

Airfield, Intermediaries and the Rescue of EU Copyright Law

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☞ Authorisation; Broadcasting right; Communication to the public right; EU law; Retransmission; Satellite television; Service providers

The CJEU's judgment in Airfield makes a packager of satellite TV channels liable for communicating works to the public. It is a judgment resting on some remarkable reasoning. In order to be able to recognise satellite packagers as intermediaries, the court has contrived a contradiction at the heart of EU copyright legislation. It has resolved that contradiction by: avoiding international copyright law; ignoring the express will of the EU legislature; draining CJEU judgments of any weight; and secretly incorporating into EU law non-EU legal materials such as French law and "doctrine". The article concludes by considering how elements of the court's legal reasoning might be used not only to rescue EU copyright law from its current crisis but also bring about new forms of social domination.

Introduction

To facilitate the cross-border broadcasting of satellite television, the EU enacted the SatCab Directive.¹ The Directive aims to deal with the copyright law issues arising from satellite and cable technology. A key provision of the Directive is art.2. It grants the author of a work the right to control the "communication [of their work] to the public by satellite subject to the provisions set out in this chapter". The sting is in the tail, namely, "subject to the provisions set out in this chapter". One of "the provisions" is art.1(2), which stipulates that the act of "communication" will be deemed to take place in the country in which the satellite signals are injected into the space circuit under the control of the broadcasting organisation. Its effect is to require broadcasters to pay the collecting societies in the place where the communication is deemed to take place. This relieves broadcasters of the need to obtain the consent of the numerous right holders which are underneath a satellite's footprint.

In contrast to the reasonably clear legal position of the broadcasting organisations under the SatCab Directive, the position of satellite TV packagers was quite unclear. For whereas satellite packagers pay the broadcasters for the channels, and the packagers relay the channels live, do the customers of the packagers constitute a new public for which the consent of a collecting society must be obtained afresh? This was the issue before the Court of Justice of the European Union (CJEU) in *Airfield*.²

Facts

Airfield is a television company that trades in the Flanders region of Belgium. It offers its customers various packages of TV and radio programmes produced by many of the world's broadcasters. Some of the packages contain channels which are freely available to anyone with a satellite dish. Other channels

¹ Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15 (the SatCab Directive).

² *Airfield and Canal Digitaal v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09) and *Airfield NV v Agicoa Belgium BVBA* (C-432/09) [2012] E.C.D.R. 3.

are only available in encrypted form; in order to access them, viewers need Airfield's decoder card (smart card), which they get in return for purchasing a subscription with Airfield.

Law and technology dictate Airfield's ability to offer these packages to its customers. On the law side, Airfield concludes contracts with the individual broadcasting organisations. The contract terms regulate and ensure the supply of the broadcaster's channels. The terms explain that Airfield's customers will be "simultaneous viewing" the broadcasting organisation's programmes; that is to say, Airfield's viewers receive the programmes at the same time as the broadcaster's other viewers. And the terms also make plain that it is the broadcasting organisation which will retain control over, and responsibility for, the programmes.

Besides the contract with the individual broadcaster, Airfield also has a contract with Canal Digitaal. This is a company belonging to the same corporate group as Airfield but this company is located over the border in Holland. Canal Digitaal provides the technical services for receiving the signals from the various broadcasting organisations, and delivering them to Airfield's customers. More specifically, Canal Digitaal looks after the technical processes of encryption, compression, multiplexing and uplinking of the programme-carrying signals to the Astra satellite—the satellite from which Airfield's customers receive their signals. It also rents the transponder space from the company running the Astra satellite. Moreover Canal Digitaal provides the decoder cards to Airfield, cards which are then passed on to Airfield's customers. Notwithstanding the fact that Canal Digitaal's role is therefore quite extensive, its exact role depends on the broadcasting organisation concerned. For whereas some broadcasters send their signals to Canal Digitaal, others beam up their signals directly to the Astra satellite in an appropriately encrypted form so that Airfield's customers can subsequently pick up and decode the satellite signals.

It is this combination of contract law and networked technologies that allows Airfield's viewers to watch a seamless package of television channels coming off the Astra satellite.

In the Belgian courts

Airfield's combination of contract law and technology did, however, give rise to a copyright dispute. The Belgian collecting society Sabam claimed that Airfield was in fact "rebroadcasting" the television programmes which had already been broadcast by the broadcasting organisations. As such, Sabam claimed that Airfield needed Sabam's consent to do this. Agreeing with Sabam, the Brussels District Court of First Instance held that Airfield's supply of channels, originating from no less than 29 broadcasting organisations, did indeed infringe copyright law.

On appeal, Airfield raised the defence that it was not making a "communication to the public". In its view, it was making "a communication to the public by satellite". That concept was defined by art.1(2) of the SatCab Directive.³ Airfield therefore took the Brussels Court of Appeal through each of the relevant criteria explaining how it believed it satisfied them. Namely, the Airfield pointed out that: the programme-carrying signals were intended for reception by the public; the signals were injected into an unbroken chain of communication; the injection occurred under the control and responsibility of the broadcasting organisation; and the means for decoding the broadcast were made available with the consent of the broadcasting organisation. In other words, all Airfield was doing was an integral part of the broadcasting organisation's activity.

³ SatCab Directive art.1(2) provides:

- (a) For the purpose of this Directive, 'communication to the public by satellite' means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.
- (b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.
- (c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent."

Since Airfield believed it cleared the test for “a communication to the public by satellite”, it claimed there was only one copyright-relevant act of communication—and for that act, the broadcasting organisations had already paid for the right holders’ consent to use the works contained in the broadcast. With the right holders paid, there was no obligation on Airfield to obtain the consent of the right holder. Bolstering their position further, Airfield and Canal Digitaal referred the Brussels Court of Appeal to expert opinions from Professors Dirk Visser and Fabienne Brison.

Sabam, however, disagreed with Airfield’s interpretation of the law. Sabam proceeded from the national provisions in the Belgian Copyright Act which implement art.1(2) of the SatCab Directive but it also read those provisions together with art.11bis(i) and (ii) of the Berne Convention. Accordingly, it submitted that the Berne Convention protected both “primary” and “secondary” communication. In its view, it was the broadcasting organisation which was making an initial broadcast. Airfield, as a third party organisation independent of the broadcasting organisation, was making a “simultaneous rebroadcast” of the broadcast. This “simultaneous rebroadcast” constituted, in Sabam’s eyes, a separate “communication to the public”—a new “secondary communication to the public” of copyright-protected works. For this secondary communication to the public (and the works contained in it), Airfield needed to obtain the consent of the collecting societies.

