Kluwer Copyright Blog

Juggling with trouble: Swedish Supreme Court asks about communication to the public in car rental cases. A comment on the CJEU reference in Case C-753/18

Kacper Szkalej (Lund University) · Thursday, December 20th, 2018

In a decision of 13 November 2018 concerning joined cases T 5909-17 and T 891-18 the Swedish Supreme Court, Högsta domstolen (HD), has decided to ask the CJEU whether the catalogue of acts falling within the concept of communication to the public includes the rental of cars with a standard-fitted radio integrated into the central control panel of the cars.

The Background

To keep things simple the car rental trade association *Biluthyrarna Sverige Servicebolag AB* entered into an agreement in 2011 with SAMI and STIM, rights management organisations representing the music industry, allowing the members of the association against the payment of an annual fee to rent out cars equipped with a radio. The agreement was terminated in 2014.

STIM initiated proceedings against *Fleetmanager Sweden* (T 5909-17), a company managing a fleet of 1 800 cars and whose customers are car rental companies in different parts of Sweden operating under the trademark Sixt, for *contribution to* communication of works to the public and public performance by allowing the car rental companies to rent out cars equipped with a radio.

Simultaneously *Nordisk Biluthyrning* (T 891-18), a company renting out cars to private individuals, companies and public authorities, sought a declaratory judgement against SAMI that it was not obliged to pay remuneration to SAMI (for the period 1 January 2015 – 31 December 2016), under section 47 Swedish Copyright Act implementing Article 8(2) Rental and Lending

Rights Directive, for the reason that the company's cars were equipped with a radio and a CD player.

While in *Fleetmanager* the first instance court did not accept Fleetmanager's contributory liability, in both cases the respective first instance courts (in *Nordisk Bilhutyrning* it was the Patent and Market Court, PMD, since the proceedings were initiated after the court reform introducing the specialised court) found that the provision for rental purposes of cars equipped with a radio such as in the present cases amounts to a copyright relevant act. In *Fleetmanager* this was a public performance (of a work), while in *Nordisk Biluthyrning* a communication to the public (of sound recordings).

On appeal, in *Fleetmanager* the Court of Appeal over Skåne and Blekinge affirmed the first instance judgment, but in *Nordisk Biluthyrning* the Patent and Market Court of Appeal, PMÖD, reversed the PMD decision holding instead that Nordisk Biluthyrning cannot be considered to communicate sound recordings. That conclusion was grounded in the observation that, beyond the mere provision of a radio in cars, there was no instance of intervening activity by Nordisk Biluthyrning when sound recordings are made available for the drivers and passengers of the rented cars. The Court also regarded the circumstances as not comparable to a situation whereby an 'apparatus' is provided as well as a sound recording in physical or digital form that can be played, or listened to, with the aid of the apparatus (distinguishing therefore the circumstances in C-162/10 *Phonographic Performance*). Both cases were further appealed to HD.

The Reference

Noting first that the concepts of communication to the public in Article 8(2) Rental and Lending Rights Directive and Article 3(1) InfoSoc Directive are to be assessed in accordance with the same criteria (referring to C-117/15 *Reha Training*, paras 33-34) and recognising the CJEU's plentiful judgments on communication to the public, HD held that it was not possible to answer, on the basis of the CJEU's case law (contrary to what PMÖD had concluded), whether the renting of cars which are standard-fitted with a radio receiver constitutes a communication to the public, either under Article 3(1) InfoSoc Directive or Article 8(2) Rental and Lending Rights Directive, nor to what extent Recital 27 InfoSoc Directive is relevant to the issue at hand. For this reason, HD decided to ask, a bit shyly perhaps, the following two questions:

1. Does the rental of cars which are standard-fitted with radio receivers mean that the one that is renting out the cars is a user that accomplishes a communication to the public within the meaning of Article 3(1) InfoSoc Directive and Article 8(2) Rental and Lending Rights Directive?
2. What relevance, if any, does the scope [extent of activity] of the car rental business, and the rental period have?

