

JUDGMENT OF THE COURT (Sixth Chamber)

3 February 2000 *

In Case C-293/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Juzgado de Primera Instancia e Instrucción de Oviedo, Spain, for a preliminary ruling in the proceedings pending before that court between

Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda)

and

Hostelería Asturiana SA (Hoasa)

on the interpretation of Article 1 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15),

* Language of the case: Spanish.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), acting for the President of the Sixth Chamber, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: A. La Pergola,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- the Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda), by J.A. Suárez Lozano, of the Madrid Bar,

- Hostelería Asturiana SA (Hoasa), by L. Alvarez Fernández, Procurador de los Tribunales, and C. Flórez Menéndez, of the Oviedo Bar,

- the Spanish Government, by S. Ortiz Vaamonde, Abogado del Estado, acting as Agent,

- the German Government, by A. Dittrich, Ministerialrat in the Federal Ministry of Justice, and C.-D. Quassowski, Regierungsdirektor in the Federal Ministry of the Economy, acting as Agents,

- the United Kingdom Government, by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, assisted by D. Alexander, Barrister,

- the Commission of the European Communities, by K. Banks and J. Crespo Carrillo, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda), represented by J.A. Suárez Lozano, of the Hostelería Asturiana SA (Hoasa), represented by C. Flórez Menéndez, of the Spanish Government, represented by S. Ortiz Vaamonde, of the French Government, represented by A. Maîtrepierre, Chargé de Mission in the Department of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and of the Commission, represented by K. Banks and by M. Desantes Real, a civil servant on detachment to its Legal Service, acting as Agent, at the hearing on 1 July 1999,

after hearing the Opinion of the Advocate General at the sitting on 9 September 1999,

gives the following

Judgment

- 1 By order of 1 June 1998, received at the Court on 29 July 1998, the Juzgado de Primera Instancia e Instrucción de Oviedo (Court of First Instance and Preliminary Investigations, Oviedo) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 1 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15, hereinafter ‘the Directive’) and in particular the concepts of ‘act of communication to the public’ and ‘reception by the public’.
- 2 That question was raised in proceedings between the Entidad de Gestión de Derechos de los Productores Audiovisuales (Collecting Society for Audio-visual Producers, hereinafter ‘Egeda’) and Hostelería Asturiana SA (hereinafter ‘Hoasa’), the owner of a hotel business known as ‘Hotel de la Reconquista’.

Legislation

- 3 Article 1(2)(a) of the Directive provides as follows:

‘For the purpose of this Directive, “communication to the public by satellite” means the act of introducing, under the control and responsibility of the

broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.’

4 Article 1(3) of the Directive provides:

‘For the purposes of this Directive, “cable retransmission” means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including ... by satellite, of television or radio programmes intended for reception by the public.’

Facts

5 In the hotel which it operates, Hoasa installed a system for the reception of television programmes broadcast terrestrially or by satellite and their exclusive distribution to the guests occupying the rooms of the hotel.

6 Taking the view that the service of distributing the audiovisual recordings and other works contained in the television programmes provided to the guests of the

hotel infringed the codified law on intellectual property, as approved by Royal Legislative Decree 1/1996 of 12 April 1996 (BOE No 97 of 22 April 1996, p. 14369), which transposed the Directive into Spanish law, Egeda brought an application in small-claim proceedings seeking that Hoasa be required to suspend the retransmission of programmes to the hotel rooms, prohibited from resuming that activity without its express authority and ordered to compensate the damage Egeda had sustained.

7 Before the national court Hoasa disputed that the hotel had made any ‘communication to the public’ or ‘cable retransmission’ within the meaning of Article 1 of the Directive.

8 The national court stated in its order, *inter alia*, that ‘Article 122(2) of the Codified Law on Intellectual Property provides that “persons using audiovisual recordings for communication to the public as defined in Article 20(2)(f) and (g) of this Law shall pay a fair one-off fee to the producers of audiovisual recordings...”’. Paragraph 3 of that article adds that ‘the copyright management societies shall administer the right to the fair one-off fee referred to in the preceding paragraph ...’.

9 The national court went on to say that ‘Article 20(2)(f) of the Law, to which Article 122(2) refers and on which the claim is based, defines as an “act of

communication to the public retransmission, by any of the means set out in the preceding subparagraphs, by an entity other than the one from which the broadcast work originates”. One of the means mentioned in the preceding subparagraphs, specifically in subparagraph (d), is communication by satellite, and subparagraph (e) refers to cable transmission, the first of those provisions setting out verbatim the definition of broadcasting or “communication to the public” by satellite which appears in Article 1(2)(a) of the directive ...’.