Furthermore, Airfield’s reliance on the “communication to the public by satellite” rule in the SatCab Directive was, in its view, quite misplaced. That was a rule of private international law, Sabam said, not a general one. And in no way was this an instance of a “communication to the public via satellite” because the broadcasting organisations lacked the requisite degree of control. The broadcasting organisations had no control over the injection of the signals. The broadcasting organisations had no control over the means for decoding the signals. The chain of communication was clearly broken. Moreover, Sabam supported its submissions by referring to Professor Hugenholtz’s contribution in *Concise European Copyright Law*.⁴

On hearing all of this, the Brussels Court of Appeal was unsure how to apply EU law.⁵ It realised that the EU had created the SatCab Directive with a view to removing the legal uncertainty that impedes cross-border satellite broadcasting. The Brussels Court of Appeal also recognised that since the CJEU’s *Egeda* judgment,⁶ the concept of “communication to the public by satellite” had been interpreted in such a way as to avoid the cumulative application of several national laws to a single act of broadcasting. But given that ruling, and the doubts surrounding whether or not Airfield was communicating works to the public, the Brussels Court of Appeal decided to ask two questions of the CJEU. Question 1 related to the “indirect” routes used by the broadcasters to get their signals to the Astra satellite via Canal Digitaal. Question 2 concerned the “direct” route whereby broadcasters uplinked directly the signals in an appropriately encrypted form to the Astra satellite.

These two questions were sent to the CJEU, which joined it with another piece of Belgian litigation also involving Airfield, on almost identical issues, but with a different collecting society.⁷ The CJEU duly circulated the questions to the EU institutions, EFTA and the Member States. As a result, the parties, plus the European Commission and Finland submitted their written observations to the Court. At the oral hearing, all but Finland turned up.

⁴ T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International, 2006), p.271.

⁵ Judgment AR nr 2008/AR/1460, decision of 8th chamber of the Brussels Court of Appeal [Hof van Beroep te Brussel], October 27, 2009.

⁶ *Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)* (C-293/98) [2000] E.C.R. I-629; [2000] E.C.D.R. 231.

⁷ This time the dispute related to whether there was a retransmission for the purposes of art.11bis1(ii) of the Berne Convention. See *Airfield NV v Agicoa Belgium BVBA*, Judgment AR nr 2008/AR/1758 decision of 8th chamber of the Brussels Court of Appeal [Hof van Beroep te Brussel], October 27, 2009.

Advocate General's Opinion

Four months after the hearing, A.G. Niilo Jääskinen gave his Opinion. Yes, he opined, satellite packagers did need to obtain the consent of the right holder. His reasoning ran as follows. The SatCab Directive's reference to a "communication to the public by satellite" was an autonomous concept in EU law. Interpreting it meant not only taking the SatCab Directive's wording into account but also seeing it in the context of international conventions and the other pieces of EU legislation, such as the InfoSoc Directive.⁸ The relevant provisions of the SatCab Directive were art. 1(2)(a) and (c), and the CJEU had already interpreted the word "public" in those provisions in such a way as to mean "general public".⁹ That definition excluded those who used professional equipment to receive satellite signals.¹⁰ Applying that here meant that the relevant "public" were those people which formed Airfield's customers. This could be a public which differed from that targeted by the broadcasting organisation. He added that Airfield's act of bundling channels together not only generated added value for Airfield but led to the creation of an audiovisual product that was quite different from that of the individual broadcasters. Taking these circumstances together, then, he felt that the signals were intended for different publics.

Furthermore, the SatCab Directive required the act of injection into the chain of communication to be under the "control and responsibility of the broadcasting organisation". He explained that this was not the case here. The wording of the contract showed that it was Airfield who chose which television channels were included in the various packages. The contract also allowed Airfield to decide whether channels would be shown across the whole of the territory or just a part of it. And for this prerogative, Airfield paid the broadcaster. In light of this, the Advocate General felt that it was Airfield who was deciding the uplinked content, and it was thus Airfield which was responsible for "the communication to the public". Accordingly, Airfield needed to obtain the permission of the right holder.

As to the SatCab Directive's requirement that the chain of communication also had to be "uninterrupted", he believed that, once again, this was not the case here. Airfield's interventions were not limited to "normal technical procedures". Airfield required technical adjustments to be made to the broadcaster's signals, and Airfield was also using its own frequency to broadcast the channels. These factors, he thought, changed the nature of the signals being broadcast. Consequently, the Advocate General felt that Airfield was acting autonomously from the broadcasting organisations.

Did those acts also go beyond the "normal technical procedures"? Yes. Airfield was creating and defining a new chain. The satellite transmission could reach a public different to that of the broadcasting organisation's initial broadcast notwithstanding the fact that the programmes were being broadcast simultaneously, and the fact that they were identical in content.¹¹ The chain of communication, he opined, was broken.

As for the final criterion in the SatCab Directive, namely that the means of decryption must be provided with the consent of the broadcasting organisation, the Advocate General noted that, at the court hearing, Airfield had explained that it was providing the necessary technical help to encrypt the programmes so as to ensure that only Airfield's subscribers, and not everyone else in the region of Flanders, could receive the signals.¹² The Advocate General relied on this admission to find that Airfield exerted considerable influence over who was the target group of the "communication to the public by satellite". He was therefore of the view that the permission which the right holder had given purely covered the act of exploitation

⁸ Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L167/10 (the InfoSoc Directive).

⁹ *Lagarrière Active Broadcast v Société pour la perception de la rémunération équitable (SPRE)* (C-192/04) [2005] E.C.R. I-7199; [2005] 3 C.M.L.R. 48.

¹⁰ *Airfield*, Opinion of A.G. Jääskinen March 17, 2011 at [63].

¹¹ *Airfield*, Opinion of A.G. Jääskinen March 17, 2011 at [74].

¹² *Airfield*, Opinion of A.G. Jääskinen March 17, 2011 at [47].

relating to the initial satellite broadcast, and it could not be presumed to include the transmission of the same programmes by an independent company to another audience.

Therefore A.G. Jääskinen concluded that the answer to question 1 should be that the SatCab Directive did not obviate the need of the supplier of satellite packages to gain the consent of the right holder where the signals were transmitted in an indirect way—this by dint of the satellite packager’s more intensive involvement.

As to question 2 and the direct route of the broadcasting organisation’s signals being beamed straight up to the Astra satellite, he felt that this too constituted a communication to the public. Airfield and Canal Digitaal gave “instructions” to the directly uplinking broadcasting organisations. It was Airfield who had the encryption in hand, and it was they who provided the encryption codes to the broadcasting organisations. It was they who changed the codes every month. And it was they who gave new instructions about the code to be used. As with the indirect route, it was Airfield that decided which channels were included in the package. In those circumstances, therefore, the Advocate General opined that the broadcasting organisations had neither complete control nor complete responsibility for the uplink—rather, these attributes were either being shared with supplier, or they rested with the supplier alone. Finally, A.G. Jääskinen pointed out that whereas an author might have consented to a broadcasting organisation communicating the works to the public, this consent did not imply that they had agreed to the bundling of the programme with other programmes which had been selected and broadcast by Airfield. Requiring consent would therefore allow the author to protect their financial interests and their moral rights in a programme.¹³ In this way, he opined that the answer to question 2 should be that the SatCab Directive does not stop the supplier from needing to obtain the consent of the collecting societies for the direct uplink.

