



JUDICIARY OF
ENGLAND AND WALES

**The continuing relevance of CJEU copyright case law:
the example of “communication to the public”**

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Article 8 of the WIPO Copyright Treaty

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Agreed statement:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. ...

Article 3 of the Information Society Directive 2001/29/EC

Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

...

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Article 3 of the Information Society Directive 2001/29/EC

Recitals:

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

Section 20 of the Copyright, Designs and Patents Act 1988

Infringement by communication to the public

- (1) The communication to the public of the work is an act restricted by the copyright in—
 - (a) a literary, dramatic, musical or artistic work,
 - (b) a sound recording or film, or
 - (c) a broadcast.

- (2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include—
 - (a) the broadcasting of the work;
 - (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

Pre-Brexit case law of the Court of Justice of the European Union

As at 31 December 2020 the meaning of the expression “communication to the public” had been considered by the CJEU in a series of 25 judgments (including three Grand Chamber judgments) and reasoned orders spanning some 14 years:

- 1) Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECR I-11519 (“SGAE”);
- 2) Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia* [2010] ECR I-37 (“Organismos”);
- 3) Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* [2010] ECR I-13971 (“Bezpečnostní”);
- 4) Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083 (“FAPL”);
- 5) Joined Cases C-431/09 and C-432/09 *Airfield NV v Belgische Vereniging van Auteurs, Compositien en Uitgevers CVBA (SABAM)* [2011] ECR I-9363 (“Airfield”);
- 6) Case C-283/10 *Circul Globus Bucuresti (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)* [2011] ECR I-12031 (“Circul”);

Pre-Brexit case law of the CJEU

- 7) Case C-135/10 *Società Consortile Fonografici (SCF) v Del Corso* [EU:C:2012:140] (“SCF”);
- 8) Case C-162/10 *Phonographic Performance (Ireland) Ltd v Ireland* [EU:C:2012:141] (“PPIL”);
- 9) Case C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* [EU:C:2013:147] (“ITV”);
- 10) Case C-466/12 *Svensson v Retriever Sverige AB* [EU:C:2014:76] (“Svensson”);
- 11) Case C-348/13 *BestWater International GmbH v Mebes* [EU:C:2014:2315] (“BestWater”);
- 12) Case C-351/12 *OSA - Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* [EU:C:2015:110] (“OSA”);
- 13) Case C-151/15 *Sociedade Portuguesa de Autores CRL v Ministério Público* [EU:C:2015:468] (“SPA”);
- 14) Case C 325/14 *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)* [EU:C:2015:764] (“SBS”);
- 15) Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* [EU:C:2016:379] (“Reha”);
- 16) Case C 160/15 *GS Media BV v Sanoma Media Netherlands BV* [EU:C:2016:644] (“GS Media”);

Pre-Brexit case law of the CJEU

- 17) Case C-301/15 *Soulier v Premier Ministre* [EU:C:2016:878] (“*Soulier*”);
- 18) Case C-138/16 *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH* [EU:C:2017:218] (“*AKM*”);
- 19) Case C 527/15 *Stichting Brein v Wullems* [EU:C:2017:300] (“*Filmspeler*”);
- 20) Case C 610/15 *Stichting Brein v Ziggo BV* [EU:C:2017:456] (“*Pirate Bay*”);
- 21) Case C-265/16 *VCAST Ltd v RTI SpA* [EU:C:2017:913] (“*VCAST*”);
- 22) Case C-161/17 *Land Nordrhein-Westfalen v Renckhoff* [EU:C:2018:634] (“*Renckhoff*”);
- 23) Case C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV* [EU:C:2019:1111] (“*Tom Kabinet*”);
- 24) Case C-753/18 *Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim) v Fleetmanager Sweden AB* [EU:C:2020:268] (“*Stim*”);
- 25) Case C-637/19 *BY v CX* [EU:C:2020:863] (“*BY*”).

Case law of the CJEU between 31 December 2020 and 21 March 2021

On 9 March 2021 the Grand Chamber gave judgment number 26: Case C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* [EU:C:2021:181] (“*VG Bild*”).

***TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 (26 March 2021)**

- The 25 pre-Brexit judgments and orders of the CJEU constituted “retained EU case law” (section 6(7) of the European Union (Withdrawal) Act 2018), meaning that they continued to form part of domestic law post-Brexit and continued to bind lower courts: section 6(3) of the 2018 Act.
- The Court of Appeal and the Supreme Court had power to depart from such judgments and orders, but only on the same basis that the Supreme Court had power to depart from one of its own precedents or of one of the House of Lords in accordance with the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234: section 6(5A) of the 2018 Act and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).
- Judgments of the CJEU given after 31 December 2020 did not form part of “retained EU law” and thus were not binding on any UK court or tribunal. A UK court or tribunal could nevertheless “have regard to” such judgments: section 6(2) of the 2018 Act.

