



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 15 January 2020¹

Case C-753/18

**Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim),
Svenska artisters och musikers intresseorganisation ek. för. (SAMI)**

v

**Fleetmanager Sweden AB,
Nordisk Biluthyrning AB**

(Request for a preliminary ruling
from the Högsta domstolen (Supreme Court, Sweden))

(Reference for a preliminary ruling — Intellectual property — Copyright and related rights — Directive 2001/29/EC — Article 3(1) — Directive 2006/115/EC — Article 8(2) — Concept of ‘communication to the public’ — Company hiring out cars each equipped with a radio as standard)

Introduction

1. Few questions in EU law have given rise to as many rulings of the Court in so little time as that of the interpretation of the concept of the ‘right of communication to the public under copyright’.² Such extensive, albeit necessarily disparate, case-law has even been dubbed a ‘labyrinth’ and the Court itself as ‘Theseus’.³

2. Although the present case does not lend itself to providing a complete systemisation of that case-law,⁴ it does afford the Court the opportunity to set out a number of general principles which make it possible to define with greater precision what is covered by the right of communication to the public and what is not. More specifically, the present case concerns in particular the crucial element of communication to the public, namely the act of communication.

¹ Original language: French.

² This issue has formed the subject of more than 20 judgments and orders since the judgment of 2 June 2005, *Mediakabel* (C-89/04, EU:C:2005:348).

³ Clark, B., and Dickenson, J., ‘Theseus and the labyrinth? An overview of “communication to the public” under EU copyright law: after Reha Training and GS Media where are we now and where do we go from there?’, *European Intellectual Property Review*, No 5/2017, p. 265. The authors unfortunately do not explain who the Minotaur is in this analogy.

⁴ This may in fact prove impossible according to the legal literature (see: Treppoz, E., ‘De l’art jurisprudentiel au rang de feuilleton ou l’impossible systématisation du droit de communication au public’, *Revue trimestrielle de droit européen*, No 4/2017, p. 864).

Legal context

3. Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁵ provides:

‘Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.’

4. Under Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.⁶

‘Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.’

5. Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 were transposed into Swedish law, respectively, in point 1 of the third subparagraph of Paragraph 2 and in Paragraph 47 of the upphovrättslagen (1960:279) (Law No 279 of 1960 on copyright).

Facts, procedure and questions referred for a preliminary ruling

6. Föreningen Svenska Tonsättares Internationella Musikbyrå (Stim) u.p.a. (Swedish Performing Rights Society; ‘Stim’) and Svenska artisters och musikers intresseorganisation ek. för. (Swedish Artists’ and Musicians’ Interest Organisation; ‘SAMI’) are Swedish collecting societies managing copyright and related rights.

7. Fleetmanager Sweden AB (‘Fleetmanager’) and Nordisk Biluthyrning AB (‘NB’) are vehicle hire companies established in Sweden. They offer for hire, directly or through intermediaries, vehicles equipped with radios for periods of 29 days or less, which are regarded as short-term hires.

8. In the first of the two disputes in the context of which the questions referred for a preliminary ruling in the present case have been submitted, Stim brought an action against Fleetmanager seeking payment to it of 369 450 Swedish kronor (SEK) (approximately EUR 34 500) plus interest on the ground that Fleetmanager had contributed, without authorisation from Stim, to third parties making musical works available to the public, for the purposes of copyright, by making available to the public for short-term hire vehicles equipped with radios.

9. The tingsrätt (District Court, Sweden) found that the hiring out of vehicles equipped with a radio constituted a communication to the public within the meaning of Law No 279 of 1960 on copyright and that there were, in principle, grounds for remuneration. However, it also found that Fleetmanager had not contributed to those copyright infringements, for which reason Stim’s action was dismissed. That judgment was upheld on appeal. Stim has appealed against that decision before the Högsta domstolen (Supreme Court, Sweden).

⁵ OJ 2001 L 167, p. 10.

⁶ OJ 2006 L 376, p. 28.

10. In the second dispute, NB brought an action before the Patent- och marknadsdomstolen (Patent and Market Court, Sweden) seeking a declaration that it was not required to pay remuneration to SAMI for the use of audio recordings between 1 January 2015 and 31 December 2016 because the vehicles hired out to private individuals and to business clients were equipped with a radio and a CD player.

