

Court of Justice EU, 1 March 2017, CJEU ITV v TV Catchup



COPYRIGHT LAW

National legislation which states that there is no copyright infringement in the case of the immediate retransmission by cable including, where relevant, via the internet, in the area of initial broadcast, of works broadcast on television channels subject to public service obligations is contrary to Article 9 of the Copyright Directive

• in the light of all those considerations, the answer to the third question is that Article 9 of Directive 2001/29, and specifically the concept of “access to cable of broadcasting services”, must be interpreted as not covering, and not permitting, national legislation which provides that copyright is not infringed in the case of the immediate retransmission by cable, including, where relevant, via the internet, in the area of initial broadcast, of works broadcast on television channels subject to public service obligations

25. In the present case, it is common ground that the retransmission at issue in the main proceedings does not fall within the scope of any of the exceptions and limitations set out exhaustively in Article 5 of Directive 2001/29.

26. As regards Article 9 of Directive 2001/29, as the Advocate General noted at [points 37 and 38](#) of his Opinion, it is apparent from that provision, read in the light of recital 60 of that directive, that Article 9 is intended to maintain the provisions applicable in areas other than that harmonised by the directive.

27. Indeed, an interpretation of Article 9 of Directive 2001/29 to the effect that it permits a retransmission, such as that at issue in the main proceedings, without the consent of the authors, in cases other than those provided for in Article 5 of that directive, would run counter not only to the objective of Article 9, but also to the exhaustive nature of Article 5, and, consequently, would be detrimental to the achievement of the principal objective of that directive which is to establish a high level of protection of authors.

28. It is irrelevant whether the protected works were initially broadcast on television channels subject to public service obligations. Indeed, there is no basis in

Directive 2001/29 that would justify affording less protection to those channels’ content.

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Court of Justice EU, 1 March 2017

(T. von Danwitz, E. Juhász, C. Vajda, K. Jürimäe en C. Lycourgos)

JUDGMENT OF THE COURT (Fourth Chamber)

1 March 2017 (*)

(Reference for a preliminary ruling — Directive 2001/29/EC — Harmonisation of certain aspects of copyright and related rights in the information society — Article 9 — Access to cable of broadcasting services — Concept of “cable” — Retransmission of broadcasts of commercial television broadcasters by a third party via the internet — “Live streaming”)

In Case C-275/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 2 June 2015, received at the Court on 8 June 2015, in the proceedings

ITV Broadcasting Limited,

ITV2 Limited,

ITV Digital Channels Limited,

Channel Four Television Corporation,

4 Ventures Limited,

Channel 5 Broadcasting Limited,

ITV Studios Limited

v

TVCatchup Limited (in administration),

TVCatchup (UK) Limited,

Media Resources Limited,

interveners:

The Secretary of State for Business, Innovation and Skills,

Virgin Media Limited,

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 25 May 2016,

after considering the observations submitted on behalf of:

– ITV Broadcasting Limited, ITV2 Limited, ITV Digital Channels Limited, Channel Four Television Corporation, 4 Ventures Limited, Channel 5 Broadcasting Limited, ITV Studios Limited, by J. Mellor QC and Q. Cregan, Barrister, instructed by P. Stevens and J. Vertes, Solicitors,

– TVCatchup (UK) Limited and Media Resources Limited, by M. Howe QC, instructed by L. Gilmore, Solicitor,

– Virgin Media Limited, by T. de la Mare QC, instructed by B. Allgrove, Solicitor,

– the United Kingdom Government, initially by V. Kaye, acting as Agent, C. May QC and J. Riordan,

Barrister, and subsequently by J. Kraehling, acting as Agent, and A. Robertson QC,
– the European Commission, by T. Scharf and J. Samnadda, acting as Agents,
after hearing [the Opinion of the Advocate General](#) at the sitting on 8 September 2016,
gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 9 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10, and corrigendum OJ 2001 L 167, p. 70).

2. The request has been made in proceedings between ITV Broadcasting Limited, ITV2 Limited, ITV Digital Channels Limited, Channel Four Television Corporation, 4 Ventures Limited, Channel 5 Broadcasting Limited and ITV Studios Limited (“the appellants”), on the one hand, and TVCatchup Limited, in administration (“TVC”), TVCatchup (UK) Limited (“TVC UK”) and Media Resources Limited, on the other, concerning the transmission of the appellants’ television broadcasts by the latter via the internet.

Legal context

EU law

3. Recitals 4, 20, 23, 32 and 60 of Directive 2001/29 state:

“(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, [...]

[...]

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives [91/250/EEC, 92/100/EEC, Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), Directives 93/98/EEC and 96/9/EC], 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.

[...]

(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. ...

[...]

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public.[...]

[...]

(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.”

4. Article 1 of Directive 2001/29, entitled “Scope”, provides:

“1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

[...]

(c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;

[...]

5. Under Article 2 of that directive, entitled “Reproduction right”:

“Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

[...]

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.”

6. Article 3 of Directive 2001/29, entitled “Right of communication to the public of works and right of making available to the public other subject matter”, provides:

“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.

[...]

7. Under Article 5 of Directive 2001/29, entitled “Exceptions and limitations”:

“3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

[...]

5 *The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.*”

8. Article 9 of that directive, entitled “Continued application of other legal provisions”, states:

“This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semiconductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.”

United Kingdom law

9. The Copyright, Designs and Patents Act 1988, as amended by the Copyright and Related Rights Regulations 2003 (“the CDPA”), which implemented Directive 2001/29, provides as follows at section 73, entitled “Reception and re-transmission of wireless broadcast by cable”:

“(1) This section applies where a wireless broadcast made from a place in the United Kingdom is received and immediately re-transmitted by cable.

(2) The copyright in the broadcast is not infringed—

(a) if the re-transmission by cable is in pursuance of a relevant requirement, or

(b) if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable and forms part of a qualifying service.

(3) The copyright in any work included in the broadcast is not infringed if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable.[...]”

The dispute in the main proceedings and the questions referred for a preliminary ruling

10. The appellants in the main proceedings are commercial television broadcasters who own copyright under national law in their television broadcasts and in the films and other items which are included in their broadcasts. They are funded by advertising carried in their broadcasts.

11. TVC offered an internet television broadcasting service, permitting its users to receive, via the internet, “live” streams of free-to-air television broadcasts, including television broadcasts transmitted by the appellants in the main proceedings. Following TVC’s being put into administration, its business and services are now carried on by TVC UK, under a licence granted by Media Resources Limited.