TuneIn Inc v Warner Music UK Ltd [2021] EWCA Civ 441 (26 March 2021)

The Court of Appeal should not depart from the pre-Brexit CJEU case law for the following reasons:

- 1) there had been no change in the domestic legislation;
- 2) there had been no change in the international legislative framework, the CJEU had repeatedly stated that Article 3(1) of the Directive should so far as possible be interpreted consistently with the WIPO Treaty and the English courts would take the same approach to section 20 of the 1988 Act;
- 3) interpreting the concept of “communication to the public” was a difficult task due to (a) the absence of guidance in the legislation and (b) the conflict between the broad nature of the right of communication to the public and the global and interconnected nature of the internet; the CJEU had unrivalled experience in confronting this issue in a variety of factual scenarios, and had developed its jurisprudence over time; the jurisprudence was not free from difficulty or criticism, but it did not follow that better solutions were readily to hand;
- 4) there was no academic consensus on these issues;
- 5) case law from common law countries did not assist since the statutory framework differed in those countries and the case law could not be said to offer settled or consistent guidance;
- 6) to return to the drawing board and start all over again would create considerable legal uncertainty.

TuneIn Inc v Warner Music UK Ltd [2021] EWCA Civ 441 (26 March 2021)

***VG Bild* was highly persuasive for the following reasons:**

- 1) it was the CJEU's 26th judgment on the issue, the other 25 constituting retained EU case law the Court had decided not to depart from;
- 2) it built upon and further refined the CJEU's previous jurisprudence;
- 3) it was a decision of the Grand Chamber;
- 4) it was directly relevant to the issues in the instant case;
- 5) it addressed the relationship between the CJEU's earlier decisions in *Svensson* and *Renckhoff*, which the High Court had perceived to be in conflict with each other.

Case law of the CJEU since 26 March 2021

Since 26 March 2021 the CJEU has given four more judgments on communication to the public:

- 27) Case C-597/19 *Mircom International Content Management & Consulting (M.I.C.M.) Ltd v Telenet BVBA* [EU:C:2021:492] (“*Mircom*”);
- 28) Joined Cases C-682/18 and C-683/18 *Peterson v Google LLC* [EU:C:2021:503] (“*YouTube*”);
- 29) Joined Cases C-785/21 and C-826/21 *Blue Air Aviation SA v UCMR – ADA Asociația pentru Drepturi de Autor a Compozitorilor* [EU:C:2023:307] (“*Blue Air*”);
- 30) Case C-426/21 *Ocilion IPTV Technologies GmbH v Seven.One Entertainment Group GmbH* [EU:C:2023:564] (“*Ocilion*”).

Relevance of the new CJEU case law prior to 31 December 2023

- It seems unlikely that the new CJEU case law would make any significant difference to the question of whether the Court of Appeal or Supreme Court should depart from the pre-Brexit case law (which is not to rule out the possibility of such an argument succeeding for other reasons).
- The new case law is of persuasive authority. Exactly how persuasive will inevitably depend on the issues in any case pending before the courts of England and Wales.

Relevance of CJEU case law after 31 December 2023

- It is understood that the Retained EU Law (Revocation and Reform) Act 2023 will be brought fully into force with effect from 31 December 2023.
- Section 4 abolishes the principle of the supremacy of EU law in relation to any enactment or rule of law (whenever passed or made).
- Section 5 provides that after 31 December 2023 “retained EU law” etc will be known as “assimilated law” etc.
- Section 6 makes complex amendments to section 6 of the 2018 Act including:
- “a relevant appeal court is not bound by any retained EU case law (except so far as there is relevant domestic case law which modifies or applies the retained EU case law and is binding on the relevant appeal court)”

Relevance of CJEU case law after 31 December 2023

- “in deciding whether to depart from any retained EU case law ... the higher court concerned must (among other things) have regard to—
 - (a) the fact that decisions of a foreign court are not (unless otherwise provided) binding;
 - (b) any changes of circumstances which are relevant to the retained EU case law;
 - (c) the extent to which the retained EU case law restricts the proper development of domestic law”
- “A higher court may depart from its own retained domestic case law if it considers it right to do so having regard (among other things) to—
 - (a) the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart;
 - (b) any changes of circumstances which are relevant to the retained domestic case law;
 - (c) the extent to which the retained domestic case law restricts the proper development of domestic law.”

Relevance of CJEU case law after 31 December 2023

- “A court or tribunal (other than a higher court) may refer [to the Supreme Court or appropriate appeal court] one or more points of law which arise on retained case law and are relevant to proceedings before it if—
 - (a) it is bound by the retained case law, and
 - (b) it considers that the point or points of law are of general public importance.”
- “Higher court” means the Supreme Court and a relevant appeal court, and “relevant appeal court” and “appropriate appeal court” include the Court of Appeal of England and Wales