Judgment

Six months after the Opinion, the Third Chamber delivered its judgment. At times following its Advocate General but at other crucial times taking a different legal route altogether, the CJEU held that a satellite packager must obtain the consent of the right holders for their intervention in the direct or indirect transmission of television programmes, but not if:

- the broadcaster has obtained the consent from the right holder to communicate works to the public through that provider; and,
- the provider’s intervention does not make those works accessible to a new public.

Copyright law’s crisis and its rescue by broadcasting law

Twenty years ago, copyright law was on the brink of crisis. Egbert Dommering explained¹⁴ that the origin of the crisis lay in the demise of paper as the medium for carrying information. Computers were taking its place. These could be connected together to form networks that spread over vast geographic areas. Works too could be reduced to a series of 0s and 1s and whizz through these networks beyond the purview of copyright law’s control. Yet despite this innovation in technology, the law’s response remained conditioned by its paper-based past. For example, when the EU was trying to protect computer software programs by copyright law,¹⁵ the EU legislature defined the concept of “reproduction” so broadly as to encompass all of the technical copies which were made by a computer when it was running. This, he

¹³ *Airfield*, Opinion of A.G. Jääskinen March 17, 2011 at [89].

¹⁴ Egbert Dommering, “Het auteursrecht spoelt weg door het elektronische vergiet; enige gedachten over de naderende crisis van het auteursrecht” [Rinsing away copyright law through the electronic colander; a few thoughts on copyright law’s impending crisis] (1994), reprinted in *De achtervolging van Prometheus; over vrijheid en bezit van informatie* (Amsterdam: Otto Cramwinckel Uitgever, 2008), pp.278–285, in particular pp.282–283.

¹⁵ Directive 91/250 on the legal protection of computer programs [1991] OJ L122/42 (the Software Directive).

warned, would exert a restrictive force and make the exploitation of a network a far more difficult and costly exercise.

Dommering proposed a way forward. Law, he submitted, should abandon copyright law's traditional distinctions of (paper-based) reproduction and (performance-based) communication to the public. Lawyers should adopt "network-thinking", and develop concepts such as "electronic performance". This would not be too difficult for copyright lawyers; they had already devised legal concepts that were capable of exploiting electronic broadcasting networks. And by way of historical sequence, he charted how Dutch copyright law had been developed through a series of four phases. Each phase was triggered by the arrival of a new type of network technology. This led to the emergence of new types of intermediary. In turn, the concepts reflected new legal relationships which were created between the various actors and their respective rights.

Thus, in phase 1, works were performed when they were broadcast through the ether. Article 11bis of the Berne Convention came to recognise these broadcasts as a new publication by the *organisme d'origine* (the original broadcaster). The broadcaster paid directly for the copyright permissions. However, because of the "lighthouse" nature of broadcasting technology, the broadcasters could not charge their viewers on an individual basis. The legal solution was to develop fiscal law and create a form of licence fee. Parallel to this, copyright law also came to ask a fresh question about what constituted a "public"—the answer being determined by whether the broadcast took place in a closed, private environment. Phase 2 of copyright law's development was set in motion once aerials could be connected to the new technology of cables and cable networks. Dutch copyright law was faced with the question of whether the cable technology and networks could be said to belong to the *organisme d'origine*. Dutch law evolved to prevent a cable network from falling within the scope of this concept. It triggered a readjustment of copyright law whereby a system of collective licences for secondary acts of exploitation was devised. As a result, clearly identifiable parties could negotiate with each other and pass on the costs to subscribers which had individual contracts with the cable companies. In phase 3, Pay-TV technology came along so the user could pay for the services they were consuming. Despite the individuality of this technology, the regulatory framework still retained a collective character because the subscriber signed up to the supply of channels for a monthly fee, and the signals which they received were all decoded at home. Phase 4, the phase in which Dommering was writing, had witnessed the creation of yet more new technology. There was now a global super-network which was comprised of satellite systems that circled above the ether and cable networks. Dommering noted that the European Community had developed EU copyright law and had opted for an "injection right" whereby the person that injected the channels into the network was deemed to be responsible for all further acts of exploitation which took place within the network.

From this historical sequence, Dommering deduced that Dutch copyright law was evolving by combining legal concepts in order to allow a network to be exploited. But once there were clear moments of exploitation, and parties that could talk to each other, the law developed in such a way that collective or individual licences would be granted to pay the copyright bill. Dommering believed that this system of secondary rights was guided by the notion that a book was being put into the system and pages of it were being reproduced. This too, he warned, would make the exploitation of a network increasingly difficult and expensive.

Although based on the evolution of Dutch copyright law, Dommering's warnings have lost none of their vitality in the intervening two decades—indeed, they form a useful starting point to see the significance of the CJEU's judgment in *Airfield*. For if Dommering thought that copyright law was on the brink of a crisis, then it has surely tipped over the edge with the proliferation of portable digital devices and the widespread use of the internet. Furthermore, if he believed that EU copyright law's response to technology was conditioned by its paper-based past, then the 2009 codification of the Software Directive will have done nothing to counter that belief—the EU legislature failed to include a transient copy exception for

the “copies” made inside computers.¹⁶ And yet the CJEU’s ruling in *Airfield* might signify something new. It has recognised the satellite TV packagers as intermediaries. It has seemingly sought to redefine the “injection right”. This raises the question of how has the CJEU achieved this? And what does the court’s reasoning say about the evolution of EU copyright law? Is this growth of EU copyright law flowing as an autonomous process from the interaction between interest groups and legislative bodies, or is it more to do with a macro-economic approach and the role of technology? Moreover, does the judgment contain elements of legal reasoning that could be used to revise the concepts at the heart of EU copyright law and build a new legal order which is able to cope with the digitisation and networking of copyright works? If so, and going beyond what Dommering has written, then might the flipside to this new legal order of EU copyright law and the tweaking of property norms be the creation of new possibilities for EU law to dominate people?

These issues will now be addressed in turn; the detailed legal reasoning of the CJEU in *Airfield* provides some interesting answers.

