OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 13 July 2006 [1]

1. In the present case, the Audiencia Provincial de Barcelona (Provincial High Court, Barcelona) (Spain) seeks an interpretation of Article 3(1) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2] ('the Copyright Directive' or 'the Directive').

The Copyright Directive

2. The Copyright Directive, as its title indicates, aims to harmonise certain aspects of copyright and related rights, [3] including the right to communicate works to the public.

3. The preamble to the Directive first stresses that any harmonisation of copyright and related rights must take as a basis a high level of protection of, inter alios, authors and performers who, if they are to continue their creative and artistic work, must receive an appropriate reward for the use of their work. It adds that a rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and safeguarding the independence and dignity of artistic creators and performers. [4]

4. The following recitals are also relevant to the present case:

'(15) The ... "WIPO Copyright Treaty" ... update[s] the international protection for copyright and related rights significantly, not least with regard to the so-

1 — Original language: English.

2 — Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 (OJ 2001 L 167, p. 10).

3 — In the context of EC law, copyright ('droit d'auteur') comprises the exclusive rights granted to authors, composers, artists etc while related rights ('droits voisins') covers the analogous rights granted to performers (musicians, actors etc.) and entrepreneurs (publishers, film producers etc.).

4 — Recitals 9 to 11.

called "digital agenda" ... . This Directive also serves to implement a number of the new international obligations.

...

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

...

(27) 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.'

5. Article 3(1) of the Directive requires Member States to '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'.

6. The Directive entered into force on 22 June 2001 and required implementation by 22 December 2002. [5]

The international legal framework

7. Article 3(1) of the Copyright Directive is similar to Article 11*bis*(1) of the Berne Convention for the Protection of Literary and Artistic Works [6] ('the Berne Convention' or 'the Convention') and almost identical to Article 8 of the WIPO [7] Copyright Treaty ('the WCT'). [8] As the Commission notes, it is settled case-law that provisions of secondary Community legislation must, so far as is possible, be interpreted in a manner that is consistent with international agreements concluded by the Community. [9]

5 — Articles 13 and 14.

6 — Of 9 September 1886; as last revised on 24 July 1971 and amended on 28 September 1979.

7 — World Intellectual Property Organisation.

8 — Adopted in Geneva on 20 December 1996.

9 — Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52.

The Berne Convention

8. Although the Community is not a party to the Berne Convention (and indeed could not be, since membership of the Berne Union is confined to States), it is required to comply with the Convention by Article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement'). That Agreement is found in Annex 1C to the Agreement establishing the World Trade Organisation, [10] to which the Community is a party. It may therefore be assumed that Article 3(1) of the Directive is intended to be consistent with the Convention.

9. Article 11 of the Berne Convention provides:

'1. Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

2. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.'

10. Article 11*bis*(1) of the Berne Convention provides:

'Authors of literary and artistic works shall enjoy the exclusive right of authorising:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

10 — Approved on behalf of the Community, in respect of those areas for which it has jurisdiction, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1). The TRIPs Agreement is at OJ 1994 L 336, p. 213.

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one; [11]

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.'

11. The Berne Convention was last revised in 1971. [12] Revision of the Convention requires unanimity of the contracting parties present and voting. Even in 1971, when there were considerably fewer contracting parties, [13] unanimity proved difficult to achieve. It appears for that reason to have been regarded as unrealistic to effect a further revision of the Convention to take account of technological developments since 1971. WIPO accordingly decided to prepare a new treaty which, as a 'special agreement' within the meaning of Article 20 of the Convention, would not require unanimity of the Berne Union members. A further advantage was that the European Community could accede (as could countries which were not members of the Berne Union).

The WCT

12. The WCT entered into force on 6 December 2001. The Community, although a signatory, has not yet ratified the WCT. [14] It is none the less of relevance in interpreting the Copyright Directive since recital 15 in the preamble to the Directive states that the Directive 'serves to implement a number of the new international obligations' deriving from the WCT.

13. Article 8, headed 'Right of Communication to the Public', reads as follows:

'Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii) ... of

11 — Subparagraph (ii) is not as clear as it might be in English. The French is clearer: 'toute communication publique, soit par fil, soit sans fil, de l'œuvre radiodiffusée, lorsque cette communication est faite par un autre organisme que celui d'origine'.

