Communication to the Public, Right of Making Available to the Public, and Private Copying

EU perspective

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IFPI – representing recorded music industry worldwide

- More than 1,400 members in 66 countries ranging from major multinational companies to small independent labels, and operating in all countries of the EU

- 45 affiliated national groups

Outline

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2 – Right of making available to the public

- International and European legislation
- Case-law across the EU

3 - Private copying

- CJEU, *Padawan SL v. SGAE* (C-467/08)
- Mediator Vitorino's recommendations

1 - Communication to the public: international legislation

- **Rome Convention, Art. 12**: the right of an equitable remuneration for broadcasting or any communication to the public
- **TRIPS, Art. 14(1), (2) and (6)**
- **WIPO Performance and Phonograms Treaty, Art. 2(g):**

  'communication to the public' of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, 'communication to the public' includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

1 - Communication to the public: European Acquis

- **Rental and Lending Rights Directive 92/100**, Art. 8(2): the right to a single equitable remuneration to be paid by the user for broadcasting or for any communication to the public

- **Copyright Directive 2001/29**, Art. 3(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".

  Note: Art. 3(2): the exclusive right to authorise or prohibit the making available of phonograms to the public

1 - Communication to the public: overview of CJEU case-law

- C-306/05, *SGAE v. Rafael Hoteles SA*
- Joint cases C-403/08 *FAPL* and C429/08 *Karen Murphy*
- Joint cases C-431/09 and C-432/09 *Airfield and Canal Digitaal*
- C-283/10, *Circul Globus Bucuresti*
- C-135/10, *SCF v. Del Corso*
- C-162/10, *Phonographic Performance*
- C-607/11, *ITV Broadcasting*
- C-351/12, *OSA* (pending)
- C-466/12, *Svensson* (pending)

1 - Communication to the public: SCF v. Del Corso (C-135/10)

In Judgement of 15 March 2012 CJEU:

- Responded to a request for a preliminary ruling by the Court of Appeal of Turin (Italy) in case between SCF and Mr. Del Corso, a dental surgeon, concerning the broadcasting of protected phonograms in his dental practice;
- Examined the application of EU law concerning the remuneration rights of record producers when protected phonograms are communicated to the public by way of making broadcast programmes audible to customers/audience present in their premises;
- Analysed Art. 3(2) of Copyright Directive and Article 8(2) of Rental and Lending Rights Directive in view of international treaties;
- Clarified that Article 3(2) of Copyright Directive could apply to cases of interactive transmissions only, whereas acts of non-interactive communication to the public (or broadcasting - like the ones taking place in dental practices and hotel rooms) fall within the field of application of the right to equitable remuneration.

1 - Communication to the public: SCF v. Del Corso (C-135/10)

- The concept of « **communication to the public** » requires individual assessment (on case-by-case basis) (Para 78, SCF v. Del Corso)

- CJEU paid attention to cumulative and interdependant criteria for the concept of « communication to the public »:
  - The role of the user
  - The notion of the relevant public
  - The type of use (i.e. for profit or non-profit)

1 - Communication to the public: SCF v. Del Corso (C-135/10)

- The role of the user (also in view of C-306/05, *SGAE v. Rafael Hoteles):*

- The user makes an act of communication when it intervenes, in **full knowledge of the consequences of its action**, to give access to a broadcast containing the protected work to its customers ("deliberate intervention"; Para 94, SCF v. Del Corso).

- **In the absence of that intervention**, the user's customers, although physically within the area covered by the broadcast, would not, in principle, be able to enjoy the broadcast work. It is sufficient the public **may** have access to the broadcast.

1 - Communication to the public: SCF v. Del Corso (C-135/10)

- The notion of the relevant public:

➢ **Indeterminate number of potential listeners:**

- WIPO glossary: communication to the public means ‘making a work … perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group‘ (Para 85, *SCF v. Del Corso*).

➢ **Fairly large number of people** (Para 84, SCF v. Del Corso)

- *De minimis* threshold (the notion of 'public' does not cover groups of persons that are too small or insignificant).

- In order to determine that number, account must be taken of cumulative effects of making works available to potential audiences: not only of the number of people that can access the work at the same time, but also of the number that can access it in succession ("new public“, as follows from Case C-306/05 *SGAE v. Rafael Hoteles*).

