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Provisional text

JUDGMENT OF THE COURT (Second Chamber)

16 February 2017 (*)

(Reference for a preliminary ruling — Intellectual property — Directive 2006/115/EC — Article 8(3) — Exclusive right of broadcasting organisations — Communication to the public — Places accessible to the public against payment of an entrance fee — Communication of broadcasts by TV sets installed in hotel rooms)

In Case C-641/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Handelsgericht Wien (Commercial Court, Vienna, Austria), made by decision of 24 November 2015, received at the Court on 2 December 2015, in the proceedings

Verwertungsgesellschaft Rundfunk GmbH

v

Hettegger Hotel Edelweiss GmbH,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General : M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Verwertungsgesellschaft Rundfunk GmbH, by S. Korn, Rechtsanwalt,
- Hettegger Hotel Edelweiss GmbH, by G. Kucsko, Rechtsanwalt,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by T. Scharf and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2016,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 8(3) 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 proceedings between Verwertungsgesellschaft Rundfunk GmbH and Hettegger Hotel Edelweiss GmbH concerning the communication by the latter of television and radio broadcasts by means of TV sets installed in its hotel rooms.

Legal context

International law

- 3 Article 13 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961 (‘the Rome Convention’), entitled ‘Minimum Rights for Broadcasting Organizations’ provides:

‘Broadcasting organisations shall enjoy the right to authorise or prohibit:

...

- (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.’

EU law

4 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), 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.’

5 Recital 7 of Directive 2006/115 states:

‘The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.’

6 Under recital 16 of that directive:

‘Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.’

7 Article 8 of that directive provides:

‘1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

2. 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.

3. Member States shall 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.’

Austrian law

8 Paragraph 76a of the Urheberrechtsgesetz (Law on copyright, ‘the UrhG’), entitled ‘Transmitted broadcasts’, which seeks to transpose Article 8(3) of Directive 2006/115 into Austrian law, provides:

‘1. Any person who airs, by broadcasts or in a similar manner, sounds or images (a broadcasting organisation within the meaning of Paragraph 17) shall, within the limits laid down by law, have the exclusive right to air the broadcast simultaneously by means of another transmitter and to use the broadcast for communication to the public within the meaning of Paragraph 18(3) in places accessible to the public against payment of an entrance fee ...

...’

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Verwertungsgesellschaft Rundfunk is a collecting society whose beneficiaries are numerous broadcasting organisations established in the territory of the Republic of Austria or in other Member States. It is authorised to exercise certain intellectual property rights belonging to its beneficiaries, in particular in the case of communication to the public by means of broadcasts.

10 Hettegger Hotel Edelweiss, a company incorporated under Austrian law, operates the Edelweiss Hotel in Grossarl (Austria) which has a cable TV connection from which various television and radio programmes, including those produced and broadcast by the beneficiaries of the Verwertungsgesellschaft Rundfunk, are simultaneously redirected, unaltered and in full, via cable, to the TV sets installed in the hotel rooms.

11 Verwertungsgesellschaft Rundfunk brought an action before the Handelsgericht Wien (Commercial Court, Vienna, Austria) seeking an order that Hettegger Hotel Edelweiss, first, provide it with information on the radio and television programmes that could be received and the number of hotel rooms concerned and, second, pay it damages.

12 It claims, before that court, that Hettegger Hotel Edelweiss, by making available TV sets in its hotel rooms and by communicating the television and radio broadcasts by means of those TV sets, performs an act of communication to the public within the meaning of Paragraph 76a of the UrhG and Article 8(3) of Directive 2006/115. According to the applicant, the price of the room must be regarded as an entrance fee within the meaning of those provisions, in so far as the offer of a television in the hotel has an influence on that price. It submits, as a consequence, that that communication to the public of the broadcasts of the beneficiaries that it represents must be subject to the authorisation of those beneficiaries and to the payment of fees.

- 13 Hettegger Hotel Edelweiss contests those claims by arguing that the existence of a communication to the public within the meaning of Paragraph 76a of the UrhG presupposes a communication in places accessible to the public against payment of an entrance fee and that that expression refers to an entrance fee demanded specifically for that communication. Therefore, the price that the hotel guest must pay in consideration for the overnight stay cannot, in its view, be regarded as an entrance fee.
- 14 The referring court takes the view that the interpretation of Article 8(3) of Directive 2006/115 is necessary in order to resolve the dispute in the case in the main proceedings and that that interpretation is not so obvious as to leave no scope for any reasonable doubt.
- 15 In those circumstances, the Handelsgericht Wien (Commercial Court, Vienna) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the condition of “against payment of an entrance fee” laid down in Article 8(3) of Directive 2006/115 satisfied where

- through the TV set made available in each room of a hotel, the hotel operator provides access to the signal for various television and radio channels (‘hotel room TV’), and
- for use of the room (including hotel room TV), the hotel operator charges a fee per room per night (room rate) which also includes use of the TV set and the television and radio channels to which access is thereby provided?’

