

Copyright, Targeting and Geo-Blocking: The CJEU Stirs the Pot



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The CJEU's recent copyright decision in *Anne Frank* endorses state of the art geo-blocking as an effective way of shielding a website from the different copyright laws of another EU Member State. Although the result on the facts is welcome, the potential implications of the Court's underlying reasoning are less so. At a principled level, the judgment creates post-Brexit divergence with the UK courts' targeting approach to cross-border online copyright infringement.

The EU Position

The *Anne Frank* case concerns a scholarly digital edition of the Anne Frank diaries made available free of charge on a website in Belgium, a country in which copyright in the full diaries has expired. The website owner geo-blocked countries, including the Netherlands, in which parts of the diaries are still in copyright.

Geo-block notwithstanding, the owner of copyright in the diaries (the Anne Frank Fund) sued those involved in the Belgian website project (the Anne Frank Foundation, the Dutch Royal Academy and a Belgian association) in the Dutch courts for infringement of Dutch copyright (specifically, the communication to the public right). The Dutch Supreme Court (Hoge Raad) referred three questions about cross-border copyright infringement to the CJEU.

The Hoge Raad's first question raised the issue of whether a targeting test, familiar from CJEU caselaw on other territorial intellectual property rights, should be applied to the copyright communication to the public right:

“Is Article 3(1) of [Directive 2001/29] to be interpreted as meaning that the publication of a work on the internet is only to be regarded as a communication

to the public in a particular country if the publication is addressed to the public in that country? If so, what factors must be considered in assessing that?”

(The unfamiliar term ‘addressed’ in the first question looks like a quirk of translation. The Dutch language originals use ‘gericht’, which appears to translate readily into the familiar ‘directed’ or ‘targeted’.)

The CJEU, however, did not give a direct answer to that question. By dint of the time-honoured device of reframing and combining the referring court’s questions, it rolled the territoriality question into the labyrinth of its previous substantive jurisprudence on communication to the public. None of that case law was concerned with a cross-border question.

The operative part of its judgment concluded that where a work is in the public domain in some EU Member States but is still in copyright in another, and is published free of charge on a website that implements state of the art geo-blocking designed to prevent access by users from that other Member State, there is no communication to the public under the copyright law of that other Member State. That is the case even if internet users can circumvent the geo-blocking by means of a VPN or similar service.

That is a highly fact-specific formulation. What of the corollary? Does it follow that a website that does not implement geo-blocking necessarily engages the communication to the public right in another Member State? That would imply that mere accessibility of a website on the internet is sufficient to engage the communication to public right of another country; or, which comes to the same thing, that targeting is to be inferred from not geo-blocking.

The CJEU addresses the fact-specific corollary at para 42:

“Indeed, where a work is protected by copyright in only one Member State but is in the public domain in other Member States, any person who knows or ought reasonably to have known that to be the case ... and who publishes the work on a website must ensure that that work is made accessible only to internet users who are liable to access that website from Member States in which the work is in the public domain, so as not to infringe the exclusive and inexhaustible [communication to the public] right of the copyright holder ... in the Member State in which the work is still protected.”

It goes on:

“It follows that such a person is under an obligation to adopt effective technological measures to restrict access to the website solely to those internet users, failing which, given the freely accessible nature of websites, that person would be giving access to the work concerned to all internet users and would thus be infringing that right.”

That starts from either mere accessibility or targeting inferred from lack of geo-blocking, but with the added condition of actual or constructive knowledge of continuing copyright protection in the other Member State. The Court borrowed the knowledge requirement from its CTP jurisprudence on hyperlinks to infringing material on the internet (*G S Media*).

It is unclear whether an equivalent knowledge condition (or indeed some other condition or factor plucked from the CJEU’s voluminous CTP caselaw) would apply in other cross-border factual situations. Nor is it clear whether the CJEU’s approach would apply to websites located in countries outside the EU.

