ECLI:EU:C:2024:289

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

11 April 2024 (*)

(Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Directive 2001/29/EC – Article 3(1) – Communication to the public – Meaning – Provision of television sets in a hotel – Transmission of a signal by means of a coaxial cable distributor – Directive 93/83/EEC – Cable retransmission – Cable operators – Meaning – Licensing agreement with collective management organisations for cable retransmission – Retransmission of that signal by means of that hotel's own cable distribution network)

In Case C-723/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht München (Higher Regional Court, Munich, Germany), made by decision of 24 November 2022, received at the Court on the same day, in the proceedings

Citadines Betriebs GmbH

v

MPLC Deutschland GmbH,

THE COURT (Sixth Chamber),

composed of T. von Danwitz, President of the Chamber, P.G. Xuereb and I. Ziemele (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Citadines Betriebs GmbH, by A. Conrad and T. Schubert, Rechtsanwälte,

– MPLC Deutschland GmbH, by M. König, Rechtsanwalt,

– the European Commission, by J. Samnadda and G. von Rintelen, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1) 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).

2 The request has been made in proceedings between Citadines Betriebs GmbH ('Citadines'), the operator of a hotel, and MPLC Deutschland GmbH ('MPLC'), a collective management organisation, concerning an alleged infringement by Citadines of the exclusive right of communication to the public that MPLC holds over an episode of a television series broadcast on a public television channel, which the guests of that hotel were able to view on television sets made available by Citadines in the rooms and in the fitness area of that hotel.

Legal context

European Union law

Directive 93/83/EEC

3 Article 1(3) 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) provides:

'For the purposes of this Directive, "cable retransmission" means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.'

4 Article 8(1) of that directive provides:

'Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.'

Directive 2001/29

5 Recitals 4, 9, 10, 23 and 27 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 … and lead in turn to growth and increased competitiveness of European industry, …

…

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as “on-demand” services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

…

(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. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

…

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.’

6 Article 3(1) of that directive provides:

‘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.’

German law

7 Paragraph 15(2) of the Gesetz über Urheberrecht und verwandte Schutzrechte – Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 (BGBl. 1965 I, p. 1273), in the version applicable to the facts in the main proceedings (‘the UrhG’), provides:

‘The author has the exclusive right to communicate his or her work to the public in an intangible form (right of communication to the public). The right of communication to the public shall include, in particular:

1. the right of recitation, performance and presentation (Paragraph 19),

2. the right to make work available to the public (Paragraph 19a),

3. the right to broadcast (Paragraph 20),

4. the right of communication by video or audio recordings (Paragraph 21),

5. the right to communicate broadcasts and works made available to the public (Paragraph 22).'

8 Paragraph 20 of the UrhG reads as follows:

'"Right to broadcast" means the right to make a work available to the public by broadcasting, such as radio and television transmission, satellite transmission, cable transmission or by similar technical means.'

9 Paragraph 20b(1) of the UrhG provides:

'The right to retransmit a work broadcast in the context of a simultaneous, unaltered and unabridged retransmission of a programme, by cable or microwave systems (cable retransmission), may be asserted only by a collective management organisation. This rule does not apply to rights asserted by a broadcasting organisation over its own broadcasts.'

10 Paragraph 22 of the UrhG provides:

'"The right to communicate broadcasts and works made available to the public" means the right to make perceivable to the public, by screen, loudspeaker or similar technical device, broadcasts and communications of works that are based on their being made available to the public. Paragraph 19(3) shall apply by analogy.'

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

11 MPLC, an independent, for-profit collective management organisation under German law, brought an action against Citadines, a hotel operator, before the Landgericht München I (Regional Court, Munich I, Germany), seeking an injunction prohibiting the communication to the public of an episode of a television series by means of a broadcast via television sets installed by Citadines in the rooms and the fitness area of its hotel in so far as the signal is retransmitted to the television sets via coaxial or data cables. That episode, broadcast by a public television channel, was thus viewed on 17 November 2019 by guests of that hotel, that signal having been transmitted simultaneously and unaltered to those television sets by means of that hotel's own cable distribution network. For the purposes of cable retransmission, Citadines concluded comprehensive licensing agreements with the German collective management organisations.

12 By interim order of 17 January 2020, the Landgericht München I (Regional Court, Munich I) prohibited Citadines from making that episode available to the public.

13 By judgment of 18 June 2020, that court confirmed that interim order.

14 Citadines brought an appeal against that judgment before the Oberlandesgericht München (Higher Regional Court, Munich, Germany), which is the referring court.