1 - Communication to the public: SCF v. Del Corso (C-135/10)

- The type of use (for profit or non-profit):

- The pursuit of profit is not a necessary condition for the existence of a communication to the public (no such requirement under Art. 8(2) of Rental and Lending Rights Directive, also the international treaties). It can be relevant depending on the circumstances of the case and useful in defining "public" (case-by-case assessment) (Para 79, *SCF v. Del Corso*).

- Other important criteria in view of CJEU case-law, e.g.:
  - The communication of phonograms is an additional service which has an influence on the hotel's standing and, therefore, on the price of rooms (Case C-306/05 *SGAE v. Rafael Hoteles*).
  - Service is likely to attract additional guests (Joint cases C-403/08 *FAPL* and C429/08 *Karen Murphy*).

2 – Right of making available to the public: functioning of Peer-to-Peer (P2P)

- Peer-to-peer involves:
  - Offering content to the public/uploading -> making available right
  - Downloading content -> reproduction right

2 – Right of making available to the public: international and EU legislation

- **WIPO Performances and Phonograms Treaty (1996), Article 14**
- **EU Copyright Directive (2001), Article 3(2):**

"Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, 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."

2 - Right of making available to the public

- The act of « making available » covers the offering of content for access:
  - The mere establishment of a server which may be accessed constitutes the act of making available *(The WIPO Treaties 1996; J.Reinbothe & S.von Lewinski, p.338)*
  - It is not relevant whether any person actually has retrieved the work or not *(Explanatory Memorandum, EU Directive 2001/29, p.33)*
  - An act of making available does not even require that a copy of the phonogram be downloaded *(Oberlandesgericht Köld 9 Sept 2005)*
  - The making available right was tailored to cover permanent downloads but also on-demand streaming of works. *(EU Commisison, report on the application of Directive 2001/29, p.12)*

2 - Right of making available to the public

- « the making available right does not presuppose any constant offer. (…) within the duration of the offer, users must be able to access works and other subject matter at the time individually chosen. » (S.von Lewinski, *Certain legal problems related to the making available of literary and artistic works and other protected subject-matter through digital networks*, UNESCO, e-Copyright Bulletin, January-March 2005, pp. 5-7)

- « Public ». The offering of content on a home page or any server which may be accessed, in particular over the Internet, is covered by the right of making available *(The WIPO Treaties 1996; J.Reinbothe & S.von Lewinski, p. 341)*

2 – Right of making available to the public: application of this right to P2P

- **European Commission report on the application of the Copyright Directive, page 12:**
- *The use of peer-to-peer software to distribute works over the Internet is also subject to the making available right (Polydor & others v. Brown & others, High Court of England and Wales, 2005)*
- *Peer-to-peer sofware allows infringement of the making available right by making available to the public of a significant volume of sound recordings (EMI Sony Universal & others v; Eircom, BT Ireland 2006)*

- **European Commission Staff Working Document on the application of the Copyright Directive** (SEC(2007) 1556), page 4 + Report, p. 20:
- *“<...> "uploading" of works or sound recordings does not fall within the scope of the private copying exception.”*

2 – Right of making available to the public: academic interpretation

- **Jane Ginsburg**, *The (new) right of making available to the public,* Columbia Law School, 2004:

  - "By opening personal hard drives to other users who seek to acquire the music and other "shared" files, a person is making these files available to the public, within the meaning of the WIPO Treaties."

  - "The WIPO Treaties make clear that an act of communication to the public through "making available" occurs when the work is "accessed" by members of the public. Accordingly, it should not matter whether the access occurs from websites or hard drives; whether the files reside on a website or on an open hard drive, they are equally available for accessing. Users who use the sharing technologies would be considered "the public" because any member of the public may acquire and use the file-sharing software; its dissemination is neither limited nor private."

