Further guidances from the EUCJ on what constitutes a communication to the public

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Justine Radel-Cormann
European Audiovisual Observatory

An owner of 18 apartments, who provides his tenants with televisions equipped with indoor antennas, thus allowing them to watch music programmes, does (s)he communicate protected works to the public (his tenants) as understood by Article 3, paragraph 1 of Directive 2001/29? That is the preliminary ruling of the European Court of Justice's recent judgement on 20 June 2024.

According to this preliminary ruling, the answer depends on the owner’s intention: did (s)he do this for a profit motive (to attract people to the apartments) which would make it a communication to the public or is it merely a provision of physical facilities?

For example, a provision of facilities occurs when a radio is integrated into a rental car, allowing the user to receive terrestrial radio broadcasts accessible in the area where the car is located, without any additional intervention by the rental company. Conversely, communication to the public occurs when operators of public houses (hotel, restaurant, spa, etc.) deliberately transmit protected works to their clientele, by intentionally distributing a signal (TV or radio) installed in the establishment.

The fact that the owner has installed TVs should be considered an additional service provided with a profit motive. This allows him/her to enhance the standing of the apartments and charge a higher price for them. They become more attractive and may have higher occupancy.

The fact that these are indoor antennas and not a central antenna is irrelevant, as making such a distinction would contradict the principle of technological neutrality.

Finally, it is necessary to determine the size of the audience. A small number (de minimis threshold) does not constitute communication to the public. Therefore, it is up to the referring court to determine the number of people to whom the programmes are broadcast.

The court indicates that if the tenants are residential, this audience does not constitute a new public, thus not qualifying as communication to the public. However, if it involves short-term seasonal rentals, the opposite applies: the audience can be considered a new public, qualifying as communication to the

public, therefore requiring authors to authorise or prohibit the communication of their works, and be remunerated for such authorisation.

Case C-135/23, GEMA v. GL, 20 June 2024, ECLI:EU:C:2024:526

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