12. The appellants in the main proceedings instituted proceedings against TVC before the High Court of Justice (England & Wales), Chancery Division, United Kingdom, for breach of their copyright. That court referred a request for a preliminary ruling concerning the interpretation of the concept of “communication to

the public” in Article 3(1) of Directive 2001/29 to the Court of Justice.

13. Following the judgment of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147), the High Court of Justice (England & Wales), Chancery Division, found that TVC had infringed the copyright of the appellants in the main proceedings by communication to the public. As regards three television channels, namely ITV, Channel 4 and Channel 5, that court found, however, that TVC could rely on a defence under section 73(2)(b) and (3) of the CDPA.

14. The appellants in the main proceedings brought an appeal before the referring court. TVC UK and Media Resources Limited were added as respondents to the proceedings before the referring court.

15. The referring court explains that section 73 of the CDPA provides a defence to an action for infringement of copyright in a broadcast or in any work included in a broadcast, applicable “where a wireless broadcast made from a place in the United Kingdom is received and immediately re-transmitted by cable”. It states that the defence at issue before it does not concern section 73(2)(a) and (3) of the CDPA, under which, *inter alia*, the copyright in the broadcast is not infringed “*if the re-transmission by cable is in pursuance of a relevant requirement*”, but solely section 73(2)(b) and (3) of the CDPA, under which copyright is not infringed “*if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable and forms part of a qualifying service*”.

16. Taking the view that section 73 of the CDPA should be interpreted in the light of Article 9 of Directive 2001/29, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

“On the interpretation of Article 9 of [Directive 2001/29], specifically of the phrase “this Directive shall be without prejudice [to provisions concerning] in particular ... access to cable of broadcasting services”:

(1) Does the quoted phrase permit the continued application of a provision of national law with the scope of “cable” as defined by national law, or is the scope of this part of Article 9 determined by a meaning of “cable” that is defined by EU law?

(2) If “cable” in Article 9 is defined by EU law, what is that meaning? In particular:

(a) Does it have a technologically specific meaning, restricted to traditional cable networks operated by conventional cable service providers?

(b) Alternatively, does it have a technologically neutral meaning which includes functionally similar services transmitted via the internet?

(c) In either case, does it include transmission of microwave energy between fixed terrestrial points?

(3) Does the quoted phrase apply (1) to provisions which require cable networks to retransmit certain broadcasts or (2) to provisions which permit the retransmission by cable of broadcasts (a) where the

retransmissions are simultaneous and limited to areas in which the broadcasts were made for reception and/or (b) where the retransmissions are of broadcasts on channels which are subject to certain public service obligations?

(4) If the scope of “cable” within Article 9 is defined by national law, is the provision of national law subject to the EU principles of proportionality and fair balance between the rights of copyright owners, cable owners and the public interest?

(5) Is Article 9 limited to the provisions of national law in force at the date on which the Directive was agreed, the date it entered into force or its last date for implementation, or does it also apply to subsequent provisions of national law which concern access to cable of broadcasting services?”

Consideration of the questions referred

The third question

17. By its third question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 9 of Directive 2001/29, and specifically the concept of “access to cable of broadcasting services”, must be interpreted as covering and permitting national legislation which provides that copyright is not infringed in the case of the immediate retransmission by cable, including, where relevant, via the internet, in the area of initial broadcast, of works broadcast on television channels subject to public service obligations.

18. In this connection, it should be noted that, in the absence of any express reference to the laws of the Member States, the concept of “access to cable of broadcasting services”, in Article 9 of Directive 2001/29, must be given an autonomous and uniform interpretation throughout the European Union which takes into account the wording of that provision, its context and the objectives of the legislation of which it forms part (see, to that effect, [judgments of 21 October 2010, Padawan, C-467/08, EU:C:2010:620](#), paragraph 32, and of 10 November 2016, Private Equity Insurance Group, C-156/15, EU:C:2016:851, paragraph 39 and the case-law cited).

19. In the first place, it is apparent from the very term “access to cable” that that concept is different from that of “retransmission by cable”, since only the latter concept designates, within the framework of Directive 2001/29, the transmission of audiovisual content.

20. In the second place, as regards the context of Article 9 of Directive 2001/29, as the Advocate General noted at [point 55](#) of his Opinion, that directive already contains, in Article 1(2)(c), a provision which deals expressly with “cable retransmission”, and excludes from the scope of that directive the provisions of EU law governing that question, in this instance, those of Directive 93/83.

21. In so far as the point needs to be made, it should be noted that the provisions of Directive 93/83 are irrelevant to the main proceedings. The main proceedings concern a retransmission within one Member State whereas Directive 93/83 provides for minimal harmonisation of certain aspects of protection

of copyright and related rights solely in the case of communication to the public by satellite or cable retransmission of programmes from other Member States ([judgment of 7 December 2006, SGAE, C-306/05, EU:2006:764](#), paragraph 30).

22. In the third place, as regards the objective of Directive 2001/29, the principal objective of that directive is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public (see, to that effect, [judgment of 4 October 2011, Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631](#), paragraph 186).

23. Having regard to that high level of protection of authors, the Court — ruling on a question referred in the action at first instance from which the main proceedings have arisen — held that the concept of “communication to the public” in Article 3(1) of Directive 2001/29 must be interpreted broadly, as recital 23 of that directive expressly states, and that a retransmission by means of an internet stream, such as that at issue in the main proceedings, constitutes such a communication (see, to that effect, [judgment of 7 March 2013, ITV Broadcasting and Others, C-607/11, EU:C:2013:147](#), paragraphs 20 and 40).

24. It follows that, in the absence of the consent of the author concerned, such a retransmission is not, as a rule, permitted, unless it falls within the scope of Article 5 of Directive 2001/29, which sets out an exhaustive list of exceptions and limitations to the right of communication to the public established in Article 3 of that directive, as recital 32 thereof confirms.

25. In the present case, it is common ground that the retransmission at issue in the main proceedings does not fall within the scope of any of the exceptions and limitations set out exhaustively in Article 5 of Directive 2001/29.

26. As regards Article 9 of Directive 2001/29, as the Advocate General noted at [points 37 and 38](#) of his Opinion, it is apparent from that provision, read in the light of recital 60 of that directive, that Article 9 is intended to maintain the provisions applicable in areas other than that harmonised by the directive.

27. Indeed, an interpretation of Article 9 of Directive 2001/29 to the effect that it permits a retransmission, such as that at issue in the main proceedings, without the consent of the authors, in cases other than those provided for in Article 5 of that directive, would run counter not only to the objective of Article 9, but also to the exhaustive nature of Article 5, and, consequently, would be detrimental to the achievement of the principal objective of that directive which is to establish a high level of protection of authors.