15 That company maintains that it is entitled to make available free-to-air programmes broadcast on public-service television to its guests, on the television sets installed in the rooms and fitness area of the hotel concerned, on the basis of its licences for cable retransmission.

16 By contrast, MPLC argues that, by retransmitting the signal at issue by means of a cable distribution network belonging to that hotel, Citadines infringed MPLC's right of communication to the public. It is irrelevant in that regard that Citadines clarified the question of the right of cable retransmission with collective management organisations.

17 The referring court submits that, according to the case-law of the Court, although the mere provision of reception equipment does not, in itself, in the light of recital 27 of Directive 2001/29, constitute a communication to the public, the right of communication to the public is infringed where the signal is retransmitted to the reception equipment by means of such a cable distribution network.

18 However, that court observes that, in the present case, the acts carried out by Citadines going beyond the mere provision of television sets consisted solely in retransmitting the television signal by means of the hotel's cable distribution network, which Citadines was entitled to do because of the licence granted to it by the collective management organisations. Given that the concept of communication to the public within the meaning of Article 3(1) of Directive 2001/29 is divided, in German law, into the right under Paragraph 20b of the UrhG ('retransmission') and that under Paragraph 22 of the UrhG ('communication of broadcasts'), it is doubtful whether it may be concluded from a user's acts which that user is entitled to perform on the basis of a licence under Paragraph 20b of the UrhG, namely cable retransmission within the hotel, that the user intended to perform an 'act of communication' when that conduct in all other respects comprises only the provision of reception equipment, which is not an infringement criterion of the right of communication to the public.

19 In those circumstances, the Oberlandesgericht München (Higher Regional Court, Munich) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 3(1) of Directive [2001/29] be interpreted as precluding a national provision or practice according to which the provision of physical facilities for enabling or making a communication – such as television sets in hotel rooms or hotel fitness rooms – is regarded as communication to the public when, while the transmission signal, in addition, is retransmitted to the physical facilities via the hotel's own cable distribution system, that cable retransmission takes place lawfully on the basis of a licence acquired by the hotel?'

Consideration of the question referred

Preliminary observations

20 It is apparent from the request for a preliminary ruling that the referring court's doubts stem, as noted in paragraph 18 above, from the fact that the communication to the public, within the meaning of Article 3(1) of Directive 2001/29, is 'divided' in national law between, on the one hand, the right provided for in Paragraph 20 of the UrhG and, on the other, that provided for in Paragraph 22 of the UrhG, those rights transposing, according to the information in the order for reference, Article 3(1) of Directive 2001/29.

21 In its reply to the request for clarification sent to it by the Court in accordance with Article 101 of the Rules of Procedure of the Court of Justice, the referring court noted, however, that Paragraph 20b of the UrhG was essentially the result of the amendment of that law by the Viertes Gesetz zur Änderung des Urheberrechtsgesetzes vom 8. Mai 1998 (Fourth Law amending the UrhG of 8 May 1998) (BGBl. 1998 I, p. 902), which was intended to transpose Directive 93/83 into German law.

22 While stating that Paragraph 20b of the UrhG was subsequently amended with effect from 1 January 2008 by the Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft vom 26. Oktober 2007 (Second Law regulating copyright in the information society of 26 October 2007) (BGBl. 2007 I, p. 2513) in order to continue the adaptation of German copyright law to developments in the field of information and communication technology and to resolve the issues that, in view of the short deadline for transposing Directive 2001/29, had not been transposed in the context of the previous copyright reform, that court submits that, according to the explanatory memorandum to that law, 'there was no question of altering the basic structure of the cable retransmission right "in the light of international and European requirements"'.

23 According to settled case-law, it is not for the Court to rule on the interpretation of national provisions, as such an interpretation falls within the exclusive jurisdiction of the national court. Thus, the Court has no jurisdiction to rule on the question whether the provisions of Paragraph 20b of the UrhG constitute a transposition of Directive 93/83 or Directive 2001/29 (see, to that effect, judgment of 28 October 2021, *A and B (Joint taxation of small breweries)*, C-221/20 and C-223/20, EU:C:2021:890, paragraphs 16 and 17 and the case-law cited).

24 That said, it should be noted that the referring court clearly states, in its reply referred to in paragraph 21 above, that the Fourth Law amending the UrhG of 8 May 1998, which inserted Paragraph 20b into the UrhG, transposed Directive 93/83.