The social construct of the EU market

The court opens *Airfield* boldly. The legislative framework section at the start of the judgment makes no mention of the Berne Convention. This is remarkable. The EU has signed the WIPO Copyright Treaty so the EU must comply with the Berne Convention.¹⁷ And the CJEU has been only too happy to quote the Berne Convention in its recent copyright law cases of *Infopaq*,¹⁸ and *BSA*¹⁹—cases which have had as their Rapporteur Judge Malenovský, the specialist in international law. Given that he was the Rapporteur in *Airfield*, the court’s failure to mention the Berne Convention in the legislative framework it used to resolve *Airfield* is at once both curious and deliberate.

A couple of factors might explain why the CJEU might have chosen to ignore the Berne Convention. The first is pragmatic insofar as the wording of art.11bis of the Berne Convention is both ambiguous and tortured, particularly when it comes to the definition of “*organisme d’origine*”.²⁰ A second is functional in so far as ignoring art.11bis allows the CJEU to gloss over the fact that the Berne Convention actually allows the concepts in art.11bis(1) BC to be defined as the contracting states saw fit. The CJEU’s displacement of the Berne Convention’s concept of the *organisme d’origine* therefore functions to allow the court to clear away the vestiges of national copyright law, and the established relations of production that those national laws have variously come to enshrine. A further sign of the rise of the new relations of production would appear to be the court’s choice of legislation: it uses just two pieces, the SatCab Directive and the InfoSoc Directive—both of which are internal market directives. In other words, the judges in the CJEU seem to be giving an early sign in this judgment that it is going to develop EU copyright law guided by a notion of a macro-economic market that spans the territorial scope of the EU and the Single European Audiovisual Area. As a consequence, EU copyright law is apparently not going to derive its legitimacy from international copyright law respecting national markets.

The social construct of the satellite technology

In tandem with the CJEU’s choice of legislation to reflect a particular social construct of the market, the reasoning used by the court to resolve an aspect of CJEU procedural law also evinces a judicial attitude towards the technology at the heart of the dispute. That is to say, there was a procedural law squabble

¹⁶ Council Directive 91/250 was replaced by codified Directive 2009/24 [2009] OJ L111/16.

¹⁷ WIPO Copyright Treaty art.1(4).

¹⁸ *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] E.C.R. I-6569; [2009] E.C.D.R. 16.

¹⁹ *Bezpečnostní softwarová asociace — Svaz softwarové ochrany v Ministerstvo kultury* (C-393/09) [2011] E.C.D.R. 3.

²⁰ For a description of the legal history to this provision of the Convention, see Alfred Baum, “Die Brüsseler Konferenz zur Revision der Revidierten Berner Übereinkunft—Erlebnis und Ergebnis” [1949] GRUR 1.

about the wording of the Brussels Court of Appeal's questions and whether the wording should centre on the SatCab Directive or the InfoSoc Directive. Put neutrally, the drafting of the InfoSoc Directive claims to leave the SatCab Directive unaffected so that the relationship between the two directives is that the SatCab Directive deals with “communication to the public by satellite”, and the InfoSoc Directive deals with a “communication to the public”. However, the collecting society Agicoa had insisted at the CJEU that the Belgian court's questions were completely inadmissible because the questions had centred on the SatCab Directive—in Agicoa's view, what was really needed to resolve the dispute were questions which centred on the InfoSoc Directive.

The CJEU's judgment rejected Agicoa's submission about the inadmissibility of the Brussels Court of Appeal's questions in these terms:

- “41. [I]t is apparent from Joined Cases C403/08 and C-429/08 *Football Association Premier League*... paras 76–145 ... that communications to the public by satellite must be capable of being received in all the Member States and that they therefore by definition have a cross-border nature. Furthermore, the communications ... display such a nature since they involve signals intended for television viewers residing²¹ in Belgium and Luxembourg.”²²

The reasonable tone of “*Airfield* [41]” robs the ridiculous. In four respects, this paragraph is nonsense. First, “paras 76–145” of *FAPL*²³ span the free movement of goods, the freedom to provide services and EU cartel law. These domains of EU law were not recorded in the referring orders made by the Brussels Court of Appeal and so presumably were not pleaded by the parties before that court. Nor were these domains of EU law mentioned in any detail in the Advocate General's Opinion. Indeed, since [76]–[145] of *FAPL* provide no answer as to whether the Belgian court's questions should be answered under the InfoSoc Directive or the SatCab Directive, the inference must be that the 69 paragraphs of *FAPL* are but a bountiful shoal of legal red-herring swimming through this paragraph of *Airfield*.

Secondly, and contrary to the impression given by the Court in *Airfield*, there is no requirement in *FAPL* that for a “communication to the public by satellite” the satellite signals must be capable of being received in all of the Member States. The Grand Chamber in *FAPL* says no such thing. And two judges in *Airfield* would have known this. The President of the Third Chamber in *Airfield* was Judge Lenaerts, who was also a judge in *FAPL*. The Judge Rapporteur in *Airfield* was Judge Malenovský, who was the Rapporteur in *FAPL*. So why is this misleading description of the nature of satellite signals being included in this part of *Airfield* on the issue of whether the CJEU should answer the Belgian court's questions with the aid of the SatCab Directive, or the InfoSoc Directive?

Thirdly, this paragraph of *Airfield* makes no technical sense either. Satellite operators can, and do, broadcast on satellite “spot” beams. These confine the area of strong signals to a zone such as the United Kingdom. In other words, there is no absolute technical need for a “communication to the public by satellite” that the signals be received “in all the Member States”. And then fourthly, there is the final riddle to the paragraph: why does the court even bother to mention that most of *Airfield*'s customers live in Belgium and Luxembourg when it has already refused to mention the Berne Convention and thus obviated the need to consider difficult Berne-related questions relating to direct zones of reception?

Two possible explanations arise. The first is that the court was split. The former President of the CJEU Ole Due has indicated that when the members of the court cannot agree, its reasoning becomes illogical²⁴—which would certainly be a fair inference to draw in light of the drafting of *Airfield* [41]. A second

²¹ The authentic language version of the judgment is Dutch. The Dutch version of the paragraph is more idiomatic than the English; it talks of “living” [*wonend*] in Belgium and Luxembourg.

²² *Airfield* [2012] E.C.D.R. 3 at [41].

²³ *Football Association Premier League Ltd v QC Leisure* (C-403/08); and *Karen Murphy v Media Protection Services Ltd* (C-429/08) (*FAPL*) [2012] 1 C.M.L.R. 29.

²⁴ Ole Due, “Understanding the Reasoning of the Court of Justice” in Gil Carlos Rodríguez Iglesias et al. (eds), *Mélanges en hommage à Fernand Schockweiler* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), pp.73–85 at p.82.

possibility is that the court has used a type of drafting technique found in French law known as “an economy of means” (*économie de moyens*). This drafting technique enables the court to avoid the issues actually raised by the parties which, as recounted in the section about what had happened in the Belgian courts, covered submissions on the Berne Convention, direct rebroadcasting, and the issues of primary and secondary transmission. Instead, the CJEU’s use of an economy of means drafting technique would seem to serve the sole function of making a social construct of the satellite technology. The CJEU imputes the satellite technology with the characteristic that it covers the same territorial scope as the social construct which the court had made of the market.

