

Sky UK Ltd v Cherrie: Outer House rules on communicating copyright works on Reddit and YouTube.

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Sky UK Ltd v Cherrie: Outer House Rules on Communicating Copyright Works on Reddit and YouTube

A. INTRODUCTION

*Sky UK Ltd v Cherrie*¹ presented the first opportunity for a Scottish court to add to the growing jurisprudence on copyright infringement by means of linking content on the internet. Lady Wolffe’s decision in the Outer House is particularly noteworthy, as Sky’s pursuit of an interim interdict in this case concerned not only material which was protected by a paywall, but also programmes that were available “free to air”. The focal point of this article lies on how the right to communicate a work to the public under section 20 of the Copyright, Designs and Patents Act 1988 (‘CDPA’) was interpreted vis-à-vis decisions of the Court of Justice of the European Union in the context of linking, which are sometimes viewed as difficult to reconcile.

B. FACTS

Sky is a well-known, major provider of pay TV services both via satellite and the internet. In order to view most of Sky’s broadcasts, users need to subscribe to their services and use specific equipment. The exception are programmes broadcast on the Sky Arts channel, which were made free to air in September 2020. Mr Cherrie was a registered user of the free to view Reddit social media platform. As a “redditor”, he would post links and images of Sky programmes to communities—“subreddits”—based on their specific interests. As sole moderator of three subreddits, controlling their content, he encouraged his audience to make requests for links to UK TV programmes to which he provided access via a Google Drive containing hyperlinked copies of the content. The defender also operated his own YouTube channel which he used to upload copies of Sky broadcasts.

Sky alleged that Mr Cherrie’s activities on Reddit and YouTube constituted infringement of their copyright in the broadcasts. He uploaded clickable hyperlinks to and copies of entire episodes of Sky programmes, which were easily identifiable by other users based on the labels Mr Cherrie had attached to them. The broadcasts included both

¹ *Sky UK Ltd v Cherrie* [2021] CSOH 36, 2021 SLT 743.

programmes that were hidden behind a paywall (which made them only available to paying Sky subscribers) and free to air content from the Sky Arts channel. In respect of the latter, “free to air” may suggest that Sky anticipated that this content would be accessible by the public at large. However, the pursuer pointed out that while access did not come at a cost, individuals were still required to create a “Sky Go” account. This came with terms and conditions which account holders had to agree to, specifically a prohibition not to copy, download or transmit content that was not for personal use.

Sky argued that these activities amounted to infringement of sections 17 and 20 of the CDPA. Section 17 concerns copying by making a photograph of the whole or a substantial part of any image forming part of the broadcast (section 17(4)), while section 20 restricts the communication of copies of the broadcasts to the public. In other words, Mr Cherrie provided unauthorised access to view and share Sky programmes: he communicated the content to a “new public” which Sky did not have in mind at the time it was initially made available for viewing. There was evidence of thousands of readers of Mr Cherrie’s subreddits, and just short of one hundred thousand followers—and over 16 million views—of his YouTube channel. While Sky had already made successful requests to YouTube to close Mr Cherrie’s account and to Reddit to take down specified unauthorised content, this proved a “cat-and-mouse” activity, as the defender kept on uploading new material. This led Sky to pursue an interim interdict against Mr Cherrie directly.

C. DECISION

Lady Wolffe had no difficulty in finding that the evidence Sky presented identified the defender as the person behind the alleged breaches of copyright, both in respect of Reddit and YouTube.

The Lord Ordinary also found that Sky had a strong *prima facie* case on the breach of copyright arguments. In respect of the broadcasts behind paywalls, the defender’s activity went well beyond the mere copying of images, which would satisfy the requirements under section 17(4), by copying and making available whole episodes of Sky’s content. Since the content was made available to the public by electronic means which allowed readers of his subreddits to access at a time and in a way suitable to them, there was also a strong case under section 20: Mr Cherrie had clearly enabled a “new public” to access the content without Sky’s authorisation as the rights-holder.

In respect of the free to air Sky Arts channel broadcasts, Lady Wolffe considered the test for the “new public” aspect as part of the communication right under section 20 in more detail. On the question of whether the provision of hyperlinks on one website to copyright works made available on another could be regarded as an “act of communication”, the Lord Ordinary referred to the seminal decision in *Svensson*² where the Court of Justice of the European Union (CJEU) held that “the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works”³ constituted such an act. In respect of the “new public” criterion, the CJEU held in the same decision that:

[...] in order to be covered by the concept of “communication to the public”, [...] a communication [...] concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the Internet, and therefore by the same technical means, must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public)[.]⁴

Lady Wolffe pointed out that the CJEU confirmed its view on a “new public” in *GS Media*⁵ as “a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work”.⁶ Applying these statements to the facts, she focused on the necessity of Sky Arts viewers to download the “Sky Go” app and agree to its terms and conditions, including the ‘personal use only’ restriction. In that manner, Sky retained some control over that channel’s audience without making “those programmes free to the world at large”.⁷ In addition, she agreed with the pursuer’s argument that much of the Sky Arts content was time limited, meaning that many programmes could only be viewed to Sky Go users during a specific time frame. By hyperlinking these programmes, the defender effectively circumvented this second attempt by Sky at retaining control as rights-holder. As a result, the balance of convenience favoured Sky and the interim interdict as duly granted.