2 – Right of making available to the public: academic interpretation

- **Silke von Lewinski**, *Certain legal problems related to the making available of literary and artistic works and other protected subject-matter through digital networks*, UNESCO, e-Copyright Bulletin, January-March 2005, pp. 5-7:

  - « (…) under many P2P-systems, such a copy is subsequently offered to other users of the file-sharing network as long as the offerer is connected to the internet. This act constitutes a so-called act of 'making available' covered by an exclusive right under Art. 8 WCT and Arts. 10 and 14 WPPT. »

  - « There is no doubt that the millions of simultaneous users of P2P networks who do not even know each others and are all the more far from having, among each others, personal relationships, constitute the 'public' under copyright law. Accordingly, even under the narrowest possible notion of 'public' under existing laws, P2P offers for download by other users are addressed to 'the public'. »

  - « (…) where the user envisages at the same time to make available the downloaded copy for access by the other users of the file-sharing network, or is even obliged to do so under a particular system, the user may not rely on the private use limitation (…). »

2 – Right of making available to the public: case-law across the EU

- Germany
- Italy
- Sweden
- Finland
- United Kingdom
- Ireland

2 – Right of making available to the public: case-law across the EU

- **Germany**

  Hamburg Regional Court (Interlocutory Injunctions, 18 January 2006, of 25 January 2006) banned the defendants from making the music recordings available on a computer for retrieval by other participants in file-sharing systems and thereby making it publicly accessible. The Court held that:

  - Recordings were made available to the public from the defendants' internet connection via file-sharing systems and in this way could be downloaded and listened to, and
  - Defendants had to take responsibility for this infringement of rights when they made their internet connection available to others.

- **Italy**

  Supreme Court Decision of 29 September 2009 on The Pirate Bay (§ 4):

  "any person uploading the work engages in the unauthorized distribution of copyrighted materials via the Internet. In cases when the work is made available on the web "for any purposes and in any form", other than for profit purposes, article 171, para 1, lett. a-bis), Law 633 of April 22, 1941 shall apply. Rather, if distribution of the work via the Internet is for profit purposes, then article 171 ter, para. 2, lett. a-bis) shall apply. (...) A person is punishable under this law if the crime is committed "for profit" (see Supreme Court Rule 149, Division III, 22 November 2006 – 9 January 2007)."

2 – Right of making available to the public: case-law across the EU

- **Sweden**

  The Stockholm District Court (*Pirate Bay* Judgement, 17 April 2009):

  - *"The filesharing service did, consequently, mean that actual making available to the general public of files containing, for example, copyright-protected sound or picture recordings, films or computer software, was carried out by the computer users to an indeterminate number of individuals and not, therefore, a closed circle."*
  - *"The making available which constitutes the principal offence in the indictment is, as far as the original seeder is concerned, completed once he/she uploads the torrent file to The Pirate Bay's website and then starts making the work available to others. Other seeders have completed their individual offences when, after downloading segments of the protected work, they have made it available to others."*

- **Finland**

  The Supreme Court (Judgment 2010): unauthorized uploading of torrent files constitutes making the content available to the public and is illegal:

  "<...> because the torrent files relating to specified content files have been necessary for making the respective content files available to the public, the uploading of a torrent file, in the context of violations committed by means of the Finreactor network, is held to be an act significant in terms of copyright and in terms of the fulfilment of the constituent elements of a copyright violation."

2 – Right of making available to the public: case-law across the EU

- **UK**

  High Court of Justice (*Pirate Bay* Judgement, 20 February 2012) concluded that:

  "The torrent files which are so conveniently indexed, arranged and presented by TPB constitute precisely the means necessary for users to infringe. It is the torrent files which provide the means by which users are able to download the "pieces" of the content files and/or to make them available to others."

  "<...> users are involved as both uploaders and downloaders, it is immaterial whether the act of communication to the public is committed at the place of origination or the place of reception."

2 – Right of making available to the public: case-law across the EU

- **Ireland**

  High Court of Ireland, Judgement of Justice Charleton, 11 October 2010

  EMI, Sony, Universal, Warner Music v. UPC

"...Were UPC, or any other company, to be willing to pursue internet theft by discouraging it through detection and the interruption of transmission, that would clearly be possible. The evidence establishes this with abundant clarity. UPC have presented evidence that their cooperation with a three strikes and then cut off solution, or a diversion solution, or an interruption solution, would be costly and disproportionately difficult. I can accept none of that evidence. It suffices to say that were these solutions to present as economically attractive, UPC would pursue them. In the dispute between EMI and Eircom, which was settled as previously indicated, a pilot project is underway over three months, with a view to determining the final modalities of the solution. This, the evidence establishes, will not cause excessive expense and will, I am convinced by the evidence put before the Court by Mr. Michael Walsh, be possible and practicable. Further, none of the other solutions would be disproportionately expensive in time or expense. None of the contradicting evidence from UPC establishes in any way that I can accept that any such solution would be disproportionately expensive or burdensome. On the contrary, the basic systems of customer interaction are already in place. The excuses given are empty.