The court rigging the questions

The court’s problematic reliance on the SatCab Directive and the InfoSoc Directive returns in the next section of the judgment in *Airfield* when the CJEU rewords the national court’s questions. A reword is significant. Due has explained that this can indicate the decisive factors for the court, and it could be a sign of judicial caution that the court may not yet be ready to propose a more general solution to the problem.²⁵ Thus it is highly significant that the court in *Airfield* has deleted the words “broadcasting organisation” and it has inserted the words “satellite package provider”. For the time being at least, the ruling in *Airfield* should be limited to satellite packagers and, by implication, satellite technology.

A further sign of the instrumentality in the drafting of the questions is the fact that the court introduces the concept “communication to the public” into the national court’s question that was couched in the terms of the SatCab Directive and a “communication to the public by satellite”. The communication to the public concept is only found in the InfoSoc Directive. This is strange. Two paragraphs ago, the court’s reasoning was devoted to denying Agicoa’s submission that the question should be answered with the InfoSoc Directive. In other words, the insertion of the InfoSoc concept into the question is extremely incongruous. In the space of a couple of paragraphs, the CJEU has done a complete volte face and turned the conceptual purity of the Belgian court’s question into a hotchpotch of concepts originating in discrete pieces of EU legislation and it has brought them together to form an inherently contradictory question.

Imposing unity and coherence in EU law

This hotchpotch looks contrived. Before the CJEU gets to the real meat of the dispute in *Airfield*, it unexpectedly makes an “introductory” remark about the importance of unity and coherence to the EU legal order:

- “44. First of all, it should be borne in mind that Directive 93/83 is not the only European Union instrument in the field of intellectual property and that, in view of the requirements deriving from the unity and coherence of the legal order of the European Union, the terms used by that directive must be interpreted in the light of the rules and principles established by other directives relating to intellectual property, such as, in particular, Directive 2001/29 (see, by analogy, Case C-271/10 *VEWA* [2011] ECR I-0000, paragraph 27).”²⁶

The tone of this paragraph is seductively pleasing. It suggests that *Airfield* is the product of a paradigm of rational, positivist legal reasoning—which is just what public law would require.

The impression will not beguile a legal adviser, however. They will spot that the court in *Airfield* has argued “by analogy” from “*VEWA* [27]”. They will go back and read what *VEWA* [27] actually said. They will compare the wording of the two paragraphs. They will find two differences in the drafting as it appeared in its *VEWA* formulation. The first is that the court in *VEWA* [27] had specified that account be

²⁵ Due, “Understanding the Reasoning of the Court of Justice” in *Mélanges en hommage à Fernand Schockweiler* (1999), p.83.

²⁶ *Airfield* [2012] E.C.D.R. 3 at [44].

taken of the rules and principles established “by all of the Directives”. This has now mutated in *Airfield* to merely “other directives”. Thus the *Airfield* formulation mandates the CJEU to selectively read the EU statute book and choose any Directive it sees fit. Secondly, the court in *VEWA* [27] had stipulated that account be taken of how the rules and principles, in all of the Directives, had been “interpreted by the Court”. In its *Airfield* formulation, there is no mention whatsoever of taking the court’s interpretation into account. Therefore, the inference is that this authorises the court to drain all CJEU judgments of any weight.

The court may have redrafted the rule in *VEWA* [27] to get around the earlier judgment of *FAPL*, which was handed down the week before. In that case, the Grand Chamber had also discussed the need for coherence in the EU legal order. The Grand Chamber had explained that coherence could be imposed but not if “the European legislature has, in a specific context, expressed a different intention”.²⁷ The caveat in *FAPL* about the intention of the legislature should have been highly material to the answering the questions before the court in *Airfield*. This is because the EU legislature had expressly stated its intention that the SatCab Directive was to leave the InfoSoc Directive untouched.²⁸ If the chamber which decided *Airfield* would have complied with the Grand Chamber’s caveat, then it should neither have contrived a conceptual hotchpotch inside the national court’s question, nor created another one when discussing which EU directive it was interpreting. As such, the court in *Airfield* creates the bizarre spectacle of defying not only the will of the legislature but also the law expressed by the Grand Chamber the week before. The court in *Airfield* has apparently done all this to create a legal contradiction, and then justify its imposition of unity and coherence in EU law to bring an end to that contradiction. In other words, the reasoning is so artificial and abhorrent to the rule of law that there is no way that the ruling can rest on legal positivism—*Airfield* is pure legal ideology.

At this point, it is helpful to recall the wisdom of the late Otto Kahn-Freund. He said that unity and coherence in the legal order was a positivist utopia, partly determined by social and political environment. According to Kahn-Freund, the quest for coherence in law has affected both common law and civil law countries throughout the ages. The way through, he advised, was to realise that the judge “constantly refers to an analysis, articulate or inarticulate, of the moral, social economic function and effect of the rules and principles he applies, and of his own decision”.²⁹ So with Kahn-Freund’s observation in mind, what are the policy considerations secretly at work in the judicial reasoning in *Airfield*?

Emancipating the author

The CJEU in *Airfield* starts off by redefining “a communication to the public by satellite”. It changes EU law’s definition of that concept to rest only on art.1(2)(a) and (c) of the Directive—it ignores art.1(2)(b), which was the provision mostly likely to have obviated the satellite packager needing to obtain the consent of the collecting society. The CJEU provides no explanation for its twisted reading of the SatCab Directive. Since the function of those rules was originally intended to encourage companies to uplink satellite signals unfettered further by copyright law, the inference might be drawn that the CJEU is secretly hostile to a political policy choice of the legislature when that policy is perceived to be overriding the natural law rights of the author.

Not only does the CJEU redefine a “communication to the public by satellite” through ignoring a part of the Directive, it also goes on to create a completely new judicial exception to the SatCab Directive. The judicial exception has two legs to it. Namely, a satellite packager will not need to obtain the consent of the right holder if: (1) the broadcaster has obtained the consent from the right holder to communicate

²⁷ *FAPL* [2012] 1 C.M.L.R. 29 at [188].

²⁸ InfoSoc Directive art.1(2)(c).

²⁹ Otto Kahn-Freund, “Introduction” to Karl Renner, *The Institutions of Private Law and their Social Function* (London: Routledge, 1998 reprint of the 1949 English translation of Renner’s work), p.8.

works to the public through that provider; and (2) the provider's intervention does not make those works accessible to a new public. Regrettably, the CJEU provides no clue as to how it arrived at this result.