28. It is irrelevant whether the protected works were initially broadcast on television channels subject to public service obligations. Indeed, there is no basis in Directive 2001/29 that would justify affording less protection to those channels” content.

29. In the light of all those considerations, the answer to the third question is that Article 9 of Directive

2001/29, and specifically the concept of “access to cable of broadcasting services”, must be interpreted as not covering, and not permitting, national legislation which provides that copyright is not infringed in the case of the immediate retransmission by cable, including, where relevant, via the internet, in the area of initial broadcast, of works broadcast on television channels subject to public service obligations.

The first, second, fourth and fifth questions

30. In the light of the answer given to the third question, there is no need to answer the first, second, fourth and fifth questions.

Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 9 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, and specifically the concept of “access to cable of broadcasting services”, must be interpreted as not covering, and not permitting, national legislation which provides that copyright is not infringed in the case of the immediate retransmission by cable, including, where relevant, via the internet, in the area of initial broadcast, of works broadcast on television channels subject to public service obligations.

OPINION OF ADVOCATE GENERAL

SAUGMANDSGAARD ØE

delivered on 8 September 2016 (1)

Case C-275/15

ITV Broadcasting Limited,

ITV2 Limited,

ITV Digital Channels Limited,

Channel Four Television Corp.,

4 Ventures Limited,

Channel 5 Broadcasting Limited,

ITV Studios Limited

v

TVCatchup Limited (in administration),

TVCatchup (UK) Limited,

Media Resources Limited

interveners:

Secretary of State for Business,

Innovation and Skills,

Virgin Media Limited

(Request for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division), United Kingdom)

(Reference for a preliminary ruling — Harmonisation of certain aspects of copyright and related rights in the information society — Directive 2001/29/EC — Article 9 — Concepts of “cable” and “access to cable of

broadcasting services” — Retransmission of television broadcasts by a third party through an internet stream in their area of reception — Live streaming)

I – Introduction

1. The present request for a preliminary ruling referred by the Court of Appeal (England and Wales) (Civil Division), United Kingdom, concerns the interpretation of Article 9 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, (2) which provides that that directive is to be without prejudice to provisions applicable in certain other areas. In particular, the referring court asks the Court about the interpretation of the expression “access to cable of broadcasting services”, referred to in that article as being one of the areas reserved by Directive 2001/29.

2. The request for a preliminary ruling was submitted in proceedings brought by a number of commercial television broadcasters, which claim that the providers of a retransmission service that allows users to receive, free of charge, via live streaming, television broadcasts including those broadcast by the appellants infringe the appellants’ copyright in their television broadcasts.

3. The Court had already received a request for a preliminary ruling in connection with the same dispute. In the judgment of 7 March 2013, *ITV Broadcasting and Others*, (3) the Court ruled that a retransmission by the providers of the service at issue constitutes a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29.

4. Following that judgment, the court hearing the action at first instance held that the providers of the service at issue infringed the appellants’ copyright. It held, however, in respect of some of the broadcasts concerned, that the providers could rely on a provision laid down in United Kingdom law which allows the retransmission by cable of certain broadcast works in their area of reception.

5. The appellants contested that decision before the referring court, which asks the Court, in essence, whether such a national provision, which limits the exclusive right, conferred by Directive 2001/29 on copyright holders, to authorise or prohibit any communication to the public, is compatible with that directive. It is common ground that the disputed retransmissions do not fall within any of the exceptions provided for in Article 5 of the directive.

6. More specifically, the referring court seeks to ascertain whether the provision concerned may continue to be applicable under Article 9 of Directive 2001/29, on the ground that it may be regarded as relating to “access to cable of broadcasting services”. The referring court also raises questions relating to the interpretation of the concept of “cable” used in that article, in order to determine whether EU law precludes the application of the provision concerned with respect to the retransmissions streamed over the internet.

II – Legal framework

A – EU law

7. Recital 60 of Directive 2001/29 states:

“The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.”

8. As provided in Article 1(1), under the heading “Scope”, Directive 2001/29 concerns “the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society”.

9. Article 9 of that directive, headed “Continued application of other legal provisions”, states:

“This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semiconductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.”

B – United Kingdom law

10. Section 73(1), (2)(b) and (3) of the Copyright, Designs and Patents Act 1988 (“the CDPA”), under the heading “Reception and retransmission of wireless broadcast by cable”, provides, in the version applicable to the main proceedings:

“(1) This section applies where a wireless broadcast made from a place in the United Kingdom is received and immediately retransmitted by cable.

(2) The copyright in the broadcast is not infringed—

...

(b) if and to the extent that the broadcast is made for reception in the area in which it is retransmitted by cable and forms part of a qualifying service.

(3) The copyright in any work included in the broadcast is not infringed if and to the extent that the broadcast is made for reception in the area in which it is retransmitted by cable ...”

11. It is apparent from the order for reference that section 73(1), (2)(b) and (3) of the CDPA, as cited above, is the result of an amendment of that Act in 2003 with a view to the implementation of Directive 2001/29 in United Kingdom law.

III – The main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

12. The appellants in the main proceedings, ITV Broadcasting Limited, ITV2 Limited, ITV Digital Channels Limited, Channel Four Television Corp., 4 Ventures Limited, Channel 5 Broadcasting Limited and ITV Studios Limited (“the appellants in the main proceedings”), are commercial broadcasters of free-to-air television which hold, under United Kingdom law, copyright in their television broadcasts and in the films and other works and subject matter included in their broadcasts. They are funded by advertising carried in their broadcasts.

13. The appellants in the main proceedings brought an action against TVCatchup Limited before the High Court of Justice of England and Wales, Chancery Division, United Kingdom, claiming that the service provided by that company, which permits its users to receive over the internet, free of charge, “live” streams of television broadcasts (known as “live streaming”), including those transmitted by the appellants in the main proceedings, infringes their copyright. The services at issue are also funded by advertising.

14. The High Court of Justice of England and Wales, Chancery Division, referred to the Court a first request for a preliminary ruling, concerning the interpretation of the concept of “communication to the public” in Article 3(1) of Directive 2001/29.

15. By judgment of 7 March 2013, *ITV Broadcasting and Others*, (4) the Court ruled:

“The concept of “communication to the public”, within the meaning of [Directive 2001/29], must be interpreted as meaning that it covers a retransmission of the works included in a terrestrial television broadcast

– where the retransmission is made by an organisation other than the original broadcaster,

– by means of an internet stream made available to the subscribers of that other organisation who may receive that retransmission by logging on to its server,

– even though those subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver.”

16. Following that judgment, the High Court of Justice of England and Wales, Chancery Division, held that TVCatchup Limited had infringed the copyright of the appellants in the main proceedings and granted injunctions to prevent further infringements of that copyright.