11. The Patent- och marknadsdomstolen (Patent and Market Court) found that Law No 279 of 1960 on copyright had to be interpreted in a manner consistent with Directive 2001/29 and that, according to the case-law of the Court, the relevant use referred to in Article 8(2) of Directive 2006/115 corresponded to a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29. It further held that, by providing radios in hire vehicles, NB enabled the hirers of those vehicles to listen to audio recordings and that there was therefore a ‘communication’. In addition, that court took the view that the other criteria for a ‘communication to the public’ were likewise satisfied. In the light of the evidence put forward by SAMI, it was found that the 11 vehicles belonging to the applicant had been hired out on average 528 times per year. On that basis, the Patent- och marknadsdomstolen (Patent and Market Court) concluded that NB was liable to pay remuneration to SAMI and dismissed its action. That ruling was, however, quashed on appeal by the Patent- och marknadsöverdomstolen (Patent and Market Court of Appeal, Sweden). SAMI has appealed against the latter court’s judgment before the Högsta domstolen (Supreme Court).

12. It is in those circumstances that the Högsta domstolen (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does the hiring out of cars which are equipped as standard with radio receivers mean that the person who hires the cars out is a user who makes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29 and within the meaning of Article 8(2) of Directive 2006/115?
- (2) What is the significance, if any, of the volume of the car hire activities and the duration of the hires?’

13. The request for a preliminary ruling was received at the Court on 30 November 2018. Written observations were lodged by the parties to the main proceedings and by the European Commission. The same parties were represented at the hearing on 6 November 2019.

Analysis

The first question referred for a preliminary ruling

14. By its first question referred for a preliminary ruling, the referring court asks in essence whether the hiring out of vehicles equipped with radios constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29 and of Article 8(2) of Directive 2006/115.

15. As a preliminary point, it should be recalled that, according to the case-law of the Court, the expression ‘communication to the public’ as used in the two abovementioned provisions must be interpreted as having the same meaning.⁷ Thus, the answer given by the Court in the present case will have the same scope in the context of the two abovementioned directives, notwithstanding any terminological differences between their various language versions, in particular the Swedish-language version.

⁷ Judgment of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, paragraph 33).

16. Article 3(1) of Directive 2001/29 affords authors a right of a preventive nature to authorise or prohibit any communication to the public of their works. Authors are thus able, *inter alia*, to derive income from the use of their works in the form of a communication to the public.

17. Article 8(2) of Directive 2006/115 does not afford an analogous exclusive right. However, that provision ensures that a single equitable remuneration is paid to performers and phonogram producers where a phonogram is communicated to the public.

18. Neither Directive 2001/29 nor Directive 2006/115 gives a legal definition of the concept of ‘communication to the public’. Certain clarifications regarding the meaning to be given to that concept are provided in recital 23 of Directive 2001/29. According to that recital, the concept covers all communication to the public not present at the place where the communication originates. The right of communication to the public covers any transmission or retransmission of a work by wire or wireless means, including broadcasting. Recital 27 of that directive adds that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication to the public.

19. It should further be recalled that, from a technical standpoint, communication to the public can take two main forms: the communication *per se* and the making available to the public. In the first case, it is the user from whom the communication originates who decides the technical method and the time at which the communication is made, the potential recipients being either able or unable to receive that communication. In the second case, the work is made available to the recipients on a permanent basis, the latter being able to access it at the place and time of their choice. That second situation arises in particular in relation to on-demand and internet services. In the present case, which concerns broadcast works, it is the first scenario that is at issue, that is to say, a communication in the strict sense.

20. Several cases have given the Court the opportunity to define the parameters of the concept of ‘communication to the public’.

21. In particular, it has found that a communication to the public had to include two cumulative criteria, namely an act of communication of protected subject matter and a public to whom that communication is addressed.⁸

22. In order to answer the first question referred for a preliminary ruling in the present case, it is necessary to examine whether those two criteria are satisfied where vehicles equipped with radios are hired out.

23. It goes without saying — and this point is moreover not in dispute between the parties — that the vehicle hire companies do not carry out acts of transmission of radio programmes, such transmission being carried out by the broadcasting organisations. However, this does not mean, *a priori*, that the activity of those companies cannot be classified, in the light of the case-law of the Court, as coming under the exclusive right of communication to the public within the meaning of Article 3(1) of Directive 2001/29 and of Article 8(2) of Directive 2006/115.

24. With regard to the act of communication, the Court has held that such an act exists in a number of situations going beyond a simple direct transmission of a work, for example via broadcasting.

⁸ See, recently, judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 19 and the case-law cited).

