Kluwer Copyright Blog

First hotel rooms, then dental practice, and now spa establishments

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"When providing healthcare in healthcare facilities, there is no obligation to pay remuneration for communication to the public of copyright works. But, is a hotel room where occasionally health treatment is performed *a healthcare facility?"*

On 24 July 2012, Krajský soud v Plzni (Czech Republic) lodged a reference for preliminary ruling with the CJEU in case C-351/12, *Ochranný svaz autorský pro práva k díl?m hudebním, o.s. (OSA) v Lé?ebné lázn? Mariánské Lázn?, a.s.,* referring three questions dealing with separate issues related to a case taking place between a Czech collecting society and a business providing spa services, including both accommodation and healthcare services. Firstly, the court questions whether Czech national law is contrary to provisions of Articles 3 and 5 of the Directive 2001/29/EC (the "InfoSoc Directive") when no remuneration to authors is required for communication of the works by television or radio to patients in rooms in spa establishment which is a business. Secondly, the court explores a possibility of direct application of the above mentioned provisions of the Directive before national courts where such provisions are allegedly wrongly transposed. And finally, it wonders whether a monopolistic position held by a collecting society which is in compliance with Member State's national law could nonetheless be contrary to EU law, in particular Articles 56 and 102 TFEU. At first sight, looking at the facts of the case it may seem to be quite a straightforward case but is it really the fact?

To the first issue

The question referred is as follows: *Must 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 be interpreted as meaning that an exception disallowing remuneration to authors for the communication of their work by television or radio transmission by means of television or radio receivers to patients in rooms in a spa establishment which is a business is contrary to Articles 3 and 5 (Article 5(2)(e), (3)(b) and (5))?*

In the present case the applicant, Ochranný svaz autorský pro práva k díl?m hudebním, o.s.

("OSA"), is a Czech collective rights management society managing rights of the authors in musical works. The defendant, Lé?ebné lázn? Mariánské Lázn?, a.s. ("LLML"), is a business providing comprehensive institutional as well as ambulatory patient care (preventive, curative and rehabilitative) using local natural healing resources in the area of Mariánské Lázn? (a spa town in the Czech Republic) and also providing accommodation and other hospitality services.

The defendant refused to enter into a licensing agreement and to pay any license fees for the communication of works by performing television or radio broadcast to the applicant. They argued that the exception stipulated in Article 23 of the Czech Copyright Act 2001 ("CCA 2001") (1) which provides for an exception in the case of use of copyright works by healthcare facilities would apply to them.

Article 23 stipulates: "The performing of the radio or television broadcast of the work shall mean making such broadcasted work available by means of a device technically capable of receiving the broadcasting. The author is entitled to remuneration for making the work available by means of facilities technically capable to receive broadcasts to guests accommodated […]. *Making the work available to patients in providing healthcare in the healthcare facilities shall not be under Article 18 paragraph 3 deemed to be the performing of the radio and television broadcast* (my emphasis)." (Article 18 paragraph 3 stipulates that "the communication of the work to the public shall not mean the mere operation of a facility enabling or facilitating such communication", meaning that providers of communication services/networks and of devices securing functioning of such services do not communicate works to the public.

It is worth mentioning here that Czech copyright law breaks down the act of communication of a work to the public into separate steps, stages or activities, if you like, that can constitute communication of a work to the public. Thus, Czech Copyright Act, unlike the InfoSoc Directive, distinguishes within communication of a work to the public between acts of Life Performance of the Work and its Transmission (Art. 19 CCA 2001), Performance of the Work from a Recording and its Transmission (Art. 20 CCA 2001), Broadcasting (Art. 21 CCA 2001), Rebroadcasting and Retransmitting of the Broadcast (Art. 22 CCA 2001), and Performing of the Broadcast (Art. 23 CCA 2001). Article 23 therefore deals specifically with devices technically capable of radio or television broadcast, i.e. in plain language, TVs and radios placed where the public can (but does not necessarily have to) use them, i.e. in pubs, restaurants or hotel rooms. Mandatory extended licensing scheme applies to this particular use of works. OSA is in charge of collectively managing these rights. Not only does OSA manage this right in relation to musical works but also acts on a contractual basis on behalf of collecting societies dealing with other protected content and on behalf of foreign collecting societies when managing remuneration for communication to the public of works by television and radio when such devices are placed in hotel rooms.