² C-466/12 *Svensson v Retriever Sverige AB* EU:C:2014:76.

³ *Ibid* para 18.

⁴ *Ibid* para 24.

⁵ C-160/15 *GS Media BV v Sanoma Media Netherlands BV* EU:C:2016:644.

⁶ *Ibid* para 37.

⁷ *Sky UK Ltd v Cherrie* para 32.

D. DISCUSSION

Lady Wolffe’s judgment will be valued as another strengthening of the position of copyright holders in broadcasts in the seemingly never-ending battle against unwelcome—or unauthorised—sharing of protected content online. Most of this decision centres on the meaning of what constitutes a “new public” for the purpose of the communication right in section 20. As alluded to earlier, this issue has been considered many times in varying contexts by both the CJEU and national—including English—courts, raising questions of where the balance should be struck between rights-holders’ and users’ interests in the era of sharing content online.

The Lord Ordinary’s decision on the content protected by paywall, whereby only paying subscribers should have access to works protected by copyright, seems uncontentious: hyperlinking such content without authorisation clearly constitutes making it available to a new public in view of the CJEU’s decisions in *Svensson* and *GS Media*. However, in respect of the free to air programmes, the position may not be as straightforward, and case law on the issue has been difficult to reconcile. There is a compelling view that free to air means as much, namely available to all free of charge; alternatively, in the present case, that content was indeed available free of charge, but only to Sky Go customers.

At the heart of the matter are competing policy objectives: to allow copyright holders to exercise some form of control in respect of authorising access to content on the one hand, and to allow hyperlinking to support the sharing of information and the functioning of the internet on the other. In *Svensson* and *GS Media*, the CJEU maintained that where content is made available freely online with the authorisation of right holders, making that content available by hyperlinking it via another website would not fulfil the “new public” criterion. However, in those decisions there had not been any attempts by rights-holders to restrict access, unlike in *Sky Ltd v Cherrie* in respect of the Sky Arts channel. The CJEU alluded to “restrictive measures” potentially making a difference in *Svensson*, pointing to situations where content may no longer be available on the original online location, or where access restrictions were introduced subsequently (without stating whether this equates to paywalls or non-monetary restrictions, too).⁸

⁸ *Svensson* para 27.

In *VG Bild-Kunst*,⁹ the CJEU more recently repeated and appeared to build on its view on restricting access. These comments were obiter, made in an equally open and unillustrated manner, maintaining that right holders “cannot be allowed to limit his or her consent by means other than effective *technological* measures”.¹⁰ This raises the question of whether apps and platforms such as the Sky Go app, which come with terms and conditions on how to use content, and the time-limited availability of programmes, be regarded as such “technological” means? McDonagh highlights the demand for Mr Cherrie’s hyperlinks and uploads both on Reddit and YouTube to perhaps go some way to support the view that the Sky Go app constitutes the kind of restrictions the CJEU in *VG Bild-Kunst* could have had in mind.¹¹

The editors of the new issue of *Copinger and Skone James*¹² have proposed introducing the term “limitation” in the discussion of “new public” and “(effective technological) restrictions”, arguing that the better way to address this issue would be to explore what group of users the rights-holder had in mind when providing access to its content, instead of using the open access of content to all as the starting point. They draw on the words by Advocate-General Szpunar’s Opinion in *VG Bild-Kunst*:

The copyright holder takes into account the extent of that *circle of potential users* in authorising the making available of his or her work. This is important in particular when the work is made available under a licence, since the potential number of presumptive visitors may be an important factor in determining the price of the licence.¹³

The *price of the licence* may well be nil, as long as the rights-holder has a clear view of what their target audience may be. In the current case, Sky had different target audiences in mind in respect of access to their offerings: many channels could only be accessed via paid subscription, technical equipment or a Sky account, while individuals who choose to take out subscriptions form the relevant target audience; access is limited by means of a licence, without labelling it as such. Anyone uploading or sharing the programmes to non-subscribers

⁹ C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* EU:C:201:181.

¹⁰ *Ibid* para 46 (emphasis added).

¹¹ D McDonagh, “Sky UK Ltd v Cherrie—blue sky linking?” (2021) Entertainment LR 209.

¹² N Caddick, G Harbottle, U Suthersanen, *Copinger and Skone James on Copyright*, 18th edn (2021) para 7-242.

¹³ *VG Bild-Kunst* para 73.

free of charge would be regarded as introducing that content to a “new public” for the purposes of section 20 of the CDPA. This may be a sensible manner to approach online content sharing from the viewpoint of rights-holders. Whether this decision will act as a deterrent for individuals who regard the internet as a copyright-free zone is another matter.

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