That said, point (1), about the express consent for a broadcaster, looks like an inarticulate incorporation of French law. Article L132-20 of the French IP Code reads:

“Unless otherwise agreed: ... 3° authorization to telediffuse the work by electromagnetic waves shall not include its transmission towards a satellite enabling the work to be received by the intermediary of other organizations unless the authors or their successors in title have contractually authorized the latter organizations to communicate the work to the public; in such case, the emitting organization shall be exempted from paying any remuneration.”³⁰

Perhaps the CJEU persuaded itself to incorporate this part of French copyright law into EU law because of French “doctrine” surrounding this provision. The doctrine is laid out in a book by Pierre Sirinelli.³¹ His explanation refers to a body of literature, including an article written by Eugen Ulmer.³² Ulmer had urged for the creation of “joint responsibility” over a satellite signal, and he had advocated this because he felt that an author needed to know who the distributor was going to be (as this would determine the amount payable for the author's consent). Furthermore, reading Ulmer's argument shows that it was in part drawn from an earlier article written by Claude Masouyé. Masouyé had advocated separating the act of injecting the signals, from the issue of control and responsibility over the communication.³³ He had proposed this solution in response to the perceived weak position of authors when negotiating contracts, and because of the risk to authors when signals were beamed into space with no one being legally responsible for where the signals went afterwards.³⁴ The two texts, written by Ulmer and Masouyé respectively, apparently lie behind the current wording of French copyright legislation. So if point (1) in *Airfield* does indeed originate in French legislation and doctrine, then the judges in *Airfield* have probably also been secretly moved by a perceived plight of authors in the face of satellite technology.

Point (2), about the fact that there should be no new public, is explained by the CJEU as being reasoned “by analogy” from its earlier judgment in *SGAE v Rafael Hoteles*.³⁵ Certainly, that explanation is plausible: the principle established in *SGAE* was that when a hotelier was pumping signals through networks, he was communicating works to the public. However, Christophe Caron has claimed that the ruling in *SGAE* originates in French case law.³⁶ He points to the fact that 12 years before *SGAE*, the French Cour de Cassation had handed down a judgment which had also made a hotelier liable for transmitting programmes to a public.³⁷ Now by itself Caron's point about the French law root to *SGAE* is interesting because it would lend further support to the claim made here that the CJEU in *Airfield* has been heavily influenced by French law and doctrine when recognising satellite packagers as intermediaries.

³⁰ This English version of the French IP Code is at http://www.wipo.int/wipolex/en/text.jsp?file_id=180336 [Accessed September 25, 2012].

³¹ Pierre Sirinelli et al., *Code de la Propriété Intellectuelle; commenté*, 11th edn (Paris: Dalloz, 2011) p.243.

³² Eugen Ulmer, “Protection of authors in relation to the transmission via satellite of broadcast programmes” (1977) 93 *Revue internationale de droit d'auteur* 4, 38. See also André Kéréver, “Copyright and space satellites” (1984) 121 *Revue internationale de droit d'auteur* 26, 40, who points out that Ulmer adopts R. Fernay's and Guadrat's approaches with minor reservations. Kéréver's reference to Guadrat is to Philippe Gaudrat, “Protection of the author in relation to a retransmission by satellite of his work” (1980) 104 *Revue internationale de droit d'auteur* 2. Regrettably, Kéréver's reference to Fernay is incomplete. It might be Fernay, “Study of problems in the field of copyright raised by radio and television transmission via communication satellites”, Document UNESCO/WIPO/SAT 5 6 (February 1, 1971). In any event, this body of French literature might also be a secret source to the Advocate General's Opinion. In [87] he talked about organisations sharing control and responsibility with the satellite packager. In that context, it is worth repeating Kéréver's remark about the doubtful cogency of Fernay's case. At p.42, Kéréver wrote: “what is involved are provisions of French civil law stipulating that a creditor with several debtors for the same credit can demand from any one of them, without concern as to the final division of the charge among the joint debtors. It is not certain to begin with that these provisions of French law exist in the legislations of the two states concerned using a telecommunications satellite.”

³³ Claude Masouyé, “The place of copyright in the use of space satellites” (1972) 72 *Revue internationale de droit d'auteur* 10.

³⁴ Masouyé, “The place of copyright in the use of space satellites” (1972) 72 *Revue internationale de droit d'auteur* 10, 24 and 26.

³⁵ *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (C-306/05) [2006] E.C.R. I-11519; [2007] Bus. L.R. 521.

³⁶ See further, Christophe Caron, *Comm. Com. Electr.*, 2011 comm.111.

³⁷ N° 92-11.186, *Sté Cable News Network v Sté Novotel Paris-Les Halles*, Cour de cassation, Chambre civile 1, April 6, 1994, in (1994) 161 *Revue internationale de droit d'auteur* 366.

Indeed, the French hotels case might also hold the key to resolving the riddle which arose at the start of *Airfield*, namely, what was the significance of the procedural squabble about the Directives, the illogicality of *Airfield* [41], and the peculiar insignificance of the Berne Convention—was it because the court was split or had it used an economy of means drafting technique? In his own comment on the French hotels case, André Kéréver had noted³⁸ that the French Cour de Cassation had used “an economy of means”. In his view, this had allowed the French court to avoid the consequences of art.11bis of the Berne Convention and the issue of whether there was a cable distribution of a primary broadcast by the French hotel. It had also been used to deny any importance being attached to where the retransmission equipment was located in the French hotel. Indeed, Kéréver contended that the drafting technique allowed the French court to focus on the fact that the hotel was providing television for its own commercial reasons. This focus permitted the French court to produce a judgment that left untouched other instances of transmitting television broadcasts, such as those which took place inside domestic blocks of flats. Therefore Kéréver’s observation about the drafting technique used in the French hotels case would lend support to the assertion made here that the CJEU in *Airfield* has also used the economy of means drafting technique to avoid the Berne Convention.

Drawing these points together then, it can be seen that the CJEU in *Airfield* has made satellite packagers liable in copyright law unless the broadcasting organisation expressly contracts for this with the collecting society, and has done so because of an inarticulate analysis of the social and economic effects of the rules in the SatCab Directive. It is a judicial response guided by the perceived plight of authors who are suffering not only as a result of a dictatorial legislature that fails to respect an author’s natural law rights but also their weak position in the face of the new satellite technology. Furthermore, by incorporating French copyright law solutions that originate in doctrine, and perhaps even French credit law, the CJEU in *Airfield* appears very eager to prevent the merchant capital of intermediaries, such as hoteliers and in this case satellite packagers, from becoming too remote from authors. In light of these findings, the claim can be made that the CJEU’s expansion of EU copyright law in *Airfield* and its redefinition of a “communication to the public by satellite” is deriving its legitimacy not from any binding EU legal materials but rather French case law and doctrine.

Can *Airfield* rescue EU copyright law?

