Court of Justice of the European Communities: TV in Hotel Rooms Constitutes Communication to the Public

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On 7 December 2006, the Court of Justice delivered its judgment in the case C-306/05 (SGAE v. Rafael Hoteles). A reference for a preliminary ruling had been made regarding the interpretation of Article 3 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

In the main proceedings, the body responsible for the management of intellectual property rights in Spain, the SGAE, took the view that the use of TV sets and the playing of ambient music within Hotel Rafael involved communication to the public of works belonging to its repertoire and sought compensation accordingly. Indeed, Article 3 of the Directive requires Member States to provide authors with the exclusive right to authorise or prohibit any “communication to the public” of their works, but does not define such communication. The relevant Spanish legislation prescribes that communication taking place within a strictly domestic location shall not be regarded as public within the meaning above. In a recent decision concerning the application of copyright law, the Spanish Supreme Court held that hotel rooms did constitute strictly domestic locations: it follows that, since the use of TV sets in such rooms does not amount to communication to the public, no authorisation is required from (and no consideration is due to) the holders of intellectual property rights in respect of the works communicated. The Spanish court adjudicating in the main proceedings thus referred three questions to the ECJ: 1) whether the installation in hotel rooms of TV sets to which a signal is sent by cable constitutes an act of communication to the public within the meaning of the Directive; 2) whether the fact of considering a hotel room a strictly domestic location, so that the use of TV sets in such a context is not regarded as communication to the public, is contrary to the aims pursued by the Directive; 3) whether the communication through TV sets installed in hotel rooms should be regarded as public for the purposes of the Directive because successive viewers have access to the programmes.

It is worth recalling that the Court of Justice dealt with quite a similar case in 1998, prior to the adoption of Directive 2001/29/EC. Indeed, in EGEDA v Hoasa (case C-293/98), the ECJ was asked whether the distribution by a hotel of television signals to its rooms constituted an act of communication to the public within the meaning of Directive 93/83/EEC. On that occasion, however, the Court

swiftly dismissed the case, holding that the matter before it fell outside the scope of Directive 93/83/EEC and was thus to be decided in accordance with national law. Nonetheless, the comprehensive Opinion of the then Advocate General (AG), La Pergola, has admittedly influenced that of AG Sharpston in the present case.

The Court of Justice examined the first and third questions jointly. At the outset, the Court dealt with the notion of "communication to the public" and, drawing on its earlier decision in Mediakabel BV v Commissariaat voor de Media(Case C-89/04) , defined the "public" as "an indeterminate number of potential viewers". Hence, the ECJ found that the large number of successive viewers in hotel rooms, as well as of those who are present in the common areas of the hotel, do constitute a "public" within the meaning of the Directive.

The Court then noted that under Article 11bis(1)(ii) of the Berne Convention (which is binding on the Community by virtue of Article 9(1) of the TRIPs Agreement) the distribution of a signal through TV sets in hotel rooms constitutes a communication "made by a broadcasting organization other than the original one", which the author has the exclusive right to authorise or prohibit. Regarding the viewers, such transmission is made to a public from the one at which the original act of communication of the work is directed, that is, to a new public. However, as clarified by the non-binding WIPO Guide to the Berne Convention, when authors grant authorisation to broadcast their works they only consider direct users within their own private or family circles; whereas, if the work is made available to a larger audience, such as the clientele of a hotel, then an independent act of communication takes place. It is thus the right of the authors to grant authorisation in respect of such further communication, which may well be provided for profit: in this case, as the Court incidentally observed, Hotel Rafael distributed TV signals to its customers as an additional service, which had a direct bearing on the price of rooms. Furthermore, the ECJ clarified that for there to be communication to the public, no actual enjoyment on the part of customers is required; it is sufficient that the work be made available to them in such a way that they have access to it. Indeed, as AG La Pergola expressed it in the EGEDA case, communication to the public is not different from the situation of publishers who must pay royalties to authors for their novels on the basis of the number of copies sold, whether or not they are ever read by their purchasers.

The Court has apparently applied the same reasoning in answering the question as to whether the installation of television sets in hotel rooms constitutes, in itself, communication to the public. The wording of the 27th recital in the preamble to the Directive 2001/29/EC (in accordance with Article 8 of the WIPO Copyright Treaty) clearly mandates that the mere provision of physical facilities does not in itself amount to communication. The Court nonetheless observed that the installation of such facilities could make public access to broadcast works technically possible: hence, if by means of the installed TV sets the hotel

distributed a signal to customers in the rooms then communication to the public took place,irrespective of the technique used to transmit such a signal. It is worth recalling that, on the issue, the Opinion delivered by AG Sharpston reached the opposite conclusion, following which Rafael was unsuccessful in requesting the Court to reopen the oral procedure.

Finally, the Court of Justice turned to the issue as to whether the private nature of hotel rooms is a bar to considering the communication of audiovisual works taking place in such rooms as communication to the public. In this respect, the Court took the view that the public or private nature of the place where communication is carried out is immaterial, the relevant factor being whether a certain work is made available to the public, which is plainly a separate issue. The Court further observed that the right to authorise communication to the public under the Directive encompasses the making available of works in such a way that members of the public may access them when and where they wish, thus even in places of an allegedly private nature such as hotel rooms. Therefore, the Court concluded that the exclusive right to authorise communication to the public would be meaningless if it did not also cover communications carried out in private locations.

Court of Justice of the European Communities, Judgment of 7 December 2006 , Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, Case C-306/05

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