy on protection of competition and pluralism in audiovisual and broadcasting media

## ■ C-299/17 – VG Media

- Background: German collecting society VG Media objects to Google's use, for its own services, of text excerpts and images from content produced by its members, without paying a fee
- AG Opinion (13/13/2018): national provisions, which prohibit only commercial operators of search engines and commercial service providers which edit content, but not other users, including commercial users, from making press products or parts thereof (excluding individual words and very short text excerpts) available to the public constitute rules specifically aimed at information society services in the meaning of Directive 98/34/EC (2006/96/EC)

# What to look out for from Luxembourg? – C-682/18 - YouTube

## ■ Questions:

- does YouTube's specific business model mean that if videos made publicly accessible by users without rightsholders consent it carries out an act of communication re Art 3(1) 2001/29 (InfoSocD)
  - if no - does YouTube come within the scope of Art 14(1) ECD
  - if Q2 yes - must *actual knowledge* relate to **specific** activities or information pursuant to Article 14(1) Directive 2000/31/EC?
  - if Q2 yes - can an injunction by rightsholder against YouTube only be obtained after a repeated infringement of notified content
- availability of liability exemptions for VSPs (Q1)
  - scope of proactive activities of ISPs (Q2,Q3)
  - + "Uploaded" case: liabilities of sharehoster

# What to look out for from Luxembourg – C-682/18 - YouTube

## Implications?

- *YouTube/Uploaded* – confirmation of New Copyright Directive? Art. 17 (1-4): liability exemption of ECD not available any longer?
- will CJEU *de facto* advance Copyright Directive Art 17 (to be transposed by 16 May 2021)?

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# ECtHR Magyar Jeti Zrt v. Hungary ([no. 11257/16](#))

## ■ Case facts

- Applicant company operates a popular online news portal in Hungary.
- Following an incident where intoxicated football supporters had shouted racist remarks and made threats against students at a school (predominantly Roma), the leader of the Roma minority local government gave an interview to a media outlet with a focus on Roma issues. While describing the events, the leader stated, inter alia, that the football supporters were “members of Jobbik for sure”. The media outlet uploaded the video of the interview to YouTube.
- The applicant company published an article on the incident on its website, including a hyperlink to the YouTube video.
- The right-wing political party Jobbik brought defamation proceedings. It argued that by using the term “Jobbik” to describe the football supporters and by publishing a hyperlink to the video, the respondents had infringed its right to reputation. The applicant company was found liable for disseminating defamatory statements, infringing the political party’s right to reputation. Its appeals were dismissed.



# ECtHR Magyar Jeti Zrt v. Hungary (no. 11257/16)

## ■ ECtHRs findings:

- The domestic courts' decisions amounted to an interference with the applicant company's right to freedom of expression and pursued the legitimate aim of protecting the rights of others. Their imposition of objective liability on the applicant company had not been based on relevant and sufficient grounds.
- The issue of whether the **posting of a hyperlink** might, justifiably from the perspective of Article 10, give rise to **liability** for the content required an individual assessment in each case. Aspects:
  - (i) had the journalist endorsed the impugned content;
  - (ii) had the journalist repeated the impugned content (without endorsing it);
  - (iii) had the journalist merely put an hyperlink to the impugned content (without endorsing or repeating it);
  - (iv) had the journalist known or could reasonably have known that the impugned content was defamatory or otherwise unlawful;
  - (v) had journalist acted in good faith, respected ethics of journalism and performed the due diligence expected in responsible journalism?

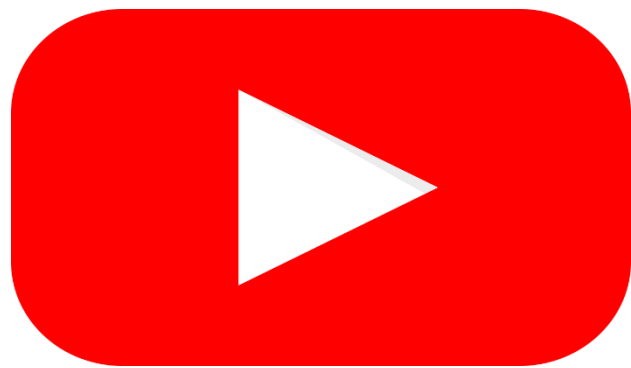
# What about Strasbourg?