The question referred for a preliminary ruling

- 10 It was in those circumstances that the Juzgado de Primera Instancia e Instrucción de Oviedo decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 1(2)(a) and (3) of Directive 93/83/EEC to be interpreted as meaning that the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel constitutes an “act of communication to the public” or “reception by the public”?’

- 11 Egeda and the German, French and United Kingdom Governments all argue, essentially, that the provisions of the Directive do not permit the Court to provide the national court with the interpretative guidance it seeks, and that the question

referred for a preliminary ruling must be decided on the basis of the provisions of national law alone.

- 12 Hoasa and the Spanish Government contend that the reception by a hotel of satellite or terrestrial television signals and their distribution by cable to the various rooms of the hotel does not amount to an act of communication to the public or cable retransmission within the meaning of Article 1(2)(a) and (3) of the Directive.

- 13 The Commission argues that Article 1(2)(a) and (3) of the Directive is not intended to be used in establishing whether or not there is an act of 'communication to the public' or what is meant by 'the public'. In this connection, it states that the Directive does not harmonise all provisions of national law relating to copyright and rights related to copyright. The Commission also states that the Kingdom of Spain has a duty to apply the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971, as amended on 28 September 1979). It argues that the retransmission of a broadcast received by a hotel to a large number of rooms could, on the basis of Articles 11 and 11A of that Convention, be regarded as a communication to the public requiring the authority of the owners of the rights in question.

- 14 It should be noted first of all that, as regards the cross-border broadcasting, in particular by cable and satellite, of programmes within the Community, the Council has already adopted Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative

action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23).

- 15 Next, the fifth recital in the preamble to the Directive states that the achievement of objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is 'currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty'.

- 16 The 12th recital states that the aim of the Directive is to supplement, with reference to copyright, 'the legal framework for the creation of the single audiovisual area laid down in Directive 89/552/EEC'.

- 17 Lastly, it should be noted that, according to the 32nd and 33rd recitals, the Directive provides for only a minimum degree of harmonisation of the provisions relating to copyright and rights related to copyright.

- 18 In the 34th recital the Directive makes it clear that it does not prejudice further harmonisation in the field of copyright and rights related thereto, as well as the collective administration of such rights.

- 19 It is in the light of those recitals that the question regarding the interpretation of Article 1(2)(a) and (3) of the Directive must be considered.
- 20 It should be observed first of all that, as is stated in the fourteenth recital, the objective of Article 1(2)(a) is to overcome the legal uncertainty regarding the rights to be acquired which impedes satellite broadcasting by defining the notion of communication to the public by satellite at a Community level and in a way which also specifies where the act of communication takes place.
- 21 The recital also states that such a definition is necessary to avoid the cumulative application of several national laws to a single act of broadcasting.
- 22 Article 2 of the Directive requires the relevant Member States to provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works, subject to the provisions of Chapter II of the Directive.
- 23 Secondly, the provisions of the Directive concerning cable retransmission are different from those concerning satellite broadcasting.

- 24 It is clear from Article 8 of the Directive, and from the 27th recital in the preamble, that the Directive neither requires the Member States to introduce a specific cable retransmission right nor defines the scope of any such right. It merely imposes an obligation upon the Member States to ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed.
- 25 It is clear from the foregoing that Article 1(2)(a) and (3) of the Directive does not provide information to enable the Court to answer the question whether the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel constitutes an 'act of communication to the public' or 'reception by the public'.
- 26 That finding is corroborated, moreover, by the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, presented by the Commission on 21 January 1998 (OJ 1998 C 108, p. 6).
- 27 The 15th recital in the preamble states that the proposal seeks to harmonise the [law] applicable to the communication to the public of works, where this had not yet been done by existing Community legislation.

- 28 Under Article 3(1) of the proposal, the Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of originals and copies 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.
- 29 Therefore, the question whether the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel is an ‘act of communication to the public’ or ‘reception by the public’ is not governed by the Directive, and must consequently be decided in accordance with national law.

Costs

- 30 The costs incurred by the Spanish, German, French and United Kingdom Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Juzgado de Primera Instancia e Instrucción de Oviedo by order of 1 June 1998, hereby rules:

The question whether the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel is an ‘act of communication to the public’ or ‘reception by the public’ is not governed by Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, and must consequently be decided in accordance with national law.

Kapteyn

Hirsch

Ragnemalm

Delivered in open court in Luxembourg on 3 February 2000.

R. Grass

J.C. Moitinho de Almeida

Registrar

President of the Sixth Chamber