25 On that point, it should be borne in mind, in the first place, that, under Article 1(3) of Directive 93/83, the concept of 'cable retransmission' is defined as the 'simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public'.

26 As the Court has already held, Directive 93/83 governs only the exercise of the cable retransmission right in the relationship between copyright owners and holders of related rights, on the one hand, and 'cable operators' or 'cable distributors', on the other. The concepts of 'cable operator' or 'cable distributor' designate the operators of traditional cable networks (judgment of 8 September 2022, *RTL Television*, C-716/20, EU:C:2022:643, paragraphs 76 and 77).

27 It follows that a hotel cannot be regarded as a 'cable operator', within the meaning of Directive 93/83 (see, to that effect, judgment of 8 September 2022, *RTL Television*, C-716/20, EU:C:2022:643, paragraphs 84 and 85).

28 In the second place, as regards the fact, raised by the referring court, that, in the case in the main proceedings, the hotel operated by Citadines has a licensing agreement authorising the retransmissions at issue, it must be held that the order for reference does not contain any details on the type of acts covered by such a licensing agreement.

29 In its written observations, Citadines maintained that, although it does not dispute that, by retransmitting broadcasts to reception equipment within its hotel, it performed acts of communication to the public, within the meaning of Article 3(1) of Directive 2001/29, it does claim that, to that effect, it acquired, in full, the required licenses from the relevant collective management organisations, for which it pays a flat-rate fee each year for each hotel room.

30 MPLC, for its part, argued that the licensing agreement concluded by Citadines does not cover the direct and indirect retransmission of radio and television programmes by means of a distribution network belonging to the hotel concerned.

31 In that regard, in accordance with settled case-law, in the context of proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court (judgment of 17 December 2020, *BAKATI PLUS*, C-656/19, EU:C:2020:1045, paragraph 30 and the case-law cited).

32 Accordingly, it is for the referring court to determine whether, in the dispute before it, the licensing agreement concluded by Citadines covers any acts of communication to the public, within the meaning of Article 3(1) of Directive 2001/29, carried out by that company.

33 In that context, it is necessary, in any event, to add that the fact that such a licensing agreement has been concluded is irrelevant to the question whether the retransmissions at issue constitute a communication to the public within the meaning of that provision. By contrast, as the European Commission stated in its written observations, the existence of such a licensing agreement is capable of establishing whether such a communication, if proved, was authorised by the author of the work concerned.

34 It is in the light of the foregoing considerations that the question referred for a preliminary ruling must be answered.

Substance

35 By its question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision of television sets installed in the rooms or in the fitness area of a hotel, where a signal is also retransmitted to those sets by means of that hotel's own cable distribution network, constitutes a 'communication to the public', within the meaning of that provision.

36 In that regard, it must be recalled that, under Article 3(1) of Directive 2001/29, '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'.

37 As the Court has repeatedly held, under that provision, authors thus have a right which is preventive in nature and which enables them to intervene between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such communication (judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 30, and of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 62 and the case-law cited).

38 As regards the content of the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, it should, as is underlined by recital 23 of Directive 2001/29, be understood in a broad sense, covering all communication to the public not present at the place where the communication originates and, thus, any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. It is, indeed, clear from recitals 4, 9 and 10 of that directive that 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 work, including when a communication to the public takes place (judgment of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 63 and the case-law cited).

39 In that regard, as the Court has repeatedly held, that concept includes two cumulative criteria, namely an act of communication of a work and the communication of that work to a public, and requires an individual assessment (judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 37; of 2 April 2020, *Stim and SAMI*, C-753/18, EU:C:2020:268, paragraph 30; and of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 66 and the case-law cited).

40 For the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Those criteria must, moreover, be applied both individually and in their interaction with each other, in so far as they may, in different particular situations, be present to widely varying degrees (judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 35, and of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 67 and the case-law cited).

41 Amongst those criteria, the Court has, first, emphasised the indispensable role played by the user and the deliberate nature of its intervention. That user makes an ‘act of communication’ when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work (see, to that effect, judgment of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 68 and the case-law cited).

42 Furthermore, the Court has held that it is relevant that a ‘communication’, within the meaning of Article 3(1) of Directive 2001/29, is of a profit-making nature (judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 38 and the case-law cited).

43 Secondly, in order to be categorised as a ‘communication to the public’, within the meaning of that provision, the protected works must also in fact be communicated to a public (judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 40, and of 28 October 2020, *BY (Photographic evidence)*, C-637/19, EU:C:2020:863, paragraph 25 and the case-law cited).