12 — The 1979 amendments concerned minor drafting detail rather than substance.

13 — There are currently 162.

14 — It appears that ratification by the Community is to take place only when, after implementing the Copyright Directive, all the Member States have ratified the WCT. The Community and the (pre-2004 enlargement 15) Member States indicated their intention at the end of the Diplomatic Conference on certain copyright and neighbouring rights questions, Geneva, 2 to 20 December 1996 to deposit their instruments of ratification simultaneously. See M. Ficsor, *The Law of Copyright and the Internet* (2002), p. 68, point 2.41.

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.'

The relevant Spanish legislation

14. According to the order for reference, the Spanish law governing intellectual property [15] grants authors exclusive rights for exploitation of their works in any form. Such rights include public communication. Article 20 explains first what is meant by public communication: 'any act by which a number of persons can have access to the work without prior distribution of copies to each of those persons'. It then states that communication which 'takes place within a strictly domestic location which is not integrated into or connected to a distribution network of any kind' does not fall to be classified as public communication.

15. The referring court states that until recently the Spanish Tribunal Supremo (Supreme Court) took the view that hotel rooms were not domestic locations and that, consequently, the use of television in those hotel rooms constituted an act of public communication within the meaning of Article 20 of the Intellectual Property Law. [16] As a result, the hotel owner was required to pay fees for authorised use to the society owning and managing the repertoire of works communicated.

16. That case-law was however reversed by a decision of the Supreme Court in 2003, [17] which ruled that a hotel room is a strictly domestic location, that consequently the use of television sets in such rooms does not constitute an act of public communication and that no authorisation is therefore required from the owners of intellectual property rights in respect of the works communicated.

The main proceedings and the reference to the Court

17. Sociedad General de Autores y Editores de España ('SGAE') is an intellectual prop-

15 — Royal Legislative Decree 1/1996 of 12 April 1996 (BOE No 97 of 22 April 1996, p. 14369); see in particular Article 17.

16 — Judgments of the Supreme Court of 19 July 1993 (RJ 1993/6164) and of 11 March 1996 (RJ 1996/2413).

17 — Judgment of 10 May 2003 — RJ 2003/3036.

erty rights management society. It commenced proceedings against Rafael Hoteles SL ('Rafael'), the owner of Hotel Rafael, for infringement of intellectual property rights managed by SGAE. Specifically, SGAE complained that in the months between June 2002 and March 2003 acts of communication to the public were carried out involving works belonging to the repertoire managed by SGAE. The acts in question were carried out through television sets installed in the hotel rooms which enabled the guests to see programmes on channels whose signals were received by the hotel main aerial and then distributed to each of the television sets in the various rooms. SGAE claimed that Rafael should be ordered to pay compensation.

18. The court of first instance dismissed SGAE's claim. It held that, on the basis of the Spanish Supreme Court's recent case-law summarised above, the use of television sets in the rooms of Hotel Rafael did not involve acts of public communication of works managed by SGAE; and that it was therefore not necessary for the hotel owner to obtain prior authorisation and pay the corresponding fee.

19. SGAE appealed to the Audiencia Provincial de Barcelona which considers that the Spanish legislation and case-law may infringe the Copyright Directive. Specifically, the referring court has doubts as to whether the reception by the hotel of the television signal, whether terrestrial or satellite, and the distribution thereof by cable to the various hotel rooms, are acts of communication to the public for the purposes of the Directive. It considers that the essence of communication to the public is rendering the work broadcast, in this case by television, accessible to a number of persons. Such a situation clearly exists where the public is present at the same time, for example when there is a television set in a hotel lobby. More doubts arise, however, when the public comprises a series of members present successively, as in the case of a hotel bedroom.

20. The Audiencia Provincial de Barcelona has accordingly stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable constitute an act of communication to the public which is covered by

the harmonisation of national laws protecting copyright provided for in Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001?

(2) Is the fact of deeming a hotel room to be a strictly domestic location, so that communication by means of television sets to which is fed a signal previously received by the hotel is not regarded as communication to the public, contrary to the protection of copyright pursued by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001?