Can such an instrumentally reasoned and covertly French ruling really be said to contain within it elements of legal reasoning which are capable of coming to the rescue of EU copyright law? At first blush, the answer does not look promising. In a current case involving the ability of viewers to use computer and telephone networks to watch television broadcasts, a judge in England has confessed that³⁹:

“The Court’s multi-factorial approach [in *Airfield*] does not make it easy to distil a clear principle as to what amounts to a communication to the public in this context. The extent to which the creation of a new link from the broadcasting organisation to the subscriber is to be equated, without more, with the creation of a ‘new public’ is not clear. It is also not clear whether the subscribers in the present case can be described as ‘unable to enjoy the broadcasts although physically within the catchment area’, given that they are entitled to receive the original broadcast in their own homes and on their laptops without intervention from TVC. Equally it is not clear whether the audience reached by these broadcasts is an audience which is additional to the public targeted by the broadcasting organisation concerned.”

³⁸ André Kéréver, Comment on CNN (1994) 161 *Revue internationale de droit d’auteur* 370, 374.

³⁹ *ITV Broadcasting Ltd v TV Catchup Ltd* [2011] EWHC 2977 (Pat), [2012] F.S.R. 10 at [23]; see also an earlier judgment given in the same action: *ITV Broadcasting Ltd v TV Catchup Ltd* [2011] EWHC 1874 (Pat), [2011] F.S.R. 40.

The uncertainty led the judge to refer a number of questions to the CJEU.⁴⁰ But should the judge have made a reference just yet? The judge did not mention the fact that the CJEU in *Airfield* had expressly reworded the question in *Airfield* and limited it specifically to satellite packagers and by implication satellite technology. This would mean that for the time being at least, the ruling in *Airfield* does not restrict the freedom enjoyed by other companies such as ISPs or platforms that currently also distribute television programmes.⁴¹ Perhaps the CJEU will now try to recognise these companies as “intermediaries” and in doing so attempt to redefine anew the communication to the public right.

Rescuing the reproduction right—towards a transient copy exception

In the meantime, the transformative potential of *Airfield* really lies in the fact that the CJEU has changed the way it interprets the EU legislation. Until now, it has radically rewritten the scope and application of EU copyright law by invoking the autonomous law doctrine. According to the CJEU, that doctrine requires the CJEU to interpret planks of EU copyright law in the light of international law obligations. Given the amount of progress the CJEU has booked using that doctrine to Europeanise copyright law,⁴² it is highly significant that the CJEU in *Airfield* has abandoned this interpretative strategy in favour of invoking the “unity and coherence” doctrine in EU law.

The unity and coherence doctrine could allow EU copyright law to shake off its paper-based past. For whereas Dommering had pointed to the restrictive effect of the concept of reproduction that lay at the heart of the EU Software Directive (and which covered all of the technological copies made inside a computer), *Airfield* [41] could end that legal situation. This is because there is now an obvious contradiction in EU copyright law between the Software Directive, which does not have a transient copy exception, and the InfoSoc Directive which does. Moreover, after *Airfield*, it clearly does not matter that the EU legislature had stated its wish in the InfoSoc Directive to leave the Software Directive unaffected.⁴³ As a result of *Airfield*, there is apparently now no legal impediment to creating a transient copy exception to the Software Directive. Indeed, there is a distinct possibility that the technology of computers could become regulated by copyright law in a way that is more appropriate for an information society.⁴⁴ A rescue of EU copyright law could be nigh.

Rescuing EU copyright law—towards harmonised copyright limitations

Indeed, the doctrine of coherence and unity may achieve a degree of harmonisation far greater than the CJEU could ever hope to have achieved with the autonomous concept doctrine. A potential target of that power is the exceptions to EU copyright law which are laid out in the InfoSoc Directive. The exceptions are in the form of an à la carte menu with Member States being able to choose which exceptions they want to the reproduction right and the communication right. So for example, art.5(3)(k) of the InfoSoc Directive

⁴⁰ *ITV Broadcasting Ltd v TV Catchup Ltd* (C-607/11), lodged on November 28, 2011 but not yet heard. Some of the issues also arise in the recently referred Case C-416/12, *Wilkom Elektrick*, lodged September 14, 2012.

⁴¹ For a description of the actors involved in distributing content, see further Commission, “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market”, COM(2011) 427 final, Brussels, July 13, 2011, p.10.

⁴² The CJEU has sung this autonomous concept mantra in its recent copyright law judgments notwithstanding the fact that a close analysis of the reasoning suggests that the CJEU has done no such thing but has instead just taken the words and phrases found in German and French practitioners’ handbooks and inserted them largely unadorned into the reasoning of the court judgments. On the influence of German law books on *Infopaq* [2009] E.C.R. I-6569; [2009] E.C.D.R. 16, see Stephen Vousden, “Infopaq and the Europeanisation of Copyright Law” [2010] W.I.P.O.J. 197. On the influence of French law books on the judgment in *Bezpečnostní softwarová asociace* [2011] E.C.D.R. 3, see Stephen Vousden, “Protecting GUIs in EU Law-Bezpečnostní Softwarová Asociace” [2011] *Journal of Intellectual Property Law & Practice* 728.

⁴³ InfoSoc Directive art.1(2)(a).

⁴⁴ A further argument in support of creating a transient copy exception across EU copyright law is to be found in the CJEU’s case law interpreting Directive 96/9 on the legal protection of databases [1996] OJ L77/20. The plain wording of the Directive was thought to mean that the Directive did not contain a transient copy exception. However, in *Apis-Hristovich EOOD v Lakorda AD* (C-545/07) [2009] E.C.R. I-1627; [2009] 3 C.M.L.R. 3, the court decided at [44] that a “transfer is temporary if the materials are stored for a limited period on another medium, such as the operating memory of a computer”. The court seems to have introduced a transient copy exception into the law of the Database Directive. See further, Stephen Vousden, “Apis, Databases, and EU Law” (2011) *Intellectual Property Quarterly* 215, 220.

allows an exception for “caricature, parody, and pastiche”. Now, a plain reading of that provision grants this exception to the Member States. As such, that makes the provision unsusceptible to the CJEU applying the autonomous concept doctrine, for that doctrine only applies where there is no mention of the Member States. However, the CJEU’s unity and coherence doctrine gets around that limitation—whether an EU legislative provision is reserved to the Member States is now of no concern to the CJEU. From now on, whenever the CJEU decides to spot an incoherence in the system of EU law, it can invoke *Airfield* [41] and impose new EU law in the name of “coherence and unity”.

