



## Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

2 April 2020\*<sup>i</sup>

(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’ – Undertaking hiring out cars each having a radio receiver as standard equipment)

In Case C-753/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta domstolen (Supreme Court, Sweden), made by decision of 15 November 2018, received at the Court on 30 November 2018, in the proceedings

**Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim),**

**Svenska Artisters och musikers, intresseorganisation ek. för. (SAMI)**

v

**Fleetmanager Sweden AB,**

**Nordisk Biluthyrning AB,**

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič (Rapporteur) and C. Lycourgos, Judges,

Advocate General: M. Szpunar,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 6 November 2019,

after considering the observations submitted on behalf of:

- Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim) and Svenska Artisters och musikers, intresseorganisation ek. för. (SAMI), by P. Sande and D. Eklöf, advokater,
- Fleetmanager Sweden AB, by S. Hallbäck, S. Wendén, J. Åberg and U. Dahlberg, advokater,

\* Language of the case: Swedish.

- Nordisk Biluthyrning AB, by J. Åberg, C. Nothnagel and M. Bruder, advokater,
- the European Commission, by K. Simonsson, J. Samnadda, E. Ljung Rasmussen and G. Tolstoy, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2020,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 2001 L 167, p. 10), and of 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 (OJ 2006 L 376, p. 28).
- 2 The request has been made in connection with two disputes between Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim) (the Swedish organisation which collectively manages copyright in music) and Fleetmanager Sweden AB ('Fleetmanager'), on the one hand, and Svenska artisters och musikers intresseorganisation ek. för. (SAMI) (the Swedish organisation managing the related rights of performers) and Nordisk Biluthyrning AB ('NB'), on the other, concerning the classification, from the copyright perspective, of the hiring out of motor vehicles equipped with radio receivers.

### **Legal context**

#### ***International law***

- 3 The World Intellectual Property Organization (WIPO) adopted the WIPO Copyright Treaty ('the WCT') in Geneva on 20 December 1996, a treaty which was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6) and which entered into force with respect to the European Union on 14 March 2010 (OJ 2010 L 32, p. 1).
- 4 Article 8 of the WCT, headed 'Right of communication to the public':  
'Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising 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 these works from a place and at a time individually chosen by them.'
- 5 Joint declarations concerning the WCT were adopted by the Diplomatic Conference on 20 December 1996.

6 The joint declaration concerning Article 8 of that Treaty is worded as follows:

‘It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. ...’

### ***European Union law***

#### *Directive 2001/29*

7 Recital 27 of Directive 2001/29 is worded as follows:

‘The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this directive.’

8 Article 3 of that directive, entitled ‘Right of communication to the public of works and right of making available to the public other subject matter’, provides:

‘1. 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.

...

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this article.’

#### *Directive 2006/115*

9 Article 8 of Directive 2006/115, entitled ‘Broadcasting and communication to the public’, provides in paragraph 2 thereof:

‘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.’

### ***Swedish Law***

10 The upphovrättslagen (1960:279) (Law (1960:279) on copyright; ‘the UL’) transposed Directive 2001/29 into Swedish law. Paragraph 2 of the UL governs the exclusive right of authors to reproduce their works and to make them available to the public following the ‘communication’ of the work to the public (third subparagraph, point 1) or of its representation (third subparagraph, point 2).

- 11 Paragraphs 45 and 46 of the UL govern the related rights of performers and producers of sound recordings and films.
- 12 Under Paragraph 47 of that law, implementing Article 8(2) of Directive 2006/115, sound recordings may be the subject of public performance or of a communication to the public, unless that communication is made in such a way that individuals have access to the sound recording from a place and at a time which they themselves choose. In such use, the producer and the performing artists whose performances are on the recording are entitled to fair remuneration.