Two cases from Russia: Rebechenko

([10257/17](#)) + Kablis ([48310/16](#); [59663/17](#))

## ■ Rebechenko:

- Case facts: Rebchenko published on YouTube a video with the title “Kolkhoz TV on Ukrainian crisis” dealing with statements made by the head of the Ust-Labinskiy District (Ms.F) in a tv talk show on the situation in the eastern region of Ukraine and relations between Russia and Ukraine. Ms. F brought action against the applicant, stating that he had offended her and harmed her reputation.



- ECtHR held that there had been a violation of Art. 10. The ECtHR values the statements of the **blogger** as those of a “**public watchdog**”

# What about Strasbourg?

Two cases from Russia: Rebechenko

([10257/17](#)) + Kablis ([48310/16](#); [59663/17](#))

## ■ Kablis

- Case facts: Kablis wanted to make a picket-style protest to discuss the arrest of Komi Republic officials on criminal charges but the competent administration refused by suggesting another location as proposed by Kablis. Kablis blogged about these developments and posted information on **social networking site** Vkontakte and urged people to join him in a “people’s assembly” and discussion there instead. His VKontakte **account was blocked** on the orders of a deputy prosecutor, who found that he had called for people to take part in an unlawful public event
- ECtHR held that there had been a **violation of Art. 10 (freedom of expression)**, 11 (freedom of assembly) and 13 (effective remedy)

# What about Strasbourg?

## - ... and another important issue

- Williamson v. Germany (no. [64496/17](#))
- Case: Williamson, living in Great Britain, gave an interview in Germany to Swedish TV in which he **denied the existence of gas chambers** and the murder of six million Jews in the Nazi regime. German Courts issued penal orders against him, finding him guilty of incitement to hatred. Williamson appealed relying on Art. 10.
- Ruling: Application was declared **inadmissible**. The German courts did not overstep their margin of appreciation; the (very mild) interference was proportionate to the legitimate aim pursued and was “necessary in a democratic society”.

### Bishop Denies Holocaust - YouTube

<https://www.youtube.com/watch?v=11B6qDv8FNs> ▼ [Diese Seite übersetzen](#)



05.02.2009 - Hochgeladen von CBS

"CBS News RAW:" Bishop **Richard Williamson**, who Pope Benedict XVI ... excommunication, says that he ...

### Holocaust-denying bishop loses case against German conviction - DW

<https://www.dw.com/en/holocaust-denying.../a-47306452> - [Diese Seite übersetzen](#)



31.01.2019

**Richard Williamson** had been fined €1,800 (\$2,066) for denying there were gas chambers in Nazi Germany's ...

# What about Strasbourg?

## - and again a German issue ...

- BILD and AXEL SPRINGER v. Germany (nos. 62721/13 and 62741/13)
  - Case facts: concerned an order issued by a German civil court against German newspaper BILD by means of a ban on the publication and distribution of a photograph of the well-known Swiss journalist Jörg Kachelmann, which shows him during his stay in custody.
  - ECtHR rejected the appeal of BILD and did not hold a breach of violation of the ECHR. In the Court's view, although the photograph was not defamatory, it was taken in a situation in which the Kachelmann could not have expected to be photographed. The judges in Strasbourg concluded that the German courts had properly weighed in their decisions the plaintiff's right to freedom of expression against the TV presenter's right to privacy.



Institut für Europäisches Medienrecht  
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Institut du droit européen des médias

Franz-Mai-Straße 6  
66121 Saarbrücken  
Deutschland

Telefon +49/681/99275-11  
Telefax +49/681/99275-12  
Mail [emr@emr-sb.de](mailto:emr@emr-sb.de)  
Web [europaeisches-medienrecht.de](http://europaeisches-medienrecht.de)