17. With respect to three television channels, namely ITV, Channel 4 and Channel 5, that court held, however, that TVCatchup Limited could rely on a defence under section 73(2)(b) and (3) of the CPDA in so far as it streamed those channels over the internet to subscribers in the area of the original transmission. In that regard, the court considered that the expression “retransmitted by cable”, used in Article 73(2)(b) and (3) of the CDPA, was broad enough to cover retransmission over the internet, but not retransmission to mobile devices using mobile telephone networks.

18. The appellants in the main proceedings appealed to the Court of Appeal (England and Wales) (Civil Division). In the course of the proceedings before that court, TVCatchup Limited was placed in administration. The business previously carried on by TVCatchup Limited is now operated by TVCatchup (UK) Limited under a licence granted by Media Resources Limited. The latter two companies sought and were granted leave to intervene in the appeal.

19. Being of the view that section 73 of the CDPA must be interpreted in the light of Article 9 of Directive 2001/29 and that the present case raises questions relating to the scope of that article, the referring court

decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

“On the interpretation of Article 9 of [Directive 2001/29], specifically of the phrase “this Directive shall be without prejudice in particular to ... access to cable of broadcasting services”:

1. *Does the quoted phrase permit the continued application of a provision of national law with the scope of “cable” as defined by national law, or is the scope of this part of Article 9 determined by a meaning of “cable” that is defined by EU law?*

2. *If “cable” in Article 9 is defined by EU law, what is that meaning? In particular:*

(a) *Does it have a technologically specific meaning, restricted to traditional cable networks operated by conventional cable service providers?*

(b) *Alternatively, does it have a technologically neutral meaning which includes functionally similar services transmitted via the internet?*

(c) *In either case, does it include transmission of microwave energy between fixed terrestrial points?*

3. *Does the quoted phrase apply (1) to provisions which require cable networks to retransmit certain broadcasts or (2) to provisions which permit the retransmission by cable of broadcasts (a) where the retransmissions are simultaneous and limited to areas in which the broadcasts were made for reception and/or (b) where the retransmissions are of broadcasts on channels which are subject to certain public service obligations?*

4. *If the scope of “cable” within Article 9 is defined by national law, is the provision of national law subject to the EU principles of proportionality and fair balance between the rights of copyright owners, cable owners and the public interest?*

5. *Is Article 9 limited to the provisions of national law in force at the date on which the Directive was agreed, the date it entered into force or its last date for implementation, or does it also apply to subsequent provisions of national law which concern access to cable of broadcasting services?”*

20. Written observations were lodged by the appellants in the main proceedings, TVCatchup (UK) Limited, the United Kingdom Government and the European Commission. The appellants in the main proceedings, Virgin Media Limited, the United Kingdom Government and the Commission were represented at the hearing on 25 May 2016.

IV – Legal assessment

A – The judgment in *ITV Broadcasting and Others* and the subject matter of the present request for a preliminary ruling

21. By its judgment of 7 March 2013, *ITV Broadcasting and Others*, (5) which provides the backdrop to the present request for a preliminary ruling, the Court held that a retransmission such as those made by the respondents in the main proceedings is a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29. (6)

22. It follows that such a retransmission may not be made without the consent of the copyright holder,

unless the retransmission satisfies the conditions laid down in Article 5 of that directive. (7)

23. The national legislation concerned, namely section 73(2)(b) and (3) of the CDPA, establishes in my view an exception to the right of communication laid down in Article 3 of Directive 2001/29 in that it provides that the copyright “is not infringed” where certain broadcast works are retransmitted in the area for which they were intended. (8) That finding is confirmed by the fact that, in formal terms, section 73(2)(b) and (3) of the CDPA is, according to the referring court, specifically classified in national law as an “exception” and a “defence to infringement of copyright”.

24. It is apparent from the order for reference that none of the parties claims that that legislation falls within any of the exceptions listed in Article 5 of Directive 2001/29.

25. As the referring court states, the main issue that arises is therefore whether such legislation falls within Article 9 of Directive 2001/29, on the ground that it may be regarded as concerning “access to cable of broadcasting services” within the meaning of that article. (9)

26. Accordingly, I propose that the Court should deal in the first place with the third question referred for a preliminary ruling, which relates, in essence, to that main issue.

27. As formulated, the third question relates both to provisions which require the retransmission of certain broadcast works and to those permitting the retransmission by cable of broadcast works “(a) where the retransmissions are simultaneous and limited to areas in which the broadcasts were made for reception and/or (b) where the retransmissions are of broadcasts on channels which are subject to certain public service obligations”. (10) It is apparent from the order for reference, however, that the national legislation concerned does not require any retransmission and, moreover, that it applies only in situations where retransmission is limited to areas in which the broadcasts were made for reception. (11)

28. I am therefore of the view that the third question must be reformulated as seeking to ascertain whether Article 9 of Directive 2001/29 must be interpreted as meaning that legislation, such as section 73(2)(b) and (3) of the CDPA, which permits the retransmission by cable of broadcasts, without the consent of the copyright holders, where the retransmissions are simultaneous and limited to areas in which the broadcasts were made for reception, and where the retransmissions are of broadcasts on channels which are subject to certain public service obligations, falls within the scope of that provision, and in particular of the expression “access to cable of broadcasting services”. (12)

29. In the following analysis, I shall set out the reasons why I consider that legislation such as section 73(2)(b) and (3) of the CDPA does not fall within the reservation provided for in Article 9 of Directive 2001/29 (Part B). That conclusion is inevitable owing to the nature and scope of Article 9 (Part B.2) and also

to the fact that such legislation does not concern “access to cable of broadcasting services” within the meaning of that article (Part B.3).

30. It follows from that analysis that there is no need to rule on the other questions raised by the referring court, concerning the scope *ratione temporis* of Article 9 of Directive 2001/29 (fifth question) and the interpretation of the concept of “cable” used in that article (first, second and fourth questions). Nonetheless, in case it should be of use, I will make a number of observations on the interpretation of the concept of “cable”, in order to respond to the arguments put forward in that respect by the parties (Part C). (13)

31. So far as concerns point (c) of the second question, which seeks to ascertain whether the concept of “cable” includes transmission of microwave energy between fixed terrestrial points, the referring court has provided no explanation of the reasons that led it to consider it necessary to refer that question to the Court. Nor can such an explanation be inferred from the order for reference or the observations submitted to the Court, which contain no information to the effect that the retransmissions at issue involve the transmission of microwave energy between fixed terrestrial points. I therefore propose that the Court should find, in accordance with settled case-law, that point (c) of the second question is inadmissible. (14)

B – The interpretation of Article 9 of Directive 2001/29 and of the expression “access to cable of broadcasting services” (third question)

32. By its third question, the referring court asks the Court, in essence, whether legislation such as section 73(2)(b) and (3) of the CDPA falls within the scope of Article 9 of Directive 2001/29 and, in particular, of the expression “access to cable of broadcasting services”.

