

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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- Assignment of radio frequencies for digital terrestrial television broadcasting for the benefit of operators which already had analogue broadcasting radio frequencies and operated analogue channels
- Background: In a reasoned opinion of 19 July 2007, the Commission found the Italian legislation, by allowing only operators which were already broadcasting in analogue mode to have access to the digital radio and television market, shielded them from competition on that market. The Italian Government adopted a number measures in order to make that legislation compatible with EU law
- CJEU judgement
 - 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 threshold
 - “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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