Article 5 (2) e) InfoSoc Directive states that Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: …(e) in respect of reproductions of broadcasts made by *social institutions pursuing non-commercial purposes*, such as hospitals or prisons, on condition that the rightholders *receive fair compensation* (my emphasis); Article 5 (3) b) states that Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 (i.e. reproduction and communication to the public) in the following cases: …(b) *uses*, for the benefit of people with a disability, *which are directly related to the disability and of a non-commercial nature*, to the extent required by the specific disability… *(Typically this provision applies to works reproduced in Braille or special audio files, etc. Can one subsume the use of works in the present case under this provision?).*

The applicant’s argument was that part of the provision of Article 23 that introduces an exception for healthcare facilities is not compliant with the provisions of the Directive 2001/29/EC. This is because no compensation to rightholders is provided for and because the exception is not limited for non-commercial uses only (provision of LLML’s services is, in OSA’s view, commercial). It appears that Article 23 is wrongly transposing Articles 3 and 5 of the InfoSoc Directive by not providing a fair compensation to rightholders for communication of their works to the public and for making reproductions of broadcasts available to the public.

Leaving aside for a moment the issue of wrong transposition of the Directive, another question that arises here is whether the defendant is a *social institution pursuing non-commercial purposes and/or whether the uses are for the benefit of people with a disability*? The defendant claimed that they provide healthcare as a non-state provider of healthcare according to the law (2) and the healthcare services are covered fully or partially by the public health insurance (and therefore they qualify as *providing healthcare in healthcare facilities* within the meaning of Article 23 even though they are a business). They also claimed that such healthcare *inter alia* is provided directly in clients’/patients’ rooms and such care cannot be separated from providing accommodation in those patients’ (hotel) rooms. Thus exception as stipulated in Article 23 last sentence does apply to them.

When applying Czech law, the healthcare services provided by the defendant are considered as non-commercial in the meaning of the InfoSoc Directive. However, describing the related accommodation services as non-commercial is highly questionable. In addition, the defendant’s argument that the healthcare services are provided in the patient’s rooms in some cases and thus the exception applies, resembles a drowning person clutching at a straw. Even if occasionally healthcare is provided in the rooms, does it change the nature of the accommodation services? Or in a reverse way of argument: if there is no television or radio in the room, does it change anything about the nature or quality of the healthcare services? Probably not. But by placing a radio or television in the room does change the quality of the accommodation services. It increases their attractiveness and also competitiveness not only for the “non-paying” guests but also for the regular commercial guests of the hotel (which is one of the applicant’s arguments). Why, in such situation, should the authors be left out from their compensation?

LLML also argued that no communication to the public would take place here since their patients would stay in the facilities for a longer period than other hotel guests (on average for 22 days) and thus the ruling C-306/05, *SGAE v. Rafael Hotel*s does not apply here. The Czech court questioned whether the SGAE v. Rafael Hotels decision applies to rooms in spa establishments which have a different purpose and whether the differentiation made from the SGAE *v. Rafael Hotels* in the *Societa Consortile Fonografici* case (C-135/10) was relevant in this case?

The problem is thus twofold. On the one hand, the defendant needs to establish that since they provide healthcare in the rooms and such healthcare constitutes healthcare as defined in the special law, in the cases where such healthcare is covered by public health insurance funds (as oppose to services, possibly identical, provided to clients/patients paying for them privately) exception of Article 23 last sentence applies. When *providing healthcare in healthcare facilities*, there is no obligation to pay remuneration for communication to the public of copyright works. But, is a hotel room where occasionally health treatment is performed *a healthcare facility*? On the other hand, even if the defendant succeeded to establish this, it is not much of a help if the examined provision is found to be non-compliant with the InfoSoc Directive for allowing use of copyright works without fair compensation to rightholders.

One could argue that the referred question that the Court posed should have been worded slightly differently. Rather than asking whether it is contrary to [….] if the spa establishment *is a business*, it should have asked whether it is contrary to [….] if the spa establishment *is acting in the capacity* of a business or (to stick to the InfoSoc Directive terminology) if the activity is *of a commercial nature*.

To the second issue

The question referred is as follows: *Is the content of those provisions of the directive concerning the above use of a work unconditional enough and sufficiently precise for copyright collecting societies to be able to rely on them before the national courts in a dispute between individuals, if the State has not transposed the directive correctly in national law?*

Therefore the question is whether the wording of Article 3 and Article 5(2)(e), (3)(b) and (5) of the InfoSoc Directive is "unconditional enough" and "sufficiently precise". As to the direct effect, the applicant pointed out the ECJ's (as it was) decisions in case C-397/01, *Pfeiffer* (3) as to interpretation methods, and C-555/07, *Seda Kücükdeveci v Swedex* concerning the direct application of a non-transposed Directive between individuals should such Directive apply general principle of European Union law. The question is whether a principle of fair remuneration to authors/rightholders is a general principle of the EU law?

