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The broadcasters' related right of communication to the public: vintage, but still captivating

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The right of communication to the public has proved to be one of the most intriguing concepts of EU copyright law. The CJEU has had to decide on its scope of application in a variety of cases both in the analogue (See the seminal SGAE case C-306/05) and in the digital world (See: Svensson case C-466/12, GS Media case C-160/15 and the recent AG opinions in the "Ziggo" case C?610/15 and the "Filmspeler" case C?527/15).

The Court of Justice, following a teleological approach, has generally opted for a broad interpretation of the right of communication to the public covering every act providing access to a work, even if the public is not really present in the place of communication (SGAE, par. 36, FAPL case C-403/08 & 429/08, para. 93, TV Catchup, case C-607/11, para. 23).

In the recent case Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH, Case C?641/15, the CJEU was called upon to give light to another, lesser known, aspect of the right of communication to the public and specifically to article 8 par. 3 of Directive 2006/115. According to this provision, "*Member States shall provide for broadcasting organisations the exclusive right to authorise 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 dispute arose when Verwertungsgesellschaft Rundfunk, a collecting society in Austria whose beneficiaries are numerous broadcasting organisations, claimed that Hettegger Hotel Edelweiss, by making available TV sets in its hotel rooms and by communicating television and radio broadcasts by means of those TV sets, performs an act of communication to the public within the meaning of Article 8(3) of Directive 2006/115 and asked for the payment of fees. According to the collecting society, the price of the room must be regarded as an entrance fee, insofar as the offer of a television in the hotel has an influence on that price. So, the Court had to decide whether Article 8(3) of Directive 2006/115 must be interpreted as meaning that the communication of television and radio broadcasts by means of TV sets installed in hotel rooms constitutes a communication made in a place accessible to the public against payment of an entrance fee.

In order to give an answer the CJEU had to go through a series of interpretative exercises. First, the CJEU consolidated its previous case law in relation to the coherent interpretation of the concept of communication to the public in different EU legislation by affirming that the concepts used by Directives 2001/29 and 2006/115 must have the same meaning, unless the EU legislature has

expressed a different intention (see para. 19). Consequently, the provision of a signal by means of television or radio sets installed in hotel rooms must also constitute a communication to the public of broadcasts from broadcasting organisations within the meaning of Article 8(3).

Nonetheless, the application of this principle has not led the Court to opt for an extension of the right of communication to the public to situations which, in the opinion of the Court, are not covered by the letter of the EU law and the intention of its drafters. Indeed, article 8 par. 3 of Directive 2006/115 provides a very restrictive scope of the right of the broadcasters by limiting their exclusive right to cases of communication to the public in places accessible to the public against payment of an entrance fee.

This additional condition originates from Article 13 (d) of the Rome Convention of 26 October 1961 and it dates back to the early years of television. At this time the communication to the public of broadcasts in public places against the payment of an entrance fee was a very common practice, since private television sets were rare. This is certainly not the case today. On the contrary, the situations where the payment of an entrance fee will be required specifically for the communication of a broadcast are minimal, so as to raise doubt about the real application of the right in practice. This situation could have given the Court an argument for proceeding with a creative or dynamic interpretation of this provision in order to make the law seem less anachronistic or to give new life to this almost “dead” provision. However, resurrecting the broadcasters’ right like the phoenix from the ashes could create far more turbulence than leaving it to completely vanish. In this context, the CJEU, following closely the Advocate’s General Opinion, opted for a safer interpretative path by founding its choice on the drafting history of the provision.

Since the requirement for an entrance fee derives from Article 13 (d) of the Rome Convention, it shall also be interpreted and applied in conformity with the latter because the intention of the drafters of Article 8 par. 3 of Directive 2006/115 was to follow, to a large extent, the provisions of the Rome Convention introducing minimum protection. The CJEU refers to the Guide to the Rome Convention and to the Phonograms Convention of the World Intellectual Property Organisation (WIPO), a document prepared by the WIPO which, without being legally binding, provides explanations as to the origin, purpose, nature and scope of that convention. This is not the first time the CJEU has drawn its argumentation from texts not forming part of the acquis communautaire. One of the most striking examples has been the introduction of the concept of “new public” in relation to the right of communication to the public, which the CJEU audaciously derived from the Guide to the Berne Convention in the SGAE case (para 41).

According to the Guide to the Rome Convention, the condition of payment of an entrance fee presupposes a payment specifically requested in return for a communication to the public of a TV broadcast and not for additional services, such as the payment for a meal or drinks in a restaurant or in a bar where TV broadcasts are aired. In this context, the additional service of the distribution of a signal by means of TV and radio sets installed in hotel rooms cannot be regarded as a payment of an entrance fee within the meaning of Article 8 par. 3, even though it has a certain influence on the hotel’s standing and, therefore, on the price of rooms (see par. 25). Consequently, the Court held that Article 8(3) of Directive 2006/115/EC must be interpreted as meaning that the communication of television and radio broadcasts by means of TV sets installed in hotel rooms does not constitute a communication made in a place accessible to the public against payment of an entrance fee.

In conclusion, the Court opted for a conventional interpretation of Article 8 para. 3 even though current conditions could have authorised a more radical one. This is completely understandable, since as Bacon prudently said "*judges ought to remember that their office is jus dicere, and not jus dare; to interpret law, and not to make law, or give law*". The introduction of a new extended scope for the broadcasters' communication right would have necessitated a legislative intervention and public consultation. The CJEU itself has left the door open for Member states in the C More Entertainment case C?279/13, para. 35, where it was held that "*Directive 2006/115 gives the Member States the option of providing for more protective provisions with regard to the broadcasting and communication to the public of transmissions made by broadcasting organisations than those which must be instituted in accordance with Article 8(3) of that directive. Such an option implies that the Member States may grant broadcasting organisations an exclusive right to authorise or prohibit acts of communication to the public of their transmissions on conditions different from those laid down in Article 8(3)…*". At an EU level such an initiative would probably be another opportunity to demonstrate the increasing divide between the pro-copyright and anti-copyright blocs.

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