(3) For the purposes of protecting copyright in relation to acts of communication to the public provided for in Directive 2001/29/EEC of the European Parliament and of the Council of 22 May 2001, can a communication that is effected through a television set inside a hotel bedroom be regarded as public because successive viewers have access to the work?'

21. Written observations have been submitted by SGAE, the Austrian, French and Irish Governments and the Commission. SGAE, Rafael, the Irish and Polish Governments and the Commission were represented at the hearing.

The *EGEDA* case

22. The Spanish legislation which has given rise to the present case has already been the subject-matter of a reference for a preliminary ruling, made before the Copyright Directive was adopted. In *EGEDA* [18] the Court was asked 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 constituted an act of communication to the public or reception by the public within the meaning of Directive 93/83. [19] The Court ruled that that question was not governed by Directive 93/83 and was consequently to be decided in accordance with national law.

18 — Case C-293/98 [2000] ECR I-629.

19 — 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).

23. Advocate General La Pergola had also taken the view that the question was not governed by Directive 93/83. [20] Nevertheless, he went on to analyse Article 11*bis*(1) of the Berne Convention, which in his view enabled an answer to be given to the national court's question. [21] He concluded by proposing that the Court should rule that, first, Directive 93/83 was not applicable, and, second, that the reception by a hotel of protected works broadcast by satellite or terrestrial television signals from another Member State and the subsequent retransmission by cable of the programme signals received to the televisions located in the bedrooms of the same hotel constitutes an act of communication to the public within the meaning of Article 11*bis* of the Berne Convention. I shall refer in this Opinion to much of Advocate General La Pergola's helpful analysis.

Assessment

24. The questions referred concern the interpretation of 'communication to the public' in Article 3(1) of the Directive.

25. Essentially, SGAE and the French Government consider that that concept properly construed covers the activities described, so that all three questions referred should be answered in the affirmative. Rafael and the Austrian and Irish Governments take the contrary view. The Polish Government focuses on the second and third questions, which it considers should be answered in the affirmative. The Commission considers that, while the mere installation of television sets in hotel rooms does not constitute an act of 'communication to the public', the distribution to hotel rooms by cable of television signals, received by satellite or terrestrially, does constitute such an act.

The first question

26. I agree with Rafael, the Austrian and Irish Governments and the Commission that the mere installation of television sets in hotel rooms does not constitute an act of communication to the public within the meaning of Article 3(1) of the Directive. [22]

20 — Point 14 of his Opinion.

21 — Points 20 to 27.

22 — Although the national court refers to Article 3 of the Directive, it is clear that it is Article 3(1) which calls for interpretation, since it is that provision which explicitly confers the right to authorise 'communication to the public', the subject-matter of all three questions referred. (Article 3(2) extends the right to authorise 'the making available to the public of their works', conferred on authors by the second phrase of Article 3(1), to performers, phonogram producers, film producers and broadcasting organisations.)

27. That conclusion follows clearly from recital 27 in the preamble to the Directive, which states 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'. That limitation, which is unequivocal, corroborates the statement in recital 23 that the 'right [of communication to the public] should cover any ... transmission or retransmission of a work to the public [not present at the place where the communication originates] by wire or wireless means, including broadcasting [and] should not cover any other acts'.

28. That approach is moreover consistent with the interpretation of the term 'communication' in the WCT. It is clear that Article 3(1) of the Directive seeks to implement at Community level certain new international obligations imposed by that Treaty. [23] Indeed the right which Article 3(1) requires Member States to provide is framed in virtually identical terms to Article 8 thereof. That is not coincidental: the Community and the Member States proposed Article 8. [24] The Diplomatic Conference which adopted that treaty [25] also adopted the following 'agreed statement' concerning Article 8:

'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. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2).'

29. I accordingly consider that the answer to the first question referred should be that the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable does not constitute an act of communication to the public within the meaning of Article 3(1) of the Copyright Directive.

23 — Recital 15 in the preamble, set out in point 4 above.