1. The proposed interpretations

33. The referring court, which is uncertain as to the meaning of the expression “access to cable of broadcasting services”, used in Article 9 of Directive 2001/29, presents three possible interpretations of that expression in the order for reference.

34. According to a first approach, corresponding to the position taken by the appellants in the main proceedings and the Commission, the expression “access to cable of broadcasting services” concerns only the provisions that require cable operators to provide broadcasting services, that is to say, the provisions relating to the “must carry” obligations within the meaning of Article 31 of Directive 2002/22/EC (“the Universal Service Directive”). (15)

35. According to a second approach, corresponding to the position taken by TVCatchup (UK) Limited, Virgin Media Limited and the United Kingdom Government, Article 9 of Directive 2001/29 applies both to the provisions that require cable operators to retransmit certain broadcast content and to those that permit, in the interest of the public service, the retransmission of certain content within the area in which it was meant to be received.

36. According to a third approach, the expression “access to cable” in Article 9 of Directive 2001/29

refers not to a defence against copyright infringement but rather to access to the physical infrastructure in the Member States.

2. The reservation introduced by Article 9 of Directive 2001/29

37. As stated in its heading and in its wording, Article 9 of Directive 2001/29 concerns the “continued application of other provisions” and provides that that directive is to be “without prejudice to” provisions in certain areas. Recital 60 of the directive explains that the provisions referred to in Article 9 are those connected with “other areas” and which “may affect the protection of copyright or related rights”. (16)

38. Article 9 of Directive 2001/29 thus does not in the slightest permit exceptions to the rights established by Articles 2 to 4 of the directive. The exceptions are, moreover, the subject of exhaustive harmonisation under Article 5 of the directive. (17) The objective pursued by Article 9 is, on the contrary, to maintain the effect of the provisions applicable in certain areas other than the area harmonised by the directive. (18) That reading is confirmed by the list of areas in Article 9, which refers, *inter alia*, to trade marks, design rights, protection of national treasures, laws on restrictive practices and unfair competition, data protection and privacy, and the law of contract. (19)

39. That in itself means that legislation, such as section 73(2)(b) and (3) of the CDPA, which provides for an exception to the exclusive right of communication enshrined in Article 3 of Directive 2001/29 cannot fall within Article 9 of that directive.

40. That conclusion holds good irrespective of whether the retransmission of the protected works is made by cable or streaming on the internet. It is thus clear from the Court’s case-law that the concept of “communication to the public”, within the meaning of Article 3(1) of Directive 2001/29, covers any transmission of the protected works, irrespective of the technical means or process used, (20) and that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question. (21)

41. That case-law is consistent with the objective pursued by Directive 2001/29, namely to adapt the rules on copyright and related rights in the light of the technical development which led to the creation of new forms of exploitation, (22) while ensuring a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. (23) I note that no reward is paid to the copyright holders for the retransmission authorised by section 73(2)(b) and (3) of the CDPA. (24)

42. A contrary interpretation of Article 9 of Directive 2001/29, which would lead to legislation such as that at issue in the main proceedings being brought within its scope, would in my view frustrate the harmonisation objective pursued by Articles 3 and 5 of that directive.

43. Nor can the interpretation which I advocate be undermined by the arguments submitted against it, in particular by the United Kingdom Government.

44. First, the argument raised by the United Kingdom Government at the hearing that the national legislative regimes on the licensing of cable operators, their infrastructure and the retransmission of their broadcasts constitute one of the other areas covered by Article 9 of Directive 2001/29 finds no support in that directive. While provisions relating to the cable infrastructure of the Member States and the conditions of access to the electronic communication market do indeed fall within an area other than that forming the subject matter of the harmonisation effected by that directive, (25) the same does not apply to provisions, such as section 73(2)(b) and (3) of the CDPA, which belong to the very core of the harmonisation provided for in Directive 2001/29, namely the protection of copyright. (26)

45. That conclusion cannot be affected by the fact that the retransmission permitted by the legislation concerned is limited to content broadcast on channels subject to certain public service obligations. In the absence of the slightest indication to that effect in the actual wording of Directive 2001/29 or in the associated travaux préparatoires, I see no reason why such content should be afforded less protection than that provided for in Article 3 of the directive. (27)

46. Second, contrary to the United Kingdom Government's assertion, Article 9 of Directive 2001/29 does not constitute an "outright exclusion from harmonisation". While Article 1 of that directive, headed "Scope", excludes, under paragraph 2, from the harmonisation provided for by the directive certain provisions of the EU acquis which, in the absence of that express exclusion, would fall within the directive's scope, (28) Article 9 seeks not to circumscribe the scope of Directive 2001/29 but rather to ensure legal certainty, (29) by avoiding unexpected legal consequences resulting from adoption of the directive.

47. Third, the objectives pursued by section 73(2)(b) and (3) of the CDPA — namely, according to the United Kingdom Government, to increase consumer choice for public service broadcasting, by allowing consumers to receive such broadcasts in areas suffering from poor terrestrial television reception, and to encourage cable network operators to lay cable infrastructure — cannot have the slightest impact on the interpretation of the scope of Article 9 of Directive 2001/29. (30) I recall, in that regard, that, in the judgment in *ITV Broadcasting and Others*, (31) the Court expressly ruled out the possibility that the retransmissions at issue might be regarded as a mere technical means to ensure or improve reception of the original transmission in its catchment area, in which case they would not constitute, according to the Court's case-law, a "communication to the public" within the meaning of Article 3(1) of Directive 2001/29. In that context, the argument put forward by the United Kingdom Government amounts, in reality, to an invitation to the Court to reverse that case-law, without there being any justification for doing so.

48. In conclusion, there is little doubt in my view that legislation such as section 73(2)(b) and (3) of the

CDPA does not fall within Article 9 of Directive 2001/29.

49. That conclusion applies irrespective of the interpretation of the expression "access to cable of broadcasting services", used in Article 9 of the directive. In the following part I shall show, however, that examination of that expression leads to the same conclusion.

3. The interpretation of the expression "access to cable of broadcasting services" in Article 9 of Directive 2001/29.

50. At first sight, the expression "access to cable of broadcasting services", used in Article 9 of Directive 2001/29, gives the impression that reference is being made to a legal concept well known in the EU acquis. My research suggests, however, that that is not the case.