44 In that regard, the Court has specified that the concept of ‘public’ refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of people (judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 41, and of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 69 and the case-law cited).

45 It also follows from settled case-law that, in order to be categorised as a ‘communication to the public’, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a ‘new public’, that is to say, to a public that was not already taken into account by the copyright holder when it authorised the initial communication of

its work to the public (judgment of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 70 and the case-law cited).

46 It is in the light, inter alia, of those criteria and in accordance with the need for an individual assessment established in paragraph 39 above that it must be assessed whether, in a case such as that at issue in the main proceedings, a hotel operator that provides in the rooms and fitness area of that hotel television and/or radio sets to which it retransmits a broadcast signal is making a communication to the public, within the meaning of Article 3(1) of Directive 2001/29.

47 While it is, in principle, for the national court to determine whether that is the situation in a particular case and to make all definitive findings of fact in that regard, the Court has jurisdiction to provide the national court with all the guidance as to the interpretation of EU law in order to determine whether there is such an act of communication to the public.

48 In the present case, in the first place, it must be held that a hotel operator carries out an act of communication, within the meaning of Article 3(1) of Directive 2001/29, when it intentionally transmits protected works to its clientele by intentionally distributing a signal by means of television sets which it has installed in its establishment (see, to that effect, judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 54 and the case-law cited).

49 In the second place, the Court has already held that the guests of such a hotel constitute an indeterminate number of potential recipients, in so far as the access of those guests to the services of that establishment is the result of their own choice and is limited only by the capacity of the establishment in question, and that the guests of a hotel constitute a fairly large number of persons, such that they must be considered to be a 'public' (judgment of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraphs 41 and 42).

50 In the third place, the Court has held that, in order for there to be a communication to the public within the meaning of Article 3(1) of Directive 2001/29, the user concerned must, in full knowledge of the consequences of its actions, give access to a television broadcast containing a protected work to an additional public and that it appears thereby that, in the absence of that intervention, those 'new' viewers are unable to enjoy that work, although physically within the broadcast's catchment area. Thus, where a hotel operator intentionally broadcasts such a work to its clientele, by intentionally distributing a signal by means of television or radio sets that it has installed in its establishment, it intervenes in full knowledge of the consequences of its actions to give access to that work to its guests. In the absence of that intervention, those guests are unable to enjoy that work, although physically within such a catchment area (see, to that effect, judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraphs 46 and 47 and the case-law cited).

51 In the fourth place, according to the case-law of the Court, for there to be communication to the public, within the meaning of that provision, it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it (see, to that effect, judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 43). It follows that the fact, mentioned by the referring court, that the television sets were not switched on by Citadines but by guests of the hotel operated by that company is irrelevant.

52 In the fifth place, as regards the profit-making nature referred to in paragraph 42 above, it is apparent from the case-law of the Court that the act by which a hotel operator gives access to a broadcast work to its guests constitutes an additional service which has an influence on the hotel's standing and, therefore, on the price of rooms of that hotel, so that that act is of a profit-making

nature (see, to that effect, judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 44, and of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraphs 44 and 45).

53 In the sixth and last place, it cannot be held that the provision of television sets in the rooms and fitness area of the hotel at issue in the main proceedings constitutes a 'mere provision of physical facilities', within the meaning of recital 27 of Directive 2001/29.

54 As regards hotels, it is clear from the case-law of the Court that, while the mere provision of physical facilities, usually involving, besides the hotel, companies specialising in the sale or hire of television sets, does not constitute, as such, a communication within the meaning of Directive 2001/29, the installation of such facilities may nevertheless make public access to broadcast works technically possible. Therefore, if, by means of television sets thus installed, the hotel distributes the signal to guests staying in its rooms, then communication to the public, within the meaning of Article 3(1) of that directive, takes place, irrespective of the technique used to transmit the signal (see, to that effect, judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 46).

55 In the light of the foregoing considerations, the answer to the question referred is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision of television sets installed in the rooms or in the fitness area of a hotel, where a signal is also retransmitted to those sets by means of that hotel's own cable distribution network, constitutes a 'communication to the public', within the meaning of that provision.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Sixth Chamber) hereby rules:

Article 3(1) 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 the provision of television sets installed in the rooms or in the fitness area of a hotel, where a signal is also retransmitted to those sets by means of that hotel's own cable distribution network, constitutes a 'communication to the public', within the meaning of that provision.

[Signatures]

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* Language of the case: German.