> "The online exploitation of newspapers and journals in general is directed towards the general public. . . . It may be that at that time publishers maintained electronic data bases offering access for online use within closed networks with limited access. However, these types of exploitation did not relate to publicly accessibly communication networks for broad circles of the general public. Since newspapers and journals are typical mass media, the technical availability of digital copies to few and possibly only commercial users is not susceptible to establish knowledge in the sense of Article 31(4) of the Copyright Act. . . . Graphical applications on screens such as 'Windows' were not used at that time and did not have any relevant impact, even if early types may have been used by certain groups of PC users. Access within electronic data networks was only possible for closed user groups. . . . Accordingly, the online use of newspapers and journals cannot be considered as known in 1984."

Taking into consideration that well-known German periodicals like the *Frankfurter Allgemeine Zeitung*, the *Süddeutsche Zeitung* and the *Spiegel* began offering online versions from 1993 onwards, the court considered this date as relevant, focusing also on the fact the new type of exploitation would hardly have had any economic relevance before that time.

For these reasons the contract of 1986 could not include the grant of digital rights. Since the subsequent amendments of the contract in 1998 and 2000 did not relate to the grant of exploitation rights but only to the payment, they did not affect the granting clauses. The court held:

> "Based on the facts such amendments are not intended or susceptible to modify the general contractual basis between the parties concerning the transfer of images and texts by the plaintiff. The agreements' text reveals that the parties proceeded upon the assumption that the original agreement remained in effect unless it was changed by the subsequent amendment. In such a case the Court considers that the relevant time concerning the question whether a type of exploitation was 'known' can only be the time of the conclusion of the contract in 1986. This was the basis for the grant of rights, which the plaintiff conceded to the defendant."

Accordingly, digital types of exploitation are not included in "old" contracts, even if they are amended subsequently, unless the granting clause is expressly broadened to include such rights, and even if "new" contracts were to include such types of exploitation without an express reference. In the court's view the publisher should have taken care to obtain digital exploitation rights in the subsequent amendments of the contract.

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COPYRIGHT
Broadcasting
LT
Copyright; Digital technology; Germany; Infringement; Online services; Television; Video recordings
"Personal video recorder"
Court of Appeal of Cologne
September 9, 2005
6U 90/35 JurPC Web-DOK 133/2005

Facts: The defendant offered a "PVR" (personal video recorder) service. According to his business idea internet users should select transmissions from TV broadcasts in Germany, which he would digitally store on his server, accessible to the user, who could download and view it at his convenience on his computer's screen. The plaintiff, a German TV broadcaster, asked for an injunction, asserting that the defendant's activities infringed his copyright (that is, the broadcaster's neighbouring rights).

Article 87(1) of the German Copyright Act grants broadcasters exclusive rights in the reproduction and making publicly accessible of their broadcasts.

Held: The court held that the defendant's offer was addressed to the public, because the offer to download transmissions which were stored on the PVR was accessible to everybody:

> "The defendant's customer may watch the transmission 'at a place of his choice', because he could watch it at any place where he kept his personal computer. This may occur 'at any time chosen by him', because the stored transmission is available for download. There is also a 'making accessible' in the sense of the Act, since this criterion is fulfilled through the interactive download . . ., which is made by a customer from the allocated space on the server."

The court held that the defendant infringed also the plaintiff's right of reproduction:

> "Already the storing of the selected TV transmission on the server constitutes a reproduction by the defendant, which falls within the statutory definition of Article 16 of the Copyright Act. Additionally, also the modification of the received program signal by digitisation, which is made in order to render the interactive download possible, falls within the statutory definition, because the use of a work by digitisation involves a reproduction."

However, the court considered that the defendant infringed the plaintiff's rights only in so far as he asked his customers for the payment of a remuneration:

> "The defendant succeeds with the private use defence in the sense of Article 53(1) of the Copyright Act, provided that he supplied his services free of charge. This does not only concern the right of reproduction, but also with regard to the more comprehensive right of making the broadcast publicly accessible, since the transmission of a commissioned reproduction in the sense of Article 53 of the Act does not constitute an infringing exploitation."

Based on Art. 53(1) sentence 1 of the Copyright Act, the individual reproductions of a work by a natural person for private use are allowed. This includes also digital reproductions. The court explained:

> "If the copy is not made by the person who is the addressee of the exception from the copyright in the sense of sentence 1, it is lawful, if the addressee authorises a third person to make the copy in the sense of sentence 2, provided that the reproduction is made without charges (first alternative) or if it is a traditional paper-based reproduction (second alternative)."

In the court's view the defendant, but not his customers, has to be considered as the "maker" of the reproductions:

> "The Court accepts the view that the delimitation between the making of a copy by the addressee of the exception in the sense of Article 53(1) sentence 1 of the Act and having it made by a third person in the sense of sentence of the provision may be blurred in the case of digital reproduction technologies. But based on the facts and taking into account that Article 53 of the Act, which exempts certain activities from a rightholder's exclusive rights, has to be given a narrow interpretation because of its exceptional nature, it has to be assumed that the maker of the digital copies of TV broadcast transmissions is not the defendant's private customer, but the defendant himself."

Accordingly, PVR systems over the internet require the TV broadcaster's authorisation unless they are offered free of charge.

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