51. In fact, that expression is used, to my knowledge, only in the travaux préparatoires and the case-law relating to Directive 2001/29 (32) and in Directive 2012/28, (33) as the EU legislature chose, in Article 7 of Directive 2012/28, to reproduce in almost identical terms Article 9 of Directive 2001/29. (34)

52. Notwithstanding the lack of details in those travaux préparatoires and that case-law as to the meaning of the expression "access to cable of broadcasting services", (35) there is little doubt in my view that legislation such as section 73(2)(b) and (3) of the CDPA is not covered by that expression.

53. First, in spite of certain divergences in the various language versions, (36) to my mind it is indisputable that that expression concerns "access" to a "cable". That said, I see no connection between Article 9 of Directive 2001/29, which refers to "access to cable", and the United Kingdom legislation concerned, which provides that a broadcast work may be "retransmitted by cable". It seems to me that the concept of "cable" is used in different contexts in those two pieces of legislation.

54. Whereas Article 9 of Directive 2001/29 refers to a "cable" to which access is requested, the United Kingdom legislation refers to a "cable" which serves as a means of retransmission. In other words, Article 9 of the directive concerns not access by the public to broadcast content, as *TVCatchup (UK) Limited, Virgin Media Limited and the United Kingdom Government* appear to claim, but, rather, access to a network. (37)

55. Second, the equating by *TVCatchup (UK) Limited, Virgin Media Limited and the United Kingdom Government* of the terms "access to cable" and "retransmitted by cable" seems illogical given that Directive 2001/29 already contains, in Article 1(2)(c), a provision which deals expressly with "cable retransmission". (38)

56. Third, in the EU acquis, the words "access to cable" are mainly used, it seems to me, in connection with the question of access between providers to cable networks, (39) which has been harmonised at EU level, in particular by Directive 2002/19/EC ("the Access Directive"). (40)

57. That directive, according to Article 1(1), is intended to harmonise “the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities”. (41) It follows from that article that the Access Directive is part of the common regulatory framework presented in Directive 2002/21/EC (“the Framework Directive”), (42) the aim of which, according to the Commission, is “to encourage competition in the electronic communications markets, to improve the functioning of the internal market and to guarantee basic user interests that would not be guaranteed by market forces”. (43)

58. The most logical interpretation would therefore appear to be the conclusion that the expression “access to cable of broadcasting services”, used in Article 9 of Directive 2001/29, refers to that regulatory framework and, in particular, to the provisions of the Access Directive. (44) I note, incidentally, that the legislative procedures for the Framework Directive and the Access Directive partly overlapped in time with the legislative procedure for Directive 2001/29. (45)

59. I consider, however, that it is sufficient to state that legislation such as section 73(2)(b) and (3) of the CDPA, which does not concern access to a network, is not covered by the expression “access to cable of broadcasting services”, used in Article 9 of Directive 2001/29, without there being any need for the Court to rule on the exact meaning of that expression.

60. Given the foregoing observations, I propose that the Court’s answer to the third question referred for a preliminary ruling should be that legislation which permits the retransmission by cable of broadcasts, without the consent of the copyright holders, where the retransmissions are simultaneous and limited to areas in which the broadcasts were made for reception, irrespective of whether or not the retransmissions are of broadcasts on channels which are subject to certain public service obligations, is not covered by Article 9 of Directive 2001/29.

61. Having regard to the answer which I have just proposed should be given to the third question, that Article 9 of Directive 2001/29 does not apply *ratione materiae* to the national legislation at issue in the main proceedings, I consider that there is no need to rule on the fifth question, concerning the scope *ratione temporis* of that provision.

62. It also follows from that finding that there is no need to address the questions raised by the referring court concerning the interpretation of the concept of “cable” used in Article 9 of Directive 2001/29, namely the first, second and fourth questions. Nonetheless, in case it should be of use, in the following part I shall make some observations on the interpretation of that concept. Those observations make it possible to reject the argument, put forward by TVCatchup and Virgin Media Limited, that that concept is broad enough to include broadcasting by streaming over the internet.

C – The concept of “cable” used in Article 9 of Directive 2001/29 (first, second and fourth questions)

1. The autonomous nature of the concept of “cable”

63. By its first question, the referring court asks, in essence, whether the concept of “cable”, used in Article 9 of Directive 2001/29, is an autonomous concept of EU law.

64. It should be borne in mind that, according to settled case-law, the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union. (46)

65. The wording of Directive 2001/29 makes no reference to national law as regards the meaning of the concept of “cable” in Article 9 of that directive. It follows that that concept must be regarded, for the purposes of applying the directive, as amounting to an autonomous concept of EU law, which must be interpreted in a uniform manner in the European Union.

66. Accordingly, there is no need to answer the fourth question, which does not arise unless the Court should decide that the concept of “cable”, in Article 9 of Directive 2001/29, is not an autonomous concept of EU law.

2. The interpretation of the concept of “cable”

67. By parts (a) and (b) of its second question, which should be examined together, the referring court seeks, in essence, to ascertain whether the concept of “cable” in Article 9 of Directive 2001/29 is linked with a particular technology, being restricted to traditional cable networks operated by conventional cable services providers, or whether, rather, it has a technologically neutral meaning which includes functionally similar services transmitted over the internet.

68. For the following reasons, I shall support the position put forward by the appellants in the main proceedings, the United Kingdom Government and the Commission, that the concept of “cable” within the meaning of Article 9 of Directive 2001/29 is restricted to traditional cable networks.

69. It should be pointed out, first of all, that the concept of “cable” appears not only in Article 9 of Directive 2001/29 but also in Article 1(2)(c), Article 2(e) and Article 3(2)(d) of that directive. (47) It is also used in certain of the directives on which Directive 2001/29 is based, (48) namely Directives 92/100/EEC, (49) 93/83 and 93/98/EEC. (50)

70. In those circumstances, and given the requirements of unity of the EU legal order and its coherence, the concepts used by that body of directives must have the same meaning, unless the EU legislature has expressed a different intention in a specific legislative context. (51)

71. None of the abovementioned directives contains a definition of “cable”. That concept must therefore be interpreted by taking account of its context and the objectives pursued by Directive 2001/29. (52)

72. As regards the context in which the concept of “cable” occurs, it should be observed that that concept is used, in all the directives in question, in the light of

other technologies, in particular “satellite” broadcasting. (53) The words “by wire or over the air, including by cable or satellite”, in Article 2(e) and Article 3(2)(d) of Directive 2001/29, (54) give the impression, moreover, that the concepts of “cable” and “satellite” are, respectively, the sub-categories of the wider concepts of “wire” and “over the air”. (55)

