ASPEN CASEBOOK SERIES

INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY

Fourth Edition

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though the national legislature has already transformed relevant provisions of the Convention into national law.

SUISA (SWISS SOCIETY OF AUTHORS AND PUBLISHERS) v. REDIFFUSION AG

Bundesgericht (Swiss Federal Supreme Court), [1982] ECC 481 (BGE 107 II 57), 20 January 1981

Panel: The President, Judge CHATELAIN; Judges RUEDI, STOFFEL, MESSMER and WEYERMANN

Appeal from the Tribunal Cantonal (Cantonal Court), Zurich.

JUDGEMENT: . . .

The issue between the parties is essentially the extent to which the simultaneous retransmission of unaltered broadcasts with the aid of collective aerials requires authorisation from the authors and payment of their royalties. The decision would be the same whether it related only to radio broadcasts or also to television programmes. On the other hand, what must be clarified from the beginning is the meaning to be attached to the term "collective aerial." Indeed it may refer to installations of very different sizes, from the external aerial of an apartment block to a giant network serving an entire town or even region and, in between, a common aerial for several neighbouring houses or a number of districts. (HJ Stern, Die Weiterverbreitung von Radio und Fernsehsendungen, thesis, Zurich 1970, p 36.) In this case there is a large network with wide-spread branches offering some 60,000 subscribers in the Zurich region the broadcasts which are the subject of the dispute.

Section 12 of the Federal Copyright Act (LDA) gives an author the exclusive right to broadcast his work by radio (sub-section (1) no 5) and, in addition, to "communicate [it] publicly either by cable or wireless, if such communication is made by a body other than that which originated it" (no 6), television being treated in the same way as radio broadcasting (sub-section 2). Any person who infringes copyright in respect of any of these provisions is liable, according to section 42, no 1(f) LDA, to civil procedings and prosecution.

In the opinion of the cantonal Court, no such contravention can be found to have occurred in the present case because the defendant does not itself broadcast and confines itself to making technical improvements to reception conditions. The Court's decision argument is that the defendant simultaneously transmits, without alteration, programmes which its subscribers could just as easily receive directly with the aid of private aerials and that, in either case, the user must apply for a licence from the Post Office and pay a fee a share of which intended for authors is already collected by SUISA through the Swiss Radio and Television Corporation (SSR), so that the plaintiff would be seeking to obtain double payment for one and the same service, which constitutes an abuse.

With this reasoning the cantonal Court takes account only of the Federal Copyright Act and neglects, even with regard to foreign broadcasts, the Berne Convention for the protection of literary and artistic works, revised in Brussels on 26 June 1948. . . .

This is why, after all, the parties refer to the origin of the rules adopted by Swiss law, to foreign case law and international attempts to interpret the Convention on these points and to adopt it to technical progress.

(a) In the Rome version of 1928 the Convention reserves to the author the initial radio broadcasting right, and this had to be reconsidered later when it became technically possible to retransmit broadcasts. During the preparatory work of the Brussels Conference on Article 11*bis* of the Berne Convention, there was a proposal to subject any new public communication of the broadcast work, whether by cable or wireless, to a fresh authorisation from the author. This requirement seemed excessive to some delegations, insufficient to others, and was also considered too vague. On a proposal from Belgium, agreement was finally reached on the wording "any public communication," but making the author's authorisation subject to the additional condition: "when this communication is made by a body other than that which originated it" (A Baum, [1949] GRUR 18).

In the plaintiff's opinion this means that there is no requirement for a "new public," but this is disputed by the defendant which considers that the specific words "a body other . . ." aimed, on the contrary, to restrict the author's right even more. However, it does not appear from the proceedings cited by the defendant that the Conference really had this intention. . . . Consequently Article 11*bis*, no 2 of the Berne Convention may apply in cases where the retransmission does not reach a new public, so that it is unnecessary for the reception area of the original broadcast to be enlarged.

Moreover, this is the interpretation given to the preparatory work for the Brussels revision by several writers. . . .

Among Swiss writers, Stern (Thesis, p 58 et seq and in [1975] Film und Recht 773) also accepts that Article 11*bis*, no 2 of the Berne Convention does not presuppose either a new public or an enlargement of the reception area. . . .

(b) The cantonal Court has not taken account of the judgments of foreign courts cited by the parties on the pretext that they cannot constitute precedents in Switzerland. However, in so far as they refer to the Berne Convention they may very well assist in its interpretation. It is true that allowance must be made for the fact that these judgments are based partly on national law which takes priority over the Berne Convention when a contracting State uses the proviso stipulated in Article 11*bis*(2) of the Convention.

The legal situation in Belgium, where the Convention applies as it stands, is instructive. In an action against Coditel, a cable television company, a contravention of Article 11*bis*(1), no 1 of the Berne Convention was sanctioned on 19 June 1979 by the Brussels Appeal Court. Both courts adhered strictly to the letter of the Convention without entering into technical details or into the theory of a new public. . . .

In a case in Feldkirch in Austria judgment was given against a cable television enterprise for infringing copyright. Although the lower courts found that there had only been an enlargement, though only in part, of the direct reception area, the Austrian Supreme Court, in its judgment of 25 June 1974, refused to consider this distinction ([1975] GRUR Int 68-69). In another action against Telesystem, a cable television enterprise, the same Court reached a similar decision on 12 November 1979. The criticism to which these judgments gave rise led to an amendment of the Austrian Act on 2 July 1980. Section 17(3) exempts cable relays of broadcasts by Austrian Radio (ORF) and small collective aerials

serving not more than 500 users from authorisation by the author. Section 59 lays down a statutory licence for the rediffusion of foreign broadcasts. These new provisions clearly differ from the Swiss legislation and are therefore of no assistance to the defendant.