24 — 'Basic Proposal for the substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by the Diplomatic Conference' ('the Basic Proposal', available on the WIPO website (www.wipo.int)), Explanatory Notes 10.07 and 10.08. The Memorandum Prepared by the Chairman of the Committees of Experts prefacing the Basic Proposal explains (at point 19): 'The purpose of the Explanatory Notes is: (i) to explain briefly the contents and rationale of the proposals and to offer guidelines for understanding and interpreting specific provisions, (ii) to indicate the reasoning behind the proposals, and (iii) to include references to proposals and comments made at sessions of the Committees of Experts, as well as references to models and points of comparison found in existing treaties.'

25 — See footnote 14. The Agreed statements concerning the WIPO Copyright Treaty (CRNR/DC/96) may be found on the WIPO website.

The second and third questions

30. The referring court's second and third questions can conveniently be dealt with together. Read in conjunction, they ask in effect whether communication of broadcasts to hotel bedrooms by means of television sets to which is fed a signal initially received by the hotel is to be regarded as 'communication to the public' within the meaning of Article 3(1) of the Directive.

31. It is common ground that, if the recipients are found to constitute 'the public', Article 3(1) will apply: what divides the parties submitting observations, and what prompted the referring court to make the reference, is the meaning of 'the public'.

32. In my view, the second and third questions should be answered in the affirmative.

33. The Directive gives no definition of 'the public', although (as SGAE and the French and Polish Governments submit) there are indications that the term is, for the purposes of the Directive, to be interpreted broadly. That is suggested both by the principal objective of the Directive, which takes as its basis 'a high level of protection' of copyright and related rights, [26] and by the statement in the preamble to the Directive that the right of communication to the public 'should be understood in a broad sense covering all communication to the public not present at the place where the communication originates [and] should cover any such transmission or retransmission to the public by wire or wireless means'. [27]

34. In the absence of a definition or clearer indications in the Directive, I consider that it is legitimate to seek guidance from the relevant international instruments.

35. As explained above, [28] Article 3(1) of the Directive seeks to implement at Community level the obligations imposed by Article 8 of the WCT.

36. The objectives of Article 8 are to clarify the provisions of the Berne Convention concerning the exclusive right of commu-

26 — Recital 9 in the preamble. See point 3 above.
27 — Recital 23.
28 — Point 28.

nication to the public of works, principally Article 11*bis*(1), and to supplement the rights provided under that Convention 'by extending the field of application of the right of communication to the public to cover all categories of works'. [29]

37. The second of those objectives concerns in particular literary works, photographic works, works of pictorial art and graphic works, not previously covered by the right of communication. The Basic Proposal mentions that technological developments 'have made it possible to make protected works available in many ways that differ from traditional methods'. [30] The principal such development is, of course, the internet; [31] and it is interactive (on demand), on-line transmissions that are specifically intended to be caught by the phrase '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' in Article 3(1) [32] of the Directive and Article 8 of the WCT. [33] For that reason, I do not consider that, as Rafael submits, there is no 'communication to the public' in the present case because the hotel guests, being bound by existing schedules, cannot access television programmes at a time individually chosen by them. More broadly, the present case is concerned with the general rule laid down by Article 3(1) of the Directive and Article 8 of the WCT rather than the specific area expressly included under it.

38. Article 8 of the WCT seeks to supplement the provisions of the Berne Convention concerning communication to the public by conferring an exclusive right of communication to the public for authors of all kinds of works, in so far as that right is not already conferred by the Convention. [34] It thus confers a broader right to authorise 'any communication to the public of their works, by wire or wireless means'. There is no definition of 'the public'.

29 — Basic Proposal, Explanatory Note 10.05. These objectives are moreover reflected in the recitals in the preamble to the WCT, which refers to 'the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments'.

30 — Ibid.

31 — See also recital 5 in the preamble to the Copyright Directive.

32 — And indeed Article 3(2).

33 — Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM(97) 628 final, points 1.I.B.6 and 3.II.A.1 in the Explanatory Memorandum; Basic Proposal, point 10.11. This is also made clear by recital 25 in the preamble to the Directive.

34 — For an exhaustive analysis of the scope of protection conferred by the Berne Convention as compared to that conferred by the WCT, see Reinbothe and von Lