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Broadcasters' Cable Retransmission Rights: in line (or not) with the EU right of communication to the public?

Tatiana Synodinou (University of Cyprus) · Wednesday, April 13th, 2022

On March 10th, 2022, the Advocate General (AG) Pitruzzella delivered his Opinion on the case *RTL Television GmbH v Grupo Pestana S.G.P.S., S.A.,* et al (C-716/20). The case is an ideal example of the intricacy of the EU copyright law edifice regarding the right of communication to the public, which appears as a patchwork of disperse legislative provisions and case law.

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The facts of the case are the following. Hotel operators in Portugal captured the satellite signal of the "free-to-air" RTL channels and then transmitted them through coaxial cables on the TV sets in the hotels' rooms. Since the defendants did not have an authorization, RTL brought actions before the Portuguese courts.

Having in mind the previous decisions of the CJEU confirming the application of the right of communication to the public regarding the transmission of radio television programs in TV sets installed in hotels (see*: SGAE,* C-306/05, *Divani Acropolis Hotel* Case C-136/09), one would logically doubt about the purpose and the utility of the referral. However, the case is more complex than it appears, since it does not concern the right of communication to the public which is granted to authors. Rather, it concerns, first, the conceptual autonomy (or actually the lack of it) of the cable retransmission as a broadcasters' right, and, second, the extent to which the right of communication to the public is granted to broadcasting organisations.

Indeed, while the Infosoc Directive expressly granted to broadcasting organisations the making available right (Art. 3 (2)), it did not grant the general right of communication to the public to broadcasting organisations (Art. 3 (1)). The latter benefit this right on the basis of Art. 8 (3) of the Rental Right Directive, which provides for a limited right of communication to the public on the model of Art. 13 (d)

of the Rome Convention, as following: "*Member States shall provide for broadcasting organizations the exclusive right to authorize or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee*."

The legal status of cable retransmission is regulated by Art. 8 (1) of the Sat/Cab Directive. The latter does not directly provide for the mandatory establishment of an exclusive right of cable retransmission for the benefit of broadcasting organisations. However, Member States can provide for such a right in their legislations. In the present case, the claim of RTL is based on Article 187 of the Portuguese Copyright and Related Rights Act which introduced in favor of television channels the right to authorise or prohibit the retransmission when someone retransmits by cable their free-to-air programs.

Given the dispersity of legal sources regarding cable retransmission, one of the key issues of the case is whether the claims of RTL regarding the unauthorised transmission of its signals in hotel rooms through coaxial cable should be based on the general right of communication to the public or on the special regime of the Sat/Cab Directive.

Cable retransmission or communication to the public, a misconception?

For the AG, the acts of retransmission by cable made by hotel operators shall not fall within the conceptual framework of the Sat/Cab Directive, since the latter covers only retransmissions which are made by professional cable networks. Furthermore, a transmission through coaxal cable (the "normal" TV cable that links a TV to an antenna) should not be regarded as cable retransmission in the sense of EU copyright law.

This is based on a historical interpretation of the concept of cable retransmission which should be inextricably linked to the specific technology that the Sat/Cab Directive aimed to regulate (par. 58). The disconnection of the notions of "cable" and of "cable operator" from the specific technological framework and of the aims of the Sat/Cab Directive would abusively enlarge the concept of "cable retransmission" as the later was conceived by the EU legislator. Even if Member States remain free to establish cable retransmission rights both for copyright holders and holders of related rights, these rights should be construed through the harmonised conceptual framework of this Directive. This narrow interpretation of the concepts of the Directive might a priori appear incompatible with the continuous evolution of technology. However, it is consistent with the vertical character of the initial phase of EU copyright harmonisation which fragmentarily regulated specific sectors, concepts and rights.

Since hotel operators are not professional cable operators in the sense of the Sat/Cab Directive, the only applicable right is the general right of communication to the public. However, EU copyright law grants to broadcasting organisations this right only in a

restricted form, under the scope of Art. 8 (3) of the Rental Right Directive. By applying the CJEU's finding in the *Verwertungsgesellschaft (C-641/15)* the AG proposes that no remuneration is due by the hotel operators to RTL since Art. 8 (3) presupposes a payment specifically requested in return for a communication to the public of a TV broadcast. Although the distribution of a signal by means of TV and radio sets installed in hotel rooms constitutes an additional service which has an influence on the hotel's standing and on the price of rooms, it cannot be considered that this additional service is offered in a place accessible to the public against payment of an entrance fee within the meaning of Article 8(3) (*Verwertungsgesellschaft,* paras. 25, 26)

Indeed, the narrow delimitation of the broadcasting organisations' right of communication to the public in Art. 8 (3) cannot enable any alternative meaning. However, it is noteworthy that the AG goes one step further and puts in question the whole interpretative line of the CJEU regarding the application of the right of communication to the public in hotel rooms, cafes and similar places. For the AG, a hotel does not derive any specific economic advantage from the re-broadcasting of TV programs in the rooms for use by the hotel guests, since for the determination of the room price, based on common experience does not take into account this fact (par. 82). Additionally, the AG links the justification for remuneration on the grounds of communication to the public to the model of commercial exploitation chosen by the broadcasters, either pay-TV or free to air communication which is financed by advertising (paras. 86, 87). This is at odds with the interpretative line of the CJEU since *SGAE* (C-306/05), which expressly recognised that hotel operators have an economic profit from the communication of TV programs to their clients (SGAE, par. 44. See also: FAPL, Joined Cases C-403/08 and C-429/08, paras. 204, 206). Although the AG's general reasoning and conclusions seem very sound, this argument maybe not be followed by the Court.

Rights of authors and related rights: united or separated?

Finally, for the AG the non-remuneration of the broadcasters for the retransmission by coaxial cable of TV programs in hotel rooms is not expected to have any negative impact on the rights of the authors (paras. 84, 85). This is because, the latter are regulated independently by EU law from the rights granted to broadcasters.

This ontological distinction might have further repercussions. First, this might lead to an even deeper fragmentation and complexity of the EU copyright law, which already appears as an amalgam of special principles, rules and statuses. At the same time, it is also clear that related rights should not automatically and indistinctively benefit from copyright principles whose justification is the protection of the authors.

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