73. As regards the objectives pursued by Directive 2001/29, I recall that the directive was adopted with a view to responding, at EU level, to the issues of protection of copyright and related rights presented by the new services of the information society, made possible by the internet. (56) In that context, it must be assumed that the EU legislature was fully aware of the choice of the terminology used in that directive. In other words, if the EU legislature had intended to give the concept of “cable” within the meaning of Directive 2001/29 a technologically neutral meaning, it must be considered that it would have chosen a more general concept, for example “wire”, or that it would at least have made clear that the concept of “cable” included other technologies, such as transmission by means of the internet. (57)

74. The foregoing considerations as a whole support the conclusion that the concept of “cable”, used in Article 9 of Directive 2001/29, is restricted to traditional cable networks operated by conventional cable service providers. That conclusion is, moreover, in line with the distinction which the Framework Directive and the Access Directive draw between the various types of electronic communications networks. (58)

V – Conclusion

75. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Court of Appeal (England and Wales) (Civil Division), United Kingdom, as follows:

Article 9 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that legislation which permits the retransmission by cable of broadcasts, without the consent of the copyright holders, where the retransmissions are simultaneous and limited to areas in which the broadcasts were made for reception, irrespective of whether or not the retransmissions are of broadcasts on channels which are subject to certain public service obligations, does not fall within the scope of that provision.

judgment of 31 May 2016, Reha Training (C-117/15, EU:C:2016:379, paragraphs 35 to 52).

7 – See, to that effect, judgment of 16 July 2009, Infopaq International (C-5/08, EU:C:2009:465, paragraph 52).

8 – It seems to be undisputed in the main proceedings that the works retransmitted by the respondents are part of a “qualifying service” within the meaning of section 73(2)(b) of the CDPA. See point 10 of this Opinion.

9 – I note that the Court has been given no indication that one of the other areas referred to in Article 9 of Directive 2001/29 would serve as the basis for the national legislation concerned.

10 – Emphasis added.

11 – See point 10 of this Opinion.

12 – It will be recalled that it is settled case-law that, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court, the Court may reformulate the questions referred to it in order to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. See judgments of 26 November 2015, Aira Pascual and Others (C-509/14, EU:C:2015:781, paragraph 22), and of 17 December 2015, Viamar (C-402/14, EU:C:2015:830, paragraph 29).

13 – See points 63 to 74 of this Opinion.

14 – Judgment of 10 March 2016, Safe Interenvíos (C-235/14, EU:C:2016:154, paragraphs 115 and 116).

15 – Directive of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51).

16 – Emphasis added. It is apparent from that recital that Article 9 of Directive 2001/29 covers both national provisions and provisions of EU law. The expression “in particular”, used in that article, indicates that the list of areas not affected by the directive is not exhaustive.

17 – See recital 32 of Directive 2001/29.

18 – This type of legislative measure is by no means exceptional. See Article 13 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20) and, as regards Directive 2012/28/EU, point 51 of this Opinion. See, as regards the scope of Directive 2001/29, Article 1(1) thereof.

19 – Article 9 of Directive 2001/29 refers, in addition, to patent rights, utility models, topographies of semiconductor products, type faces, conditional access, legal deposit requirements, trade secrets, security, confidentiality and access to public documents.

20 – Judgment of 31 May 2016, Reha Training (C-117/15, EU:C:2016:379, paragraph 38 and the case-law cited). See also Article 11bis(1)(ii) of the Berne Convention for the Protection of Literary and Artistic Works as amended on 28 September 1979 and Article 8 of the World Intellectual Property Organisation (WIPO) Copyright Treaty, adopted in Geneva on 20 December 1996.

1 – Original language: French.

2 – Directive of the European Parliament and of the Council of 22 May 2001 (OJ 2001 L 167, p. 10).

3 – C-607/11, EU:C:2013:147.

4 – C-607/11, EU:C:2013:147.

5 – C-607/11, EU:C:2013:147.

6 – See, as regards the concept of “communication to the public”, recital 23 of Directive 2001/29 and

21 – Judgment of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraph 24).

22 – See recitals 5 and 31 of Directive 2001/29, Chapter 2 of the explanatory memorandum for the Commission proposal, presented on 21 January 1998, which led to the adoption of Directive 2001/29 (COM(97) 628 final) and the Green Paper on Copyright and Related Rights in the Information Society, presented by the Commission on 19 July 1995 (COM(95) 382 final, Chapter One, II, A).

23 – Judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 186). See also recitals 4, 9, 10, 31 and 35 of Directive 2001/29 and judgment of 12 September 2006, *Laserdisken* (C-479/04, EU:C:2006:549, paragraph 57).

24 – See, in that regard, Article 5(5) of Directive 2001/29, which is intended to implement the international obligations of the Member States and the European Union (recital 15 of Directive 2001/29 and paragraph 38 of Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000 (OJ 2000 C 344, p. 1)). See, as regards whether the United Kingdom legislation in question is in conformity with the obligations arising under the Berne Convention, Discussion Paper “Broadcasting and copyright in the internal market”, prepared by the Commission in November 1990, III/F/5263/90-EN, point 4.2.27.

25 – It is thus easy to imagine that the provisions prescribing conditions with which electronic communications network providers must comply, including provisions imposing “must carry” obligations on them, pursuant to Article 31(1) of the Universal Service Directive, fall within the scope of Article 9 of Directive 2001/29.

26 – See, as regards the scope of Directive 2001/29, Article 1(1) thereof.

27 – See, as regards the extent of the harmonisation provided for in Article 3 of Directive 2001/29, judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 33 to 41).

28 – Article 1(2)(a) to (e) of Directive 2001/29 refers, in particular, to provisions relating to the following matters: the legal protection of computer programs; rental right, lending right and certain rights related to copyright in the field of intellectual property; copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission; the term of protection of copyright and certain related rights; and the legal protection of databases.

29 – See point 50 of Common Position No 48/2000 (op. cit.) and the Communication of 20 October 2000 from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (SEC/2000/1734 final). Article 9 was not part of the original proposal, presented on 21 January 1998 (op.

cit.), or of the amended proposal, presented on 25 May 1999 (COM(1999) 250 final), that led to the adoption of Directive 2001/29. That article was added by the Council of the European Union during the legislative procedure (see Common Position No 48/2000 (op. cit.)).

30 – As the appellants in the main proceeding have submitted, the United Kingdom Government acknowledged, in a consultation document published on 26 March 2015, that the public-policy rationale for section 73 of the CDPA has become obsolete (Consultation Paper “The balance of payments between television platforms and public service broadcasters”, Department for Culture, Media & Sport, point 10, www.gov.uk/government/consultations/the-balance-of-payments-between-television-platforms-and-public-service-broadcasters-consultation-paper).