### **The disputes in the main proceedings and the questions referred for a preliminary ruling**

- 13 Fleetmanager and NB are motor vehicle rental companies established in Sweden. They offer, directly or through intermediaries, hired vehicles equipped with radio receivers, in particular for periods not exceeding 29 days, which is regarded under national law as a short-term hire.
- 14 In the dispute between Stim and Fleetmanager, before the tingsrätt (District Court, Sweden), Stim sought an order that Fleetmanager pay it the sum of 369 450 Swedish kronor (SEK) (approximately EUR 34 500), together with interest, in respect of copyright infringement. Stim claimed that Fleetmanager, by making available to third parties, namely motor vehicle rental companies, vehicles equipped with radio receivers for short-term hires to private clients, contributed to the copyright infringements committed by those companies, which have made musical works available to the public without being authorised to do so.
- 15 The court of first instance held that the hire of vehicles equipped with radio receivers involved a ‘communication to the public’ of musical works, within the meaning of the UL, and that the authors of those works were entitled to compensation. However, it also found that Fleetmanager had not participated in those copyright infringements, with the result that the action brought by Stim was dismissed. That judgment was upheld on appeal. Stim brought an appeal on a point of law against the judgment on appeal before the Högsta domstolen (Supreme Court, Sweden).
- 16 In the dispute between SAMI and NB, NB brought an action before the Patent- och marknadsdomstolen (Patents and Market Court, Sweden) seeking a declaration that NB was not required, on the basis of the fact that the vehicles which it hires to individuals and entrepreneurs are equipped with radio receivers and CD readers, to pay fees to SAMI for the use of sound recordings between 1 January 2015 and 31 December 2016.
- 17 The Patent- och marknadsdomstolen (Patents and Market Court) found that the UL should be interpreted in accordance with directive 2001/29 and that, in accordance with the case-law of the Court of Justice, the use of a phonogram, covered by 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. That court further held that the provision, by NB, of radio receivers in the hire cars made it possible for the occupants of those vehicles to hear sound recordings and must therefore be regarded as such a ‘communication’. In addition, that court held that the other criteria constituting ‘communication to the public’ were also satisfied. Consequently, it held that NB was liable to compensate SAMI and dismissed the action brought by NB. That judgment was overturned on appeal by the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patents and Market Court of Appeal, Stockholm, Sweden). SAMI appealed on a point of law against the judgment on appeal before the Högsta domstolen (Supreme Court).

18 In those circumstances, the Högsta domstolen (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice 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?’

### **The request to have the oral procedure reopened**

- 19 Following the delivery of the Advocate General’s Opinion, Stim and SAMI, by a document lodged at the Court Registry on 6 February 2020, applied for the oral part of the procedure to be reopened.
- 20 In support of their application, they submit that, as is apparent from points 39, 52 and 53 of the Advocate General’s Opinion, certain factors relating, in essence, to the distinction between the private sphere and the public sphere for the purposes of determining whether there is a ‘communication to the public’ may have been misunderstood. As a result, the Court may not have sufficient information in that regard.
- 21 It must be borne in mind that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his or her involvement. The Court is not bound either by the Advocate General’s Opinion or by the reasoning on which it is based (judgment of 30 January 2020, *Köln-Aktiefonds Deka*, C-156/17, EU:C:2020:51, paragraph 31 and the case-law cited).
- 22 Furthermore, it is a matter of settled case-law that the Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order the reopening of the oral procedure under Article 83 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be decided on the basis of an argument which has not been debated between the parties. However, the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for parties to submit observations in response to the Advocate General’s Opinion (judgment of 30 January 2020, *Köln-Aktiefonds Deka*, C-156/17, EU:C:2020:51, paragraph 32 and the case-law cited).
- 23 In the present case, Stim and SAMI’s request that the oral part of the procedure be reopened is intended to enable them to respond to the findings made by the Advocate General in his Opinion.
- 24 Moreover, the Court considers, having heard the Advocate General, that it has all the information necessary to enable it to reply to the questions put by the referring court and that all the arguments required for the decision on this case have been debated by the parties.
- 25 Consequently, there is no need to order the oral part of the procedure to be reopened.

