[DE] Federal Supreme Court submits questions to CJEU on ‘communication to the public’

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Under a decision of 8 February 2024 in case number I ZR 34/23, the first civil chamber of the German *Bundesgerichtshof* (Federal Supreme Court – BGH) submitted three preliminary questions to the Court of Justice of the European Union (CJEU), requesting clarification of whether a retirement home operator who retransmits radio and television programmes received via a satellite receiver to the home’s residents via a cable network is "communicating to the public" within the meaning of copyright law and should therefore enter into licensing agreements. The three questions were as follows:

(1.) Do the residents of a commercially operated retirement home, whose rooms are equipped with television and radio connections to which the retirement home operator retransmits radio and television programmes received via its own satellite receiver simultaneously, unchanged and in full through its cable network, constitute "an indeterminate number of potential recipients" within the meaning of CJEU case law dealing with the definition of "communication to the public"as referred to in Article 3(1) of Directive 2001/29/EC?

(2.) Is the definition used by the CJEU to date, according to which “in order to be treated as a ‘communication to the public’, the protected work must be communicated using specific technical means, different from those previously used or, failing that, to a ‘new public’, that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work” still valid, or is the technical means used only relevant in cases in which content originally received via a terrestrial, satellite or cable service is retransmitted to the open Internet?

(3.) Is there a "new public" in the sense of the aforementioned definition if the operator of a commercially run retirement home retransmits radio and television programmes received via its own satellite receiver simultaneously, unchanged and in full through its cable network to the television and radio connection points provided in residents’ rooms and, when determining whether this is the case, is it relevant whether (a) the residents are able to receive the radio and television programmes in their rooms by terrestrial means, i.e. without using the cable connection and (b) the copyright holders have already been paid for consenting to the original broadcast.

In the case heard by the BGH, the German collecting society GEMA had lodged a claim against a commercially run retirement home that provided radio and television programmes in residents' rooms. These programmes were received via the defendant's own satellite receiver and retransmitted simultaneously, unchanged and in full through its cable network to the residents' rooms. GEMA had sought an injunction against the defendant to prevent it from transmitting the programmes, claiming that this was a case of "communication to the public" without the consent of the copyright holders. The first-instance court had upheld the claim, which had then been thrown out by the appeal court.

According to Article 267(1)(b) and (3) of the Treaty on the Functioning of the European Union (TFEU), the court of a member state can, and a court of last resort such as the BGH must, submit to the CJEU questions on the interpretation of secondary EU law such as Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, if it considers that a decision on such questions is necessary to enable it to give judgment.

The courts agreed that "communication" of the radio and television programmes was taking place in this case. In its application, the BGH explained in detail why it needed answers to the questions submitted.

The first question sought clarification of whether the programmes were being communicated to "an indeterminate number of potential recipients" and were therefore the subject of public communication. Two further criteria had to be met for this to be the case: there must be "a large number of people" and no "specific people". The BGH shared the appeal court's view that, with 88 single rooms and three double rooms in the retirement home, the numerical threshold was reached in this case. It therefore focused on the question of "specific people". Whether the programmes were communicated to specific members of a private group rather than an indeterminate number of potential recipients required clarification under EU law. The fact that the retirement home residents formed a highly homogenous group with a relatively low level of turnover did not, according to the BGH, mean that the programmes were only being communicated to "specific people", since the services provided by the retirement home were, in principle, available to anyone and limited only by the building's physical capacity.

The second question asked whether a different technical means always had to be used to communicate the work in order for "public communication" to take place, or whether this was only necessary in certain cases. If the technical means used to communicate the work was not covered by the consent originally given by the copyright holders, the existence of a "new public" would be irrelevant because the communication would be unauthorised. Elsewhere in its previous case law, however, the CJEU does not refer to this requirement for consent, other than in cases of communication to a "new public".

The third question aimed, in essence, to clarify whether the retirement home residents constituted a "new public" because they received the radio and television programmes in their rooms, i.e. alone or in a private or family group, and the defendant, which was not the original broadcaster, made them available to the residents as part of its commercial operation of the retirement home.

Beschluss des BGH (Az. I ZR 34/23)

https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=136437&pos=0&anz=1

Federal Supreme Court decision (case I ZR 34/23)