31 – Judgment of 7 March 2013 (C-607/11, EU:C:2013:147, paragraphs 28 to 30 and the case-law cited).

32 – See judgment of 29 January 2008, *Promusicae* (C-275/06, EU:C:2008:54, paragraph 11); Opinion of Advocate General Kokott in *Promusicae* (C-275/06, EU:C:2007:454, point 10); and Opinion of Advocate General Sharpston in *Peek & Cloppenburg* (C-456/06, EU:C:2008:21, point 6).

33 – Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (OJ 2012 L 299, p. 5).

34 – Article 7 of Directive 2012/28 also refers to “rules on the freedom of the press and freedom of expression in the media”.

35 – In its Communication to the Parliament of 20 October 2000 on the Common Position of the Council (op. cit.), the Commission observes that Article 9 is “consistent with the Community acquis in the field of copyright and related rights”. It is possible that the Commission is referring here to the fact that other EU acts contain similar provisions. See, as regards Article 13 of Directive 96/9, footnote 18 of this Opinion.

36 – Some language versions of Article 9 of Directive 2001/29 refer to cable which belongs to the broadcasting services (broadcasting organisations) or which is exploited by them. See, in particular, the German version (“Zugang zum Kabel von Sendediensten”) and the English version (“access to cable of broadcasting services”), which seem to have that meaning. See also the Bulgarian, Czech, Danish, Estonian, Latvian, Hungarian, Dutch, Portuguese and Slovakian versions. Other, distinctly less numerous, language versions refer rather to access to cable by the broadcasting services. See, in particular, the Spanish, Greek, Croatian, Lithuanian, Romanian and Finnish versions. On the other hand, the Italian and Polish versions seem to refer to access by cable to the broadcasting services. The meaning of the French version (“l'accès au câble des services de radiodiffusion”) is not clear.

37 – See, in that regard, the distinction which the Commission draws between “the regulation of transmission and the regulation of content” in its

Communication of 26 April 2000, “The results of the public consultation on the 1999 Communications Review and orientations for the new Regulatory Framework” (COM(2000) 239 final, p. 6).

38 – In fact, Article 1(2)(c) refers, indirectly, to the provisions of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), by reproducing in almost identical terms the title of that directive. See recital 20 of Directive 2001/29 and paragraph 8 of the statement of reasons for Common Position No 48/2000 (op. cit.). Directive 93/83 covers only the cable retransmission of programmes from other Member States, as may be seen from Article 1(3) and recital 27 of that directive and also from the judgment of 7 December 2006, SGAE (C-306/05, EU:C:2006:764, paragraph 30).

39 – See, in particular, Commission Communication of 10 November 1999 “Towards a new framework for Electronic Communications infrastructure and associated services — The 1999 Communications Review” (COM(1999) 539 final), point 4.2.4, headed “Access to cable and must-carry rules”. See also Report from the Commission to the European Parliament and the Council “Evaluation of the application of Directive 98/34/EC in the field of information society services” (C(2003) 69 final, footnote 56). See, as regards “Access to infrastructure”, Commission Communication of 26 April 2000 (op. cit.).

40 – Directive of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7).

41 – According to Article 1(1), the aim of the Access Directive “is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits”.

42 – Directive of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33). The Universal Service Directive is part of the same regulatory framework.

43 – Communication from the Commission of 15 December 2003 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, “The future of European Regulatory Audiovisual Policy” (COM(2003) 784 final, p. 9).

44 – The fact that the Commission and the Member States would have been aware of the United Kingdom rules in question during the legislative procedure for Directive 2001/29, as the United Kingdom has emphasised, is not in my view capable of affecting the interpretation of Article 9 of Directive 2001/29.

45 – The proposals that led to the adoption of the Access Directive and the Framework Directive were transmitted to the Council and the European Parliament on 25 and 23 August 2000 respectively. The directives were both adopted on 7 March 2002. By comparison, the proposal for Directive 2001/29 was presented on 21 January 1998, while that directive was adopted on 22 May 2001.

46 – Judgments of 26 April 2012, DR and TV2 Danmark (C-510/10, EU:C:2012:244, paragraph 33 and the case-law cited), and of 9 June 2016, EGEDA and Others (C-470/14, EU:C:2016:418, paragraph 38).

47 – The concept of “cable” also appears in footnote 4 of Directive 2001/29, which relates to recital 20 of the directive and reproduces the title of Directive 93/83 (see the directive in its published version, OJ 2011 L 167, p. 11).

48 – See recital 20 of Directive 2001/29.

49 – Council Directive of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61).

50 – Council Directive of 19 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9).

51 – Judgment of 4 October 2011, Football Association Premier League and Others (C-403/08 and C-429/08, EU:C:2011:631, paragraph 188).

52 – See, to that effect, judgment of 16 June 2016, Kreissparkasse Wiedenbrück (C-186/15, EU:C:2016:452, paragraph 30).

53 – See Article 2(e) and Article 3(2)(d) of Directive 2001/29; Article 6(2) of Directive 92/100; and recital 19 and Article 3(4) of Directive 93/98. Likewise, Article 1(3) of Directive 93/83 distinguishes retransmission by a “cable” from retransmission by a “microwave system”.

54 – See, along very similar lines, Article 6(2) of Directive 92/100 and recital 19 and Article 3(4) of Directive 93/98.

55 – The initial proposal, presented on 21 January 1998 (op. cit.), and the amended proposal, presented on 25 May 1999 (op. cit.), that led to the adoption of Directive 2001/29, did not contain, in the French language version, the term “sans fil” but, rather, the term “voie hertzienne”. That term was amended (in the French version at least) at the initiative of the Council, which opted for the more general term “sans fil” (corresponding to the English “over the air”), which appears in the directive adopted. See Common Position No 48/2000 (op. cit.).

56 – See point 41 and footnote 22 of this Opinion.

57 – In fact, the concept of “internet” was not unknown in the EU acquis at the time when Directive 2001/29 was adopted. See, by way of example, Article 4(2) of the Universal Service Directive and recitals 2, 14, 19, 20 and 32 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

(“Directive on electronic commerce”) (OJ 2000 L 178, p. 1).

58 – See recital 1 of the Access Directive, which distinguishes between “fixed and mobile telecommunications networks”, “cable television networks”, “networks used for terrestrial broadcasting”, “satellite networks” and “internet networks”. See also Article 2(a) of the Framework Directive. I would point out that the legislative procedures for those directives overlapped in part with the legislative procedure for Directive 2001/29. See footnote 45 of this Opinion.