[translated by author]

The Comment

The two cases essentially concern the question of whether the rental of a 21st century vehicle with an integrated radio forming part of the car's central control panel amounts to a communication to the public. The Court is equipped with the CJEU's many judgments on communication to the public, but the two cases are characterised by the remarkably different circumstance that the radio wave receiving equipment at hand cannot be easily inserted into, nor removed from, the car; as

opposed to a television set, or radio in a hotel room (e.g. C-306/05 *SGAE*, C-162/10 *Phonographic Performance*), a spa (C-351/12 *OSA*), a rehabilitation centre (C-117/15 *Reha Training*), or indeed a radio in a dentist's waiting room (C?135/10 *SCF*). Such rooms do not usually come with such equipment pre-installed as part of the construction/refurbishment company's standard offer, instead it is placed there subsequently and can easily be removed and reconfigured at any time by the owner of the room. With the first question the Court prima facie seeks to ascertain the scope of the communication to the public right. The real question is whether the car rental service operator is merely providing the facilities for a communication, which Recital 27 InfoSoc Directive expressly clarifies falls outside the right, or, indeed, whether it is even doing that because not only are the radios part of the standard fitting but they are integrated into the car's interior design by the manufacturer. A more appropriate analogy to the cases at hand would not be televisions in hotel rooms but integrated network cards that are part of a laptop.

The second question, with a noticeably general scope, according to HD concerns the *Nordisk Biluthyrning* case, even though the answer to the question (as it is contextualised below on the basis of HD's decision) may also be relevant in *Fleetmanager*. Essentially with the second question HD seeks to receive clarity on how it should interpret "a fairly large amount of persons" (constituting a *public*) as referred to in *Reha Training*, para 41. In *Nordisk Biluthyrning* on the evidence submitted ca 200 rental transactions occurred per year, therefore raising questions about the minimum amount that may comprise a public. Nordisk Biluthyrning submitted that this corresponded to ca 200 different car renters, making it therefore on average less than 1 car rental per day over a year. Since it relates to the definition of 'public' the second question is intended to be a conditional one and becomes relevant only if a communication is deemed to take place.

There are a number of intricacies that HD does not mention in its question. Should the CJEU hold that a car rental company is in fact communicating protected content, the second step in the assessment is to determine whether that communication occurs to the public. That public, or rather drivers and potential passengers, is made up of both individuals acting in a private capacity and individuals acting in an official capacity on behalf of their employer, such as a private company or a public authority. One of the questions that will require an answer following such an outcome is therefore whether the latter group of vehicle users also form part of the '*public*'. In any event, the circumstances of the case present an opportunity to seek clarity on the need to take account of concurrent *and successive* access to protected subject matter (*Reha Training*, para 44) in the context of determining the existence of a public as such. A standard car of regular size normally fits up to 5 people, while any other 5 people subsequently renting the same car will likely, much like a hotel guest watching television, hear different music if they turn on the radio while in the car.

Another question that may require an answer, should a communication be deemed to occur, is whether the group of people that will ultimately be considered to fall within the definition of a public will simultaneously constitute a *new* public. It will be difficult to hold that that communication is made with technical means different from the means used for the original communication, especially that the car rental companies are not interfering with the signal in any way, and are placed at the receiving end, rather than the broadcasting end, but the result would seem to be that a new public criterion will become relevant for the determination of whether a communication to the public does occur. Interestingly, both Fleetmanager and Nordisk Biluthyrning claim that the car users through their smartphones, which can be connected to the standard-fitted, integrated audio system, have access to protected content and which can for that reason be listened to through the same car audio system; the difference being that the internet and not radio waves are the source of the signal which the radio station is broadcasting

(communicating). This is an important circumstance that ought perhaps to play an apparent role in the request for the preliminary ruling, for even if a communication to *a* public is deemed to occur, the question will remain whether it is a public that was (not) taken into account by the rightholders.

This entry was posted on Thursday, December 20th, 2018 at 4:44 pm and is filed under Case Law, inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.">CJEU, Communication (right of), European Union, Liability, Sweden
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.