[ES] RTL wins case against NH Hotels in Spain concerning illegal TV use

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Christina Etteldorf

In a ruling of 16 January 2018 (Case no. 446 (M-175) 17, decision no. 21/18), the Audiencia Provincial de Alicante (Alicante provincial court) decided that the use of the RTL media group's broadcast signals in hotel rooms by the Spanish hotel group NH was illegal.

The dispute concerned the provision of access to RTL channels in the rooms at various hotels operated by the companies NH Hoteles Group S.A. and NH Hoteles España S.A. (hereafter 'NH'), which the plaintiffs, RTL Television GmbH and RTL Disney Fernsehen GmbH & Co. KG (hereafter 'RTL'), considered unlawful. In its first-instance decision of 24 March 2017, amended on 2 June 2017 (Case no. 487/2015), the Juzgado de lo Mercantil Número 2 de Alicante (Alicante commercial court no. 2) had stated that the plaintiffs had the exclusive right to approve the retransmission of RTL and RTL SUPER broadcast signals through any technical means, ordered the defendants to cease this illegal practice in future and held them jointly and severally liable to pay damages. Both parties had appealed to the Alicante provincial court against this decision.

The appeal court largely followed the arguments of the lower court and the plaintiff, and upheld the complaint in full.

Along with provisions on the burden of proof and judicial presumption, and the calculation of the damages owed, the appeal court proceedings mainly concerned the interpretation of the concept of retransmission of broadcast signals in the sense of Article 126(1)(d) of the Spanish Ley de Propiedad Intelectual (Copyright Act - LPI). The defendants, who disputed that RTL channels had been made available in the hotel rooms concerned but admitted that they may have been inadvertently broadcast, argued with reference to Article 126(1) LPI that a one-off broadcast did not constitute retransmission in the sense of the Act. The appeal court disagreed. Firstly, this was not a one-off act, since it had been committed at multiple hotels on multiple occasions. Regardless of that, however, neither the wording of Article 126(1) LPI ("Broadcasters have an exclusive right to approve the (...) d) retransmission of their programmes and broadcasts through any technical means") nor any teleological or systematic interpretation thereof suggested that an infringement must be based on a multiple, recurring, large-scale, repeated or redundant act. Rather, an infringement was committed when a company, via cable or another broadcasting or transmission technology, provided

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its guests with access to protected content on television sets provided by the company at more than one company location. The appeal court also rejected the defendants' argument that they had merely received the images and not redistributed them because the hotel had not retransmitted the broadcast signals but only received them and distributed them to the connection points in the hotel rooms.

According to the appeal court, the ECJ judgment of 27 February 2014 (Case C-351/12) stated that the operator of an establishment carried out 'communication to the public' if it transmitted protected works by intentionally distributing a signal by means of television or radio sets in the bedrooms of the establishment's patients. Article 126(2) LPI stated that the concept of "retransmission includes public distribution by a company that transmits or distributes another company's broadcasts", while Article 126(1)(d) stated that the right included the "retransmission of their programmes and broadcasts through any technical means". In the appeal court's view, this meant that retransmission amounted to the distribution of third-party broadcasts, as was the case here. Copyright-holders needed extensive protection in the form of appropriate remuneration. Retransmission, whether via radio waves or cable, comprised the repetition of the received output signal (reception via NH aerials) by a company other than the original broadcaster (distribution of RTL channels to television sets in NH hotel rooms) for the benefit of the public. Referring to recent decisions by higher Spanish courts, the appeal court concluded that retransmission could take place via any technical means, wired or wireless, and that hotel rooms were not private in a way that could give rise to an exclusion under copyright law.

However, the Spanish court did not deal with the ECJ judgment of 16 February 2017 (Case C-641/15, Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH), in which the ECJ considered the interpretation of Article 8(3) of Directive 2006/115. This provision requires member states to 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." In this judgment, however, the ECJ only examined whether Article 8(3) of Directive 2006/115 should be interpreted as meaning that the communication of television and radio broadcasts by means of TV sets installed in hotel rooms constituted a communication made in a place accessible to the public against payment of an entrance fee. The Spanish appeal court, however, focused on the other alternative mentioned in Article 8(3), that is to say, rebroadcasting.

The decision is final.

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Decisión de la Audiencia Provincial de Alicante de 16 de enero de 2018 (Caso no. 446 (M-175) 17, decisión no. 21/18)

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