2 – Right of making available to the public: case-law across the EU

- **Ireland**

High Court of Ireland - 2012 / 167 JR, EMI / Eircom / Data Protection Commissioner

The judge noted that: “Desiring an activity to remain undetected and having an entitlement to privacy are two entirely different concepts” and agreed with the characterisation that:

"...the activity of peer-to-peer uploading and downloading of copyright materials was a marketplace transaction that could not be distinguished from a trader going and standing on the side of Henry St in Dublin with a box load of DVDs that were copied illegally and offering these to anyone who might come along.“

“An activity of swarm participation for peer-to-peer downloading does not legitimately carry the expectation of privacy. It is flying in the face of commonsense to equate open communication with all corners of the internet for the purpose of illegal downloading of copyright material with interception, with tapping or listening. Those concepts are right to be deprecated as illegal in the circumstances of privacy.

2 – Right of making available to the public: prejudicial impact of file-sharing

Ireland, High Court of Ireland, Judgement of Justice Charleton, 11 October 2010, *EMI, Sony, Universal, Warner Music v. UPC* (§ 8)

"I am satisfied that the business of the recording companies is being devastated by internet piracy. This not only undermines their business but ruins the ability of a generation of creative people in Ireland, and elsewhere, to establish a viable living. It is destructive of an important native industry. While the evidence focused on the recording industry, the retail sector must also be affected by this wholesale theft. Furthermore, the evidence presented convinces me that a substantial portion of the generation now in their teenage years and twenties are actively dissuaded by illegal alternatives from legitimately purchasing music."

"The implications of this are that those involved in creative work will get a substantially, and unfairly, reduced return for the expenditure of their talent in creative work. From the point of view of the recording companies, if there are no profits, and no royalties to artists, the legal sale of recorded music, through the preparation of albums, will cease. "

3 – Private copying: European Acquis

- **Copyright Directive 2001/29, Art. 3(1):**

  "Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

  …

  (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned".

- **Copyright Directive 2001/29, Recital 35:**

  "In certain cases of exceptions or limitations, right holders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. <...>"

3 – Private copying: CJEU, Padawan SL v. SGAE (C-467/08)

Judgement of 21 October 2010 - CJEU's findings:

- Concept of 'fair compensation' is an autonomous concept of EU law and it should be interpreted uniformly in all the Member States that have a private copying exception.
- "Private copying exception" should be interpreted as meaning "fair balance, i.e. "fair compensation" must be calculated on the basis **of** the criterion of harm caused to authors of protected works.
- It is consistent with 'fair balance' to provide that persons who have digital reproduction equipment, devices and media and who make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation, inasmuch as they are able to pass on to private users the actual burden of financing it.
- Digital reproduction equipment, devices and media which are not deemed to be used for private copying by private users should be exempted from "private copying exception" ("professional users").

3 – Private copying: Vitorino's recommendations

Published on 31 January 2013 – key recommendations:

- Private copying levies should not apply to copies made by end users for private purposes in the context of a service that has been licensed to them by right holders;
- Levies should be collected in the country where the end consumer resides (application of the country of destination principle set out in the CJEU's Opus decision);
- Liability for paying levies should be shifted from the manufacturers or importers to the retailers;
- Levies should not apply to professional users;

3 – Private copying: Vitorino's recommendations, cont.

- As an alternative to shifting liability to retailers, an *ex ante* exemption scheme should be adopted;
- Levies should be made visible for the end consumer;
- The notion of harm should be harmonised, meaning that it should reflect the value of additional payments consumers would have made for licensed copies in the absence of an exception;
- There should be more predictability for calculating levies (in particular by introducing strict time limits for tariff setting).

Thank you for your attention