Consideration of the question referred

- 16 By its question, the referring court asks, in essence, whether Article 8(3) of Directive 2006/115 must be interpreted as meaning that the communication of television and radio broadcasts by means of TV sets installed in hotel rooms constitutes a communication made in a place accessible to the public against payment of an entrance fee.
- 17 It should be borne in mind that, in the judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraphs 47 and 54), the Court held that the distribution of a signal by means of TV sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29, and that the private nature of hotel rooms by such a hotel does not preclude the communication of a work by those means from constituting a communication to the public within the meaning of Article 3(1) of Directive 2001/29.

- 18 As regards Directive 2006/115, of which an interpretation is sought, the Court also held, in the judgment of 15 March 2012, *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, paragraph 47) that a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal makes a communication to the public for the purposes of Article 8(2) of Directive 2006/115.
- 19 As the concepts used by those directives must have the same meaning, unless the EU legislature has expressed a different intention (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 188, and of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 33), the provision of a signal by means of television or radio sets installed in hotel rooms must also, as the Advocate General stated in point 16 of his Opinion, constitute a communication to the public of broadcasts from broadcasting organisations within the meaning of Article 8(3) of Directive 2006/115.
- 20 However, unlike, in particular, the exclusive right of performers and the right of phonogram producers provided for in Article 8(1) and (2) of Directive 2006/115 respectively, the exclusive right of broadcasters provided for in Article 8(3) is limited to cases of communication to the public in places accessible to the public against payment of an entrance fee.
- 21 As regards interpreting the concept of ‘places accessible to the public against payment of an entrance fee’, it is apparent from recital 7 of Directive 2006/115 that it seeks to approximate the legislation of the Member States in such a way as not to conflict, in particular, with the Rome Convention. Accordingly, although that convention does not form part of the legal order of the European Union, concepts appearing in Directive 2006/15 must be interpreted in particular in the light of that convention, in such a way that they are compatible with the equivalent concepts contained in that convention, taking account also of the context in which those concepts are found and the purpose of the relevant provisions of the convention (see, to that effect, judgment of 15 March 2012, *SCT*, C-135/10, EU:C:2012:140, paragraphs 53 to 56).
- 22 In the present case, the scope of the right of communication to the public laid down in Article 8(3) of Directive 2006/115 is equivalent to that of the right provided for in Article 13(d) of the Rome Convention, which, in accordance with the wording of Article 8(3), limits it to ‘places accessible to the public against payment of an entrance fee’ (see, to that effect, judgment of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraphs 94 to 96). The intention of the EU legislature was — as confirmed by the amended proposal for a directive, of 30 April 1992 (COM(92) 159 final, p. 12), which led to the adoption of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61), which was repealed and codified by Directive 2006/115 — to follow to

a large extent the provisions of the Rome Convention introducing minimum protection in order to achieve uniform minimum protection in the European Union and, by modelling Article 6a(3) of the proposed Directive on Article 13(d) of the Rome Convention, to provide for an exclusive right to communicate television broadcasts to the public under the conditions set out in that convention.

- 23 As regards the condition for the payment of an entrance fee provided for in Article 13(d) of the Rome Convention, it should be pointed out that, according to the Guide to the Rome Convention and to the Phonograms Convention of the World Intellectual Property Organisation (WIPO), a document prepared by the WIPO which, without being legally binding, provides explanations as to the origin, purpose, nature and scope of that convention, points 13.5 and 13.6 of which relate to Article 13 of the Rome Convention, that condition presupposes a payment specifically requested in return for a communication to the public of a TV broadcast and that, accordingly, the fact of payment for a meal or drinks in a restaurant or in a bar where TV broadcasts are aired is not to be regarded as a payment of an entrance fee within the meaning of that provision.
- 24 The fact remains that, as the Advocate General stated in points 26 to 30 of his Opinion, the price of a hotel room is not, like the price of a restaurant service, an entrance fee specifically requested in return for a communication to the public of a TV or radio broadcast, but constitutes the consideration for, principally, the accommodation service, to which, according to the hotel category, certain additional services are added, such as the communication of TV and radio broadcasts by means of receiving equipment in the rooms, which are normally included in the price of the overnight stay.
- 25 Therefore, although the distribution of a signal by means of TV and radio sets installed in hotel rooms constitutes an additional service which has an influence on the hotel's standing and, therefore, on the price of rooms, as pointed out by the Court in its judgments of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764, paragraph 44) and of 15 March 2012, *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, paragraph 44), in the context of the examination of the existence of an act 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, it cannot be considered that that additional service is offered in a place accessible to the public against payment of an entrance fee within the meaning of Article 8(3) of that directive.
- 26 Consequently, the communication to the public of TV and radio broadcasts by means of TV and radio sets installed in hotel rooms does not fall within the scope of the exclusive right of broadcasting organisations provided for in Article 8(3) of Directive 2006/115.
- 27 In the light of all of the foregoing, the answer to the question referred is that Article 8(3) of Directive 2006/115 must be interpreted as meaning that the communication

of television and radio broadcasts by means of TV sets installed in hotel rooms does not constitute a communication made in a place accessible to the public against payment of an entrance fee.

Costs

- 28 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 (Second Chamber) hereby rules:

Article 8(3) 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 communication of television and radio broadcasts by means of TV sets installed in hotel rooms does not constitute a communication made in a place accessible to the public against payment of an entrance fee.

[Signatures]

* Language of the case: German.