25. Thus, the Court has found that a hotel's provision to its customers of access to protected subject matter by placing television sets in its rooms and by distributing via those sets the television signal received by the central antenna constitutes a communication to the public.⁹ In that regard, the Court drew a distinction between the mere provision of physical facilities, which does not constitute a communication to the public, and the distribution of the signal via those facilities, which does come under that concept.¹⁰

26. The same is true where a hotel does not provide television sets in its rooms but rather equipment which allows guests to listen to CDs as well as the CDs themselves.¹¹ By making available to its customers both the technical equipment allowing access to the protected subject matter as well as that subject matter itself in the form of phonograms on CDs, such an establishment makes a communication to the public of that protected subject matter.¹²

27. A communication to the public likewise takes place where the operator of an establishment accessible to the public intentionally allows the public to access protected subject matter broadcast by means of television sets installed in that establishment.¹³

28. Communication to the public can also consist in the recording of programmes broadcast and the making available of copies of them to the public using a remote-recording cloud-based internet service (cloud computing).¹⁴

29. Remaining in the sphere of the internet, it is not only the publication of a work on a website¹⁵ but also the provision of clickable links to protected works appearing on another website¹⁶ that must be classified as an act of communication. What is more, for the purposes of such classification, it is not essential that those links appear on a website: they may also be pre-recorded in the software of a multimedia player, that is to say, technical equipment. The act of communication then consists in the provision of such multimedia players.¹⁷ However, like in the case that gave rise to the *SGAE* judgment,¹⁸ it is not the mere provision of technical equipment which is the origin of the communication but rather the pre-installation of the links to works made available (without the consent of the copyright holders) on the internet.¹⁹

30. Lastly, the provision and management of an online sharing platform within a peer-to-peer network constitutes an act of communication.²⁰

31. In its assessment of the existence of an act of communication to the public, the Court has emphasised the essential role played by the user who intervenes, in full knowledge of the facts, to give access to the public to protected subject matter.²¹

9 Judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, point 1 of the operative part).

10 Judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 46).

11 Judgment of 15 March 2012, *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, point 3 of the operative part).

12 Judgment of 15 March 2012, *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, paragraph 62).

13 See, inter alia, judgments of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, point 7 of the operative part), and of 31 May 2016, *Reha Training* (C-117/15, EU:C:2016:379, last sentence of the operative part).

14 Judgment of 29 November 2017, *VCAST* (C-265/16, EU:C:2017:913, paragraphs 46 to 49).

15 Judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 21).

16 Judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 20). Although, in that judgment, the Court did not classify the provision of links to content freely accessible on the internet as communication to the public, that is because there was no new public to whom such communication was addressed (see paragraph 27 of the judgment).

17 Judgment of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300, paragraph 42).

18 Judgment of 7 December 2006 (C-306/05, EU:C:2006:764).

19 See judgment of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300, paragraphs 39 to 41).

20 Judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 39).

21 See, recently, judgment of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300, paragraph 31).

32. That by the user cannot be limited, however, to the technical equipment which allows the protected subject matter to be played, such as radios, television sets, CD players or multimedia players. Such limited intervention must in fact be equated with the mere provision of technical equipment, which does not constitute a communication to the public, in accordance with the rule of interpretation contained in recital 27 of Directive 2001/29.

33. To constitute a communication to the public, the user's intervention must necessarily concern the protected subject matter itself, that is to say, the content of the communication.

34. That intervention in the content of the communication can take different forms. It can be the transmission of the signal to the television sets installed in hotel rooms, the provision of CDs accompanying CD players, the representation of television programmes in public spaces, the use of internet links leading to protected subject matter or the pre-installation of such links in a multimedia player, the recording of broadcast programmes or even the indexation of metadata relating to works within a peer-to-peer network.

35. None of those various forms of intervention is required (in itself) for an act of communication to be found to exist. They do, however, all have one element in common, namely the direct link between the user's intervention and the protected subject matter thus communicated. That common element is the crucial factor without which there can be no act of communication.

36. I therefore do not agree with the argument put forward by the applicants in the main proceedings according to which the Court has not laid down a general requirement to that effect to find the existence of an act of communication to the public. If the Court has not expressly elevated that requirement to the status of a general principle, it is because it is inherent in the very concept of 'communication to the public', that communication necessarily having content consisting of protected subject matter. However, that requirement of an intervention relating to the content of the communication, even if not explicitly stated, is implicit in all the rulings of the Court in which the Court has found there to be an act of communication.