Thus, if the CJEU wanted to intervene in parody law it could do so by now taking three tiny steps of legal reasoning. First, it could say that a parody involves an adaptation of a work protected by copyright. Secondly, it could acknowledge that whereas the InfoSoc Directive does not harmonise the right to control adaptations made of a work, this is not the only EU Directive relating to IP law. Namely, the adaptation right features in both EU Software Directive⁴⁵ and the EU Database Directive.⁴⁶ Thirdly, it could exclaim that “it follows” that the Member States’ exceptions for parody should be interpreted in a way that is coherent with the adaptation rights already recognised in, and harmonised by, other pieces of EU copyright legislation. And thus, in a quest to achieve coherence and unity in EU copyright law, the CJEU could immediately intervene and affect the scope of measures that, until this point, Member States thought they were free to set themselves. The unity and coherence doctrine could therefore function to allow the CJEU to cut the constitutional moorings that keep it and the Member States anchored in place.

New myths for social domination

Such an intervention and expansion of EU copyright law could have far-reaching results. For example, a CJEU-harmonised definition of parody might quickly affect the legal order of labour. This is because in times of industrial and social strife demonstrators often produce placards which vent their feelings or are intended to garner support for their cause. Satire, caricature and parody are frequently used by protesters to produce a very pithy slogan that operates upon a company slogan or mark protected by copyright law or trade mark law. In such a case,⁴⁷ the CJEU could now intervene. It could see an inconsistency in EU IP law where on the one hand copyright legislation has an overt exception for a parody under the InfoSoc Directive but no corresponding equivalent exception under EU trade mark law. Equally, it might perceive inconsistency in an EU legal order when a parody exception is being developed in trade mark law in the legal orders of Germany⁴⁸ and Austria,⁴⁹ and Holland⁵⁰ but not in every Member State. It might also perceive inconsistency if the criteria used in those three jurisdictions were not the same. More likely still, it could identify further inconsistency if the parody criteria in national copyright law differed between each Member State. All too quickly then, in the name of achieving coherence and unity in EU law, the national legal responses to the phenomenon of parody would seem to be a sitting duck for the CJEU to “Europeanise”. Are IP lawyers ready for this? Are labour lawyers?

It is not just collective labour relations that might be affected by a judicial revision of the EU IP law framework. The CJEU could re-regulate individual labour law too. That is to say, when it comes to

⁴⁵ Software Directive art.4(1)(b).

⁴⁶ Database Directive art.5(b).

⁴⁷ See for example, the Dutch case involving Aldi which tried to rely on trade mark law to stop its workers from using pithy slogans on the flyers that were handed out to Aldi’s workers. Aldi’s Dutch employees had transformed the slogan, “The Aldi principle: High Quality Low Prices” into “The Aldi principle: High Work-Pressure Low Staffing” (author’s translation of the mark “HET ALDI-PRINCIPE HOGE KWALITEIT LAGE PRIJS”, and the transformative slogan: “HET ALDI PRINCIPE: HOGE WERKDRUK LAGE BEZETTING”). The Dutch judge mentioned parody apparently to dispatch this aspect of Aldi’s claim. See further, LJN:BD2938, Dutch District Court of Zwolle [Rechtbank Zwolle], 144461 / KG ZA 08-170, judgment in kort geding, June 2, 2008.

⁴⁸ See the *Lila-Postkarte* decision of German Supreme Court [Bundesgerichtshof], I ZR 159/02, February 3, 2005.

⁴⁹ See the *Styriagra* decision of the Austrian Supreme court [Oberste Gerichtshof], 17 Ob 15/09v, September 22, 2009.

⁵⁰ *Miffy [Nijntje]* decision of the Amsterdam Court of Appeal [Hof Amsterdam], LJN: BS7825, September 13, 2011.

employee copyright, EU legislation appears inconsistent. For example,⁵¹ the Database Directive leaves the rules relating to employee copyright to the Member States or contract.⁵² But the Community Design Regulation art.14(3) vests the right to the Community design to the designer—unless it is developed by an employee in the execution of his duties, in which case the right vests in the employer, unless the parties have agreed otherwise agreed, or it is otherwise specified in national law.⁵³ In light of these two pieces of EU IP legislation, would the CJEU spot incoherence and inconsistency in EU law’s various approaches to employee copyright? And given the apparent hostility of the CJEU in *Airfield* to policy choices of a legislature that fails to respect the author’s rights in natural law, will the CJEU be minded to vest all rights in the author? Will the CJEU be beguiled into thinking that that might seem attractive in a post-industrial labour market where “creative” people are increasingly engaged by firms outside of a contract of employment?

Conclusion

There were two major novelties in *Airfield*. First, a satellite packager is independent from broadcasting organisations. And secondly, satellite packagers will, unless otherwise governed by contract law, also need to pay for the consent of the collecting societies to communicate works to the public by satellite. Analysing the reasoning of the CJEU reveals that the bulk of the judgment cannot be explained by the norms of international law, or indeed EU IP legislation.

An analysis of the reasoning in *Airfield* shows that EU law has recognised intermediaries only after it has loaded the EU legislative framework to generate a ruling that ignores the presence of national laws that enshrine the existing relations of production. The court has then contrived contradictions in the EU legal order, which it has resolved with the aid of social constructs about the market and the technology. It has tacitly ditched notions of the rule of law and separation of powers, and in incorporated into the EU legal reasoning non-EU legal materials such as French legislation and doctrine. The judges in the CJEU apparently felt that this was a price to pay in order to emancipate authors from an EU legislature’s failure to respect natural law rights, the rise of new technology, and the pernicious effects of merchant capital.

Perhaps Dommering is right in so far as broadcasting law might offer a way forward through copyright law’s crisis. Certainly, there is now the possibility that the CJEU could use planks of the reasoning in *Airfield* to allow EU copyright law to escape its paper-based past, at least insofar as the transient copies made inside computers are concerned. But perhaps his insight could be enriched because the “unity and coherence” canon of construction currently inside the area of broadcasting law and used to recognise the new intermediaries of satellite packagers, could lead to the whole-scale revision of EU copyright law and its attendant rights of communication to the public, reproduction, adaptation, and indeed the very limitations to those rights.

Given the propensity of this chamber of the CJEU to conjure up all sorts of social constructs about the market and technology, and incorporate non-EU law materials in its quest to emancipate the author and buttress IP law, the judicial chamber might give rise to a veritable array of new legal myths that are capable of subjecting citizens and workers alike—they might even restructure class relations. Accordingly, it will be interesting to see what the CJEU does with the novelties it has created in *Airfield*; the social cost of them could be immense.

⁵¹ This example originates in a paper on “Employees and other IPRS” given by Lionel Bently at a conference entitled “Employees and intellectual property rights” (March 10, 2012). His paper is replete with other examples of contradictions inside EU and national IP law; however, he does not make the link to the unity and coherence doctrine as expressed in *Airfield* [41].

⁵² Database Directive Recital 29.

⁵³ Regulation 6/2002 on Community designs OJ [2002] OJ L3/1 art.14(3).