What can be said is that the Court did not apply the conventional targeting test. Targeting requires evidence of positive conduct directed towards the country in question before its local law can be engaged. To the extent that mere accessibility, or targeting inferred from lack of geo-blocking, underlies the CJEU’s reasoning, that either rejects or inverts the targeting test.

The UK position

The *Anne Frank* judgment opens up a post-Brexit divergence of principle with the UK. Five years ago the Court of Appeal in *TuneIn* [2021] EWCA Civ 441 applied the CJEU’s well known intellectual property targeting caselaw to the copyright CTP right:

“...the internet is global and users in the UK can, in the absence of geo-restriction, access websites hosted, and content posted on or streamed from such websites, from anywhere in the world. Intellectual property rights, however, are territorial. At least in the case of copyright and similar rights and trade marks, the CJEU has held that accessibility of a website from a Member State is not sufficient to give rise to an infringement of rights conferred by the

law of that State, and that the relevant act must be targeted at that State: see [L'Oréal v eBay [2011] (trade marks), Donner [EU:C:2012:370] (copyright) and Football Dataco v Sportradar [EU:C:2012:642] (database right)]. This case law has been applied in this jurisdiction to communication to the public: EMI Records Ltd v British Sky Broadcasting Ltd [2013] EWHC 379 (Ch).

The principle is clear: mere accessibility is not sufficient. Nor, it follows, can a website be inferred to be targeting a country by reason of not geo-restricting. That would be mere accessibility in a different guise. (The *Donner* case, to be clear, concerned the copyright distribution right, which is separate from the communication to the public right.)

The status of targeting as a prior threshold condition is well illustrated in Birss J's (as he then was) first instance judgment in *TuneIn*:

"I will address [targeting] first because if TuneIn does not target the UK then UK copyright is not engaged at all." [15]

That fundamental territoriality point (subsequently endorsed by the Court of Appeal) is obscured in the CJEU's approach of combining the Hoge Raad's first question with consideration of substantive CTP law. None of the CJEU caselaw on targeting and the territoriality of IP rights relied on by the Court of Appeal is mentioned in the *Anne Frank* judgment.

In the context of trade marks, the UK Supreme Court in *Lifestyle Equities v Amazon* [2024] UKSC 8 summarised the rationale for the targeting test:

"Led by the CJEU, EU jurisprudence has sought to chart a safe course between the Scylla of watching trade mark protection become entirely illusory in the context of internet marketing and sale, and the Charybdis of creating an exorbitant and unprincipled extension into the international sphere of the territorial jurisdiction to protect trade marks. It has done so by reference to two separate concepts. The first is by treating the advertisement and offering for sale of branded goods in a way which is targeted at a protected territory as a use of the mark in the targeted territory. ..."

The CJEU in *Anne Frank* justified its conclusion in para 50:

“a [state of the art geo-blocking] measure serves to ensure a fair balance between, on the one hand, the interest of the rightholder in his or her work not being freely accessible in the Member States in which he or she still has an exclusive and inexhaustible right to authorise or prohibit any communication of the work to the public under Article 3(1) and (3) of Directive 2001/29 and, on the other hand, the interest of any third party in making the work freely accessible online free of charge in the Member States in which the work is in the public domain as well as the public’s interest in enjoying such access in those Member States, in accordance with both the freedom of expression and the freedom of information.”

However, that recitation of balancing factors appears to assume the conclusion that the legitimate interest of the rightholder is in restraining mere accessibility cross-border. In any event it does not explain why an approach that the CJEU has applied to other territorial intellectual property rights is not appropriate for the copyright CTP right.

Whatever the precise reasoning that may underlie it, the CJEU judgment in *Anne Frank* is for the moment the leading authority on the cross-border aspects of the communication to the public right within the EU. As for the UK courts, as a general matter they are not bound to follow new CJEU judgments although they may have regard to them. However, in any event the formal precedential status of the Court of Appeal judgment in *TuneIn* applying targeting is not altered by the CJEU judgment.

Graham Smith is writing in his personal capacity and opinions expressed are his personal opinions.