## Consideration of the questions referred

### *The first question*

- 26 By its first question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that the hiring out of motor vehicles equipped with radio receivers constitutes a communication to the public within the meaning of those provisions.
- 27 That question arises in the context of disputes concerning, first, the existence of an unauthorised communication to the public of musical works, within the meaning of Article 3(1) of Directive 2001/29, by vehicle rental companies hiring out vehicles equipped with radio receivers and, second, the right of a body collectively managing the related rights of performing artists to request a fair remuneration from those companies, where the rental of those vehicles gives rise to a communication to the public within the meaning of Article 8(2) of Directive 2006/115.
- 28 It should be noted that, in accordance with the case-law of the Court, since the EU legislature did not express a different intention, the expression ‘communication to the public’ used in the two abovementioned provisions must be interpreted as having the same meaning (see, to that effect, judgments of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraphs 49 and 50, and of 16 February 2017, *Verwertungsgesellschaft Rundfunk*, C-641/15, EU:C:2017:131, paragraph 19 and the case-law cited).
- 29 Furthermore, that expression must be interpreted in the light of the equivalent concepts contained in the texts of international law and in such a way that it is consistent with them, also taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property (see, to that effect, judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 189, and of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraphs 51 to 56).
- 30 In accordance with settled case-law, the concept of ‘communication to the public’ includes two cumulative criteria, namely an ‘act of communication’ of a work and the communication of that work to a ‘public’ (judgments of 16 March 2017, *AKM*, C-138/16, EU:C:2017:218, paragraph 22; of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 19 and the case-law cited; and of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 61 and the case-law cited).
- 31 In order to determine whether the hiring out of vehicles equipped with radio receivers constitutes an act of communication within the meaning of Directives 2001/29 and 2006/115, it is necessary to carry out an individual assessment, in the light of a number of complementary criteria, which are not autonomous and are interdependent. Those criteria must, moreover, be applied both individually and in their interaction with each other, in so far as they may, in different situations, be present to widely varying degrees (see, to that effect, judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 25 and the case-law cited).
- 32 Of those criteria, the Court has repeatedly emphasised the indispensable role played by the user and the deliberate nature of his intervention. That user makes an ‘act of communication’ when he intervenes, in full knowledge of the consequences of his action, to give his customers access to a protected work, particularly where, in the absence of that intervention, those customers would

not be able to enjoy the broadcast work, or would be able to do so only with difficulty (see, inter alia, judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 82 and the case-law cited; of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 31; and of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 26 and the case-law cited).

- 33 It is apparent from recital 27 of Directive 2001/29, which reproduces, in essence, the joint declaration concerning Article 8 of the WCT, that ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this directive’.
- 34 That is so in the case of the supply of a radio receiver forming an integral part of a hired motor vehicle, which makes it possible to receive, without any additional intervention by the leasing company, the terrestrial radio broadcasts available in the area in which the vehicle is located, as also noted, in essence, by the Advocate General in point 32 of his Opinion.
- 35 A supply such as that referred to in the preceding paragraph differs from acts of communication by which service providers intentionally broadcast protected works to their clientele, by distributing a signal by means of receivers that they have installed in their establishment (judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraphs 47 and 54 and the case-law cited).
- 36 Consequently, it must be held that, by making available to the public vehicles equipped with radio receivers, vehicle rental companies are not carrying out an ‘act of communication’ to the public of protected works.
- 37 That interpretation cannot be called into question by the argument that vehicle rental companies make available to their customers spaces which Stim and SAMI describe as ‘public’, namely the passenger compartments of hire vehicles, in which it is possible to enjoy protected works using the radio receivers with which those vehicles are equipped. The provision of such a space does not constitute an act of communication, any more than the provision of the radio receivers themselves constitutes such an act. It is also clear from the case-law of the Court that the private or public criterion of the place where the communication takes place is irrelevant (see, to that effect, judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 50).
- 38 In those circumstances, there is no need to examine whether such making available must be regarded as a communication to a ‘public’.
- 39 In the light of all the foregoing considerations, the answer to the first question is that Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that the hiring out of motor vehicles equipped with radio receivers does not constitute a communication to the public within the meaning of those provisions.

### ***The second question***

- 40 In the light of the answer given to the first question, there is no need to answer the second question.

## Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

**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 motor vehicles equipped with radio receivers does not constitute a communication to the public within the meaning of those provisions.**

[Signatures]

<sup>i</sup> — The wording of paragraph 14 of this document has been amended since it was first put online.