In the defendant's opinion, even if there was a discrepancy between the wording of Articles 3 and 5 of the InforSoc Directive and wording of the transposed national provisions, one cannot claim that the Directive is to be applied directly in proceedings between individuals.

The Court acknowledged that Directives in general do not have direct effect unless specific conditions are met. Where the direct effect of a Directive applies, it is not possible to claim such effect of a wrongly transposed Directive where the proceeding takes places between individuals. In such cases the national provisions have to be interpreted in court proceedings in conformity with EU law.

In copyright law, there is a general principle that authors are entitled to a fair remuneration. Such remuneration can be denied only exceptionally in justified cases. Such exceptions are listed as a mandatory rule in the Directive 2001/29/EC. Is it therefore possible for a national court not to apply an exception that is contrary to this Directive during proceedings before them?

Also, given the nature of the applicant (being an organisation appointed by the State), the Court held that it has a different position than an individual and thus maybe could be entitled to claim direct effect of the Directive before court.

To the third issue

The question referred reads: *Must Article 56 et seq. and Article 102 of the Treaty on the Functioning of the European Union (or as the case may be Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market) be interpreted as precluding the application of rules of national law which reserve the exercise of collective management of copyright in the territory of the State to only a single (monopoly) copyright collecting society and thereby do not allow recipients of services a free choice of a collecting society from another State of the European Union?*

Krajský soud v Plzni refers in its evaluation to a finding of the Czech Constitutional Court (4), coming to a conclusion in a similar matter, that it will be necessary to clarify the relation between Czech national law and EU law on this subject in a preliminary ruling initiated by the third question.

In the present case, the applicant acts as a collective rights management organisation based on the permission granted to them by a decision of the Ministry of Culture of the Czech Republic. The system in the Czech Republic is such that only entities approved/accredited(5) by the Ministry of Culture are allowed to act as collecting societies, and there is only one collecting society dealing with a specific subject matter(6) . Article 97 of the Czech Copyright Act 2001 stipulates that a collecting society is a non-for-profit legal person that obtained a permission to act as a collecting society and in which are associated and/or participate persons that are rightholders of the respective works collectively managed by the society(7).

The defendant pointed out that OSA is abusing their monopolistic position on the market in that the fees collected are unduly high compared to equivalent fees collected by neighboring foreign collecting societies (Germany, Austria, and Slovakia) for the same use despite often higher living standards of their nationals, and that such situation is worsening LLML's position in the market and their ability to compete with spa establishments in neighboring countries. *(Could a fee of approximately £0,30 (radio) and £1,- (TV) per room per month really have such a dramatic effect?).*

In addition, the defendant's establishments are also used by a foreign clientele and signal of foreign (German) television and radio broadcasts is received. The LLML claim that while they would like to enter into an agreement with a foreign collecting society (for example Austrian) whose fees are lower, the provision of free services is restricted since OSA prohibits that. OSA claims that LLML cannot enter into a licensing agreement with an Austrian collecting society because that is prevented by an agreement concluded between the two national collecting societies. But is such an agreement a legitimate instrument to prevent users or members from entering into negotiation with a foreign collecting society?

The Court of Justice will need to have a close look at the law on the boundary of copyright and competition laws, in particular to ask itself a question whether it is acceptable to have only one collective management organisation in charge of dealing with rights in one specific subject matter in the territory of one Member State? This is common practice in many European countries and is (in the blogger's opinion) justifiable by many aspects, including the size of the territory in question, a need for a state regulation in order to secure consumer/user protection etc. But the problem (in the blogger's view) does not lie in the monopolistic position of the collecting society but in the way it uses the position.

The Czech court's argument was that one cannot rule out that collective management of rights in copyright works can be considered to be a provision of services in the meaning of Article 56 TFEU and that activity of a collective management organization ("CMO") can influence competition within the EU in the meaning of Articles 101 and 102 TFEU. The Court stated that it was not clear from the provisions of the Directive 2006/123/EC on services in the internal market that it does not apply to collective rights management in the copyright context and therefore fall outside the realm of the Directive. The Directive specifies in paragraphs 8 to 35 of the Preamble which activities should or should not be covered by its scope. Paragraph 8 of the Preamble states that provisions of the Directive concerning the freedom of establishment and the free movement of services should

apply only to the extent that the activities in question are open to competition, so it does not apply to services of general economic interest (Member States do not have to abolish existing monopolies for other activities or certain distribution services). In the above mentioned paragraphs collective rights management is not expressly listed. If it did fall within the scope of the Directive the above mentioned provisions of the Czech Copyright Act 2001 could possibly, in the court's view, be contrary to Articles 16 (1) a) and 16 (2) a),b) or Article 14 (1) of the Directive on services in the internal market.