On the other hand the defendant can invoke the case law of Holland, where two actions against Amstelveen, a cable television enterprise, were dismissed. It is true that the Amsterdam District Court accepts that there was "public communication" within the meaning of the Berne Convention, without it being necessary for it to involve a public other than the original public. The Court merely found that there was no "own" publication for the purpose of the Dutch Act. On appeal, the Amsterdam Court of Justice rejected this distinction on 12 June 1980 and upheld the decision of the court of first instance, without taking the Berne Convention into consideration, on the ground that the broadcasts in question could have been just as well received direct with the aid of private aerials.

Two decisions by German courts also provide grist for the defendant's mill because they dismiss actions by GEMA, a copyright management society, against the German Post Office concerning its cable networks in Hamburg and Nuremberg. These judgments, which are said to have been affirmed in the meantime by the German Federal Supreme Court, do not however refer to the Berne Convention. . . .

When these foreign judgments do not simply ignore the Berne Convention, as in Germany or Holland, they all interpret Article 11*bis*, no 2 in the manner described above, as moreover E Ulmer agrees (In [1980] GRUR 584). Consequently foreign case law does not permit this Article to be interpreted contrary to its literal meaning by subjecting its effects to the existence of a new public or an enlarged reception area. Furthermore the decisions of the German courts clearly show how difficult it is to find criteria permitting a distinction to be made between cable television enterprises which come within copyright law and those which do not.

(c) Finally, important guidelines will be found in the international efforts at interpretation and adjustment of the controversial provisions of the Berne Convention. First of all we may cite the Guide de la Convention de Berne published in 1978 by the World Intellectual Property Organisation (WIPO). . . . In June 1977 a group of experts appointed by UNESCO and the WIPO had already decided that the concept of a direct reception area was unknown by Article 11*bis* of the Berne Convention. The same criterion was rejected once again by the same experts in 1980 for the additional reason that cable distribution enterprises always appeal to a different public, even if it remains partly identical, because what use would they have otherwise?

The observations by interest groups are, on the other hand, less convincing. Nevertheless it is clear from their documentation that already for a very long time the international associations of authors' societies of copyright management societies, radio broadcasting organisations and cable distribution enterprises have been conferring together. From this it may be deduced that the rediffusion organisations accept the principle of a copyright fee although, it is true, disputing it in respect of the direct reception area.

As the Federal Copyright Act was amended in 1955 with the specific purpose of harmonising it with the Brussels version of the Berne Convention, which has been said of the latter also applies to the interpretation of section 12(1), no 6 of the Act. . . .

In addition the defendant seeks support in the current proposals for amending the Federal Copyright Act to try to show how the legislature would, according to the defendant, settle the question now by reference to the Convention. . . .

The cantonal Court has not borrowed its theory of the "new public" from the substantive provisions of the Berne Convention, because the point is not referred to at all by the Convention. The Court merely sees it as a suitable opportunity for filling a gap. The defendant also starts from the idea of a gap but the plaintiff, with good reason, denies the gap's existence. . . .

Under no circumstances, therefore, is there any question of providing for a new legal situation which was not regulated either by the Convention or the Federal Copyright Act. What is much more important to decide is whether the protection guaranteed by section 12, no 6 of the Act can be coupled with a new restriction at the expense of authors. As the reply is in the negative, this Court will abide by the Berne Convention and Swiss legislation which, for the retransmission of a work broadcast by radio, lay down no other condition for the exercise of copyright than a public communication by a body other than the originating body, irrespective of whether the direct reception area is enlarged or not. . . .

NOTES AND QUESTIONS

1. The cable company argues that by requiring it to pay a copyright fee, the Court will award the copyright holder a double payment. The Court accepts that this may be true, but says this is a legislative determination based upon the Berne Convention. If a consumer agrees to pay for a subscription service when a public broadcast of the same material is already available, should the copyright holder be entitled to a second payment?
2. The Court refers to decisions in other countries in which the courts have distinguished between larger- and smaller-scale retransmission enterprises. An apartment building owner may install equipment that boosts signal reception from an antenna and retransmits that signal to individual apartments. On what legal basis, if any, might a court or legislature differentiate such small-scale retransmissions from those that require payment of a copyright fee? (The U.S. Copyright Act, for example, makes specific provision for small-scale retransmissions at 17 U.S.C. §111.)

Cable transmission has largely given way to transmission via Internet and service providers. The following case addressed the status of Internet providers being intermediaries in distributing and streaming copyright protected content. The case is noteworthy for its effort to find a balanced solution taking into account fundamental rights at stake.

UPC TELEKABEL WIEN GMBH v. CONSTANTIN FILM VERLEIH GMBH AND WEGA FILMPRODUKTIONSGESELLSCHAFT MBH

Judgment of the Court (Fourth Chamber), 27 March 2014

(Request for a preliminary ruling — Approximation of laws — Copyright and related rights — Information society — Directive 2001/29/EC — Website making cinematographic works available to the public without the consent of the