37. This is particularly apparent in the decisions in which the Court had to make a distinction between an act of communication and a mere provision of technical equipment. In those decisions, the Court identified the decisive factor in determining the existence of an act of communication, namely the direct intervention relating to the content of the communication; that factor being distinct from the provision of equipment. Accordingly, it is not the installation of television sets in hotel rooms but the distribution of the signal that constitutes the act of communication.²² Similarly, the provision of CD players would not have constituted such an act without the simultaneous provision of CDs, the presence of those two elements necessary in order to constitute protected subject matter.²³ Likewise, without pre-installed links enabling access via the internet to protected subject matter, the mere provision of multimedia players would not have led the Court to find there to be an act of communication.²⁴

38. It is quite clear, in my view, that the vehicle hire undertakings do not make any intervention directly concerning the works or phonograms which are broadcast and to which their customers might listen using the radios installed in the hired vehicles. Those companies simply provide their customers with vehicles equipped with radios by the vehicle manufacturers. It is the customers of those companies who decide whether or not to listen to the programmes broadcast.

²² Judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 46).

²³ Judgment of 15 March 2012, *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, paragraphs 62 and 67).

²⁴ Judgment of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300, paragraphs 39 to 41).

39. The radios installed in the vehicles are designed in such a way that they are capable of receiving, without any additional intervention, the terrestrial broadcasting accessible in the area in which they are located. The only communication to the public which takes place is that carried out by the broadcasting organisations. In such circumstances, there is, however, no subsequent communication to the public, in particular on the part of the vehicle hire companies. In authorising the broadcasting of the protected subject matter in respect of which they hold copyright or related rights, the customers of Stim and SAMI should necessarily have taken into account all users with radios located within the broadcast area of the transmission, including the radios installed in vehicles and notwithstanding the manner in which those vehicles are used.

40. The role of the vehicle hire companies is thus limited to the mere provision of physical facilities for enabling a communication to the public which, pursuant to recital 27 of Directive 2001/29, does not constitute such a communication.²⁵ The argument put forward by Stim and SAMI in their written observations, according to which that recital covers only actors specialising in the manufacture or sale of equipment for making a remote communication, is based on a misreading of the case-law of the Court, in particular the judgment in *SGAE*.²⁶ If the Court has on several occasions found the existence of an act of communication, it is due not to the status of the user concerned, but to the additional intervention by that user going beyond the mere provision of equipment, such as the transmission of the signal. In the case which gave rise to the judgment in *Stichting Brein*,²⁷ the user concerned was indeed a ‘person specialising in the provision of multimedia readers’. Nevertheless, the Court found there to be an act of communication on account of the content of those readers’ software.

41. The argument raised by Stim and SAMI that the liability of the vehicle hire companies ought to stem from the fact that they make spaces available to their customers, spaces which Stim and SAMI classify as ‘public’, namely the interiors of the hire vehicles, in which it is possible to enjoy protected subject matter using the radios installed in those vehicles cannot succeed, either. The ‘provision’ of the space in which it is possible to use such radios can no more constitute an act of communication than the provision of the radios themselves if there is no intervention by the user in relation to the content of that communication, that is to say the protected subject matter.

42. On the contrary, I agree with Stim and SAMI that it is irrelevant that the radios were installed in the vehicles by the vehicle manufacturers. However, applying the same logic, it is similarly irrelevant whether the vehicle hire companies do not want, as Stim and SAMI claim, or are unable, as the companies allege, to remove those radios or render them inoperable. Those facts concern not acts of communication to the public of the protected subject matter but rather the mere provision of technical equipment and, as such, remain outside the scope of copyright.

43. Lastly, the fact that the possibility of listening to the protected subject matter in the hire vehicles using the radios installed in those vehicles contributes to the attractiveness — and therefore to the profitability — of the vehicle hire companies’ business likewise has no bearing on the existence of an act of communication to the public or on any liability of those companies under copyright.

44. The provision of any technical equipment for making or receiving a remote communication usually occurs as part of a profit-making activity. The profitability of that activity is based to a large extent on the fact that that equipment is used to make or receive the communication of subject matter protected by copyright and related rights — this is the main purpose of purchasing such equipment. However, no

²⁵ The Commission disputes this finding, observing that the business objective of vehicle hire companies is the provision of vehicles and not of the radios installed in those vehicles. However, it seems to me possible to accept that there is a provision of radios incidental to the provision of vehicles. In any event, and I agree with the Commission in this regard, there is under no circumstances an act of communication in the present case.

²⁶ Judgment of 7 December 2006, (C-306/05, EU:C:2006:764).

²⁷ Judgment of 26 April 2017 (C-527/15, EU:C:2017:300).

remuneration is payable to those rightholders by the providers of such equipment.²⁸ It is precisely with a view to countering the rationale requiring such remuneration that the signatories to the World Intellectual Property Organization (WIPO) Copyright Treaty,²⁹ in the agreed statement concerning Article 8 of that treaty, and likewise the EU legislature in recital 27 of Directive 2001/29, stated that the mere provision of technical equipment was not to be classified as communication to the public. It is irrelevant whether such provision is effected in the form of sale, long-term hire, short-term hire or by any other means.

45. Thus, in the case of vehicles equipped with radios being hired out, there is not, in my view, an act of communication within the meaning of the case-law of the Court cited in this Opinion. There would therefore be no point in examining whether the second element of a communication to the public exists, namely the public.

46. I therefore propose that the first question referred for a preliminary ruling be answered to the effect that Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 are to be interpreted as meaning that the hiring out of vehicles equipped with radios does not constitute a communication to the public within the meaning of those provisions.

The second question referred for a preliminary ruling

47. By the second question referred for a preliminary ruling, the referring court asks whether the volume of the vehicle hire activities and the duration of the hires can affect the answer to be given to the first question.

48. In the light of the answer that I propose be given to the first question referred for a preliminary ruling, the answer to the second question can only be in the negative. The activity in question does not constitute a communication to the public with the meaning of the abovementioned provisions, regardless of the volume of that activity and the duration of the hire.

49. In the event that the Court were to answer the first question in the affirmative, I will briefly consider the second question referred for a preliminary ruling solely for the sake of completeness.

50. According to well-established case-law, the public to whom a communication must be addressed must consist of a potentially indeterminate but fairly large number of people, such that there is a *de minimis* threshold which excludes from that concept groups of persons which are too small or insignificant. Furthermore, account should be taken of the cumulative effect of making protected works available to recipients not only at the same time but also in succession.³⁰

51. Those concepts are quite clearly vague and their interpretation depends greatly on the circumstances of each specific case. I am, however, of the view that, where the vehicle hire activity is not limited to isolated rental cases but rather is of a permanent nature, the number of successive customers is large enough to exceed the threshold of a low number. In particular, those customers do not form a determinate group of persons who may be equated with a private circle.³¹ Thus, the volume of such an activity, provided that it is of a permanent nature, has no bearing on the assessment of whether there is a communication to the public.

²⁸ With the exception, where applicable, of the compensation in respect of private copying provided for in Article 5(2)(b) of Directive 2001/29.

²⁹ Treaty adopted in Geneva on 20 December 1996 and approved on behalf of the European Union by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

³⁰ See, recently, judgment of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456, paragraph 41 and the case-law cited).

³¹ See, *a contrario*, judgment of 15 March 2012, *SCF* (C-135/10, EU:C:2012:140, paragraph 95).

52. With regard to the duration of the vehicle hire, the applicants in the main proceedings differentiate between short-term hire, defined as less than 29 days, and long-term hire. They claim that, when a vehicle is hired for 30 days or more, that vehicle is no longer a public space but rather a private space, such that the presence of a radio in that vehicle no longer constitutes a communication to the public.

53. However, the Court has already had occasion to hold that the public or private nature of the space in which a communication to the public is received has no bearing on the assessment of whether there is such a communication, as otherwise the right of communication to the public would be rendered meaningless.³²

54. Thus, the duration of the vehicle hire and the alleged public or private nature of that vehicle as a result of that duration have no bearing on the assessment of whether a communication to the public exists.

55. Accordingly, if the Court were to answer the first question referred for a preliminary ruling in the affirmative, that answer, just like an answer in the negative, would be by no means conditional on the volume of the vehicle hire activity or on the duration of that hire.

Conclusion

56. In the light of all the foregoing considerations, I propose that the questions referred for a preliminary ruling by the Högsta domstolen (Supreme Court, Sweden) be answered as follows:

Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property must be interpreted as meaning that the hiring out of vehicles equipped with radios does not constitute a communication to the public within the meaning of those provisions.

³² Judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraphs 50, 51 and 54).