The author of this post is not aware of any Court of Justice decision dealing particularly with the issue of monopolistic collecting societies and is quite curious to find out what the CJEU's answer will be. However, the Commission was dealing in the past with the Czech Republic (and Hungary) regarding restrictions on the freedom of establishment and freedom of provision of services of CMOs (8) . The Commission recommended a change of the law but after an exchange of opinions between 2006 and 2009 nothing has happened in the past 4 years.

There is, however, ample jurisprudence and other material available on potential anticompetitive behavior of collective management organizations under Articles 101 and 102 TFEU (e.g. CISAC and IFPI Simulcasting cases, Santiago Agreement). It seems that it is by now almost established principle that agreements between different national collecting societies preventing its members and/or users of works in their realm from entering into agreement with foreign collecting society, especially if that is justified by e.g. reception of a foreign signal, are anticompetitive and thus in breach of European competition rules.

Concluding remarks

There are approximately 15 ongoing disputes between the applicant, OSA, and various spa facilities across the country, all awaiting the CJEU's decision. It is worth mentioning here that there was a will on OSA's side to come to amicable terms in this case, however authoritative solution was found to be desirable since it will affect the course of proceedings in all the related cases.

All three issues have relevance for other Member Satates' individuals and organizations and it will be interesting to watch the development. An answer to the first question may be of interest of national legislators who are unsure of their own transposition of the InfoSoc Directive. On the answer to the second question depends whether a collecting society can continue to enforce its members' rights immediately following the CJEU's decision, or whether it has to wait for a prospective law amendment or hope for correct interpretation by national courts in conformity with the EU law (at this moment, there have been few cases with the same facts pending in the Czech Republic where the courts ruled in the preceding instances in favour of the collecting society and another case where it ruled the opposite – thus unifying the approach is crucial.) In addition, if provisions of the InfoSoc Directive are found by the CJEU to be "unconditional enough" and "sufficiently precise" *(does the reader also doubt that?)* and a fair remuneration to authors is considered a general principal of EU law, individuals of other Member States may rely on them where the Directive 2001/29/EC has not been transposed correctly into national law. Probably the most intriguing, however, will be to see the development with regard to the third question.

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(A PDF-version of this article can be downloaded here).

(1) Act No. 121/2000 Coll., on Author's Rights, Related Rights, and on change of several acts as amended (please note that the wording provided in this link is not the most up-to-date; in particular wording of Article 23, relevant for this case, is outdated. The current wording contains additional two sentences dealing with remuneration in case of television and radio broadcasts communicated to guests in accommodation facilities, and with an exception for works communicated to such guests where this is part of provision of health services in health facilities, respectively (link).
(2) Act No. 20/1966 Coll., on public health care.
(3) C-397/01 Pfeiffer, para 113: Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in Von Colson and Kamann, paragraph 26; Marleasing, paragraph 8, and Faccini Dori, paragraph 26; see also Case C 63/97 BMW [1999] ECR I 905, paragraph 22; Joined Cases C 240/98 to C 244/98 Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941, paragraph 30; and Case C 408/01 Adidas-Salomon and Adidas Benelux [2003] ECR I-0000, paragraph 21).
(4) Nález Ústavního soudu ?eské republiky zed ne 29.11.2011 sp. Zn. II.ÚS 1658/2011.
5) Article 97 (1) of Act No. 121/2000 Coll., on Author's Rights, Related Rights, and on change of several acts as amended.
(6) Article 98 (7) of Act No. 121/2000 Coll., on Author's Rights, Related Rights, and on change of several acts as amended.
(7) Article 97 (1) to (3) of Act No. 121/2000 Coll., on Author's Rights, Related Rights, and on change of several acts as amended.
(8) The Commission is listing it as a case of infringement of a treaties under No. 2006/4091. See for example the 28th Annual Report on Monitoring the Application of EU Law (2010) Annex III, p.61.

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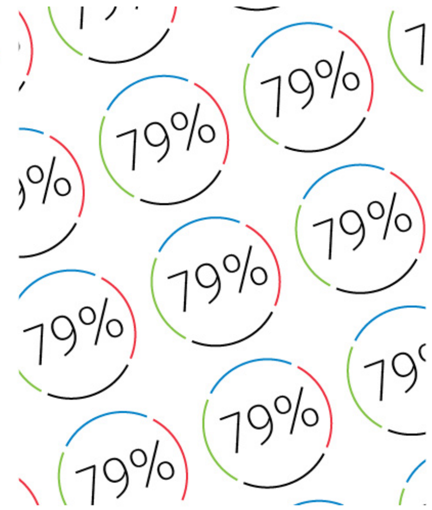

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