

C-279/13 C-More

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What is it about?

- Live broadcasts, reruns, fixations
- Links on website, circumventing paywall
- 5 questions, 4 withdrawn due to Svensson
- Remaining 5th question concerned 46 § Sw. Copyright Act, which provides broader protection for broadcasters than Art 3.2

46 § sec 1 Sw. Copyright Act

Producers of Recordings of Sounds and of Images

A phonographic record, a film or another material support on which sounds or moving images have been recorded may not, without the authorization of the producer, be reproduced or **made available to the public** until 50 years have elapsed from the year in which the recording was made, or, if the recording was published or made public within 50 years from the recording, after the year in which the recording was first published or made public. The transfer of the recording from one such support to another shall also be considered a reproduction.

Art 3 Infosoc Directive

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.
2. Member States shall provide for the exclusive right to authorise or prohibit the **making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: []**
 - d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

The question
(asked by the Sw. Supreme Court)

May the Member States give wider protection to the exclusive right of authors by enabling “communication to the public” to cover a greater range of acts than provided for in Article 3(2) of [the Infosoc Directive]?

Art 3 Infosoc Directive

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

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them **from a place and at a time individually chosen** by them: []

d) for **broadcasting organisations**, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

AUTHORS

WORKS

GENERAL COMMUNICATION TO THE PUBLIC

A RIGHT HARMONIZED ACCORDING TO SVENSSON

RELATED RIGHTS

LIMITED TO THE MAKING AVAILABLE ON DEMAND RIGHT TWO CRITERIA, PLACE AND TIME

The question (according to CJEU)

(28) The referring court asks [] whether Article 3(2) [] is to be understood as **precluding the Member States** also granting the broadcasting organisations referred to in Article 3(2)(d) an exclusive right as regards acts which, such as those at issue in the main proceedings, could be **classified as acts of communication to the public but which do not constitute acts of making available to the public the fixations of their broadcasts in such a way that members of the public may access them from a place and at a time individually chosen by them.**

Recital 7 Infosoc

Only partial harmonization

The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

Recitals 23 and 25 Infosoc

Difference between copyright ad related rights

(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.

(25) The legal uncertainty regarding the nature and the level of protection of acts of **on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level**. It should be made clear that **all rightholders recognised by this Directive** should have an exclusive right to make available to the public copyright works or any other subject-matter by way of **interactive on-demand transmissions**. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

Recital 20 Infosoc

Rental and Lending Directive applies

This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular [Renting and Lending Directive...], and it develops those principles and rules and places them in the context of the information society.

The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

Preamble 16 Renting and Lending Directive

More far reaching protection permitted for related rights

Member States should be able to provide for **more far-reaching protection** for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.

The answer from CJEU

Article 3(2) [] must be interpreted as **not precluding national legislation extending the exclusive right of the broadcasting organisations referred to in Article 3(2)(d) as regards acts of communication to the public which broadcasts of sporting fixtures made live on internet, such as those at issue in the main proceedings, may constitute**, provided that such an extension does not undermine the protection of copyright.

Conclusions

- Broadcasters' protection with regard to live broadcasts depends on national legislation in the Member States
- Communication to the public with regard to authors and works, art 3.1 Infosoc, harmonized according to Svensson
- Communication to the public with regard to related rights NOT harmonized, except for making available on demand, art 3.2 Infosoc, according to C More

An unanswered question...?

- May protection of related rights include a wider range of activities than “communication to the public” under art 3.1 Infosoc?
 - NJA 2000 p 292 Deep linking = public performance
 - Prop 2004/05:110 p 70 f – Deep linking = communication to the public
 - Svensson: Communication to the public harmonized
 - C More “...provided that such an extension does not undermine the protection of copyright”

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