

Kluwer Copyright Blog

Mass transportation and mass communication to the public

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On 20 April 2023 in the joined cases *Blue Air* (C-775/21) and *SNTFC* (C-826/21) the CJEU pronounced once again on the infringement of the right of communication to the public, making a further contribution to the already rich case law in this field. This time the questions related to the existence (or not) of a communication to the public by persons who have installed equipment that can be used for the broadcasting of copyright protected works.



The issue goes back to 2006, when the CJEU ruled that hotel operators commit acts of communication to the public within the meaning of Article 3(1) of the Information Society Directive when they distribute signals by means of television to their customers (C-306/05). Since then, in a series of cases reflecting various circumstances, the CJEU has been called many times to apply its findings in different scenarios, such as in a dentist's waiting room (C-135/10), in a spa (C-351/12), in a rehabilitation centre (C-117/15) and in relation to a car rental service (C-753/18).

In the present joined cases, the CJEU was asked to clarify whether the broadcasting of musical pieces and the installation of sound equipment in a means of transport – aircraft (C-775/21) and train (C-826/21) – constitute acts of communication to the public. The CJEU was also asked to decide whether Article 8(2) of the Rental and Lending Rights Directive precludes national legislation establishing a rebuttable presumption that musical works are communicated to the public because of the presence of sound systems in means of transport.

Regarding the first question, the CJEU held that playing a piece of music on a commercial airline flight constitutes a communication to the public. To reach this conclusion, the CJEU emphasized two criteria: that the airline intervenes in full knowledge of the consequences of its conduct to give its customers access to a protected work; and that in the absence of that intervention those

customers would not, in principle, be able to enjoy the work. This is a mainstream finding which is in line with the court's conceptual model of the right of communication to the public (a broad and flexible understanding and an "individual assessment" on the basis of several complementary and interdependent criteria, see paras. 47-49). Consequently, this answer only confirms an established position on the right of communication to the public.

Nevertheless, the decision on the first question conveys an interesting message by emphasizing the notion of purpose (para. 49), which is placed even before the other additional criterion of the profit-making nature of the act. The profit-making nature seems to be downgraded to the rank of "not necessarily an essential condition". The purpose, that is the full knowledge that the act will have the consequence to give access to protected work, appears as a prerequisite of the application of the right of communication to the public (para. 50). This subtle hierarchisation of the additional criteria for determining the communication to the public has very practical consequences regarding the answer to the two following questions.

The second and third questions are interrelated and require more attention. Indeed, an intriguing piece of the interpretative saga on the right of communication to the public has been the role of Recital 27 of the Infosoc Directive. According to this provision, the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication. Qualifying the act as mere provision of physical facilities has a neutralizing effect, since in that case the right is not applicable. It could be advanced that the distinction between providing a device and providing access through a device is quite tenuous and in this aspect a clarification was expected.

For the CJEU, the mere installation of sound equipment in a means of transport cannot be comparable to acts by which service providers intentionally transmit protected works to their customers by distributing a signal by means of receivers which they have installed in their establishment, allowing access to such works. As the Court notes, if the mere fact that the use of sound equipment and, as appropriate, software, is necessary in order for the public to be able actually to enjoy the work resulted automatically in the intervention of the operator of that system being classified as an 'act of communication', any 'provision of physical facilities for enabling or making a communication', including where the presence of such facilities is required by the national legislation governing the activity of the transport operator, would constitute such an act, which is, however, expressly excluded by recital 27 of Directive 2001/29. Consequently, Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115/EC must be interpreted as meaning that the mere installation on board a means of transport, of sound equipment and/or of software, enabling the broadcasting of background music, does not constitute a communication to the public.

Accordingly and following its answers to the previous questions, the CJEU also stated that EU law precludes national legislation which establishes a rebuttable presumption that musical works are communicated to the public because of the presence of sound systems in means of transport.

The decision is interesting since it provides a clarification on the role of the user who facilitates the access to copyright protected work. It is apparent that the mere installation of equipment enabling the communication of works is not sufficient itself as a basis for the application of the right of communication to the public. Such a broad definition would be unmanageable in practice. A more active and deliberate action of the user in terms of providing access is required, such as transmitting the works through signals. In other words, it is not enough to possess a door offering

access, but it is furthermore necessary to open the door to others for an act of communication to be characterized. Specifically, the mere installation of a device is to be distinguished from the act of giving access to a protected work in the sense that in the first case there is no proven *intention* (para.71) to give access to the protected work.

The medium, here, is not the message. While the Court's finding might seem *a priori* more restrictive in comparison with its previous rulings in the hotel cases, it is based on a similar line of reasoning. The hotel operators are communicating the works to the public not simply because they installed TV equipment in the rooms, but because they connected the devices to an antenna in full knowledge that by doing this they would provide access to copyright protected works. Similarly, the decision is also in line with the Court's findings in *Stichting Brein (C-527/15)* where it was found that a person that pre-installed, in full knowledge of the consequences of his conduct, in multimedia players add-ons that make it possible to have access to protected works is communicating these works to the public.

In conclusion, these findings contribute to delimit a core concept (the right to communication to the public) that has been broadly defined, thus approaching a more equilibrate consensus between the control of the access to the protected work and the free access to it. Practically, it also means that rightholders will have to be careful in proving the act of communication to the public, as the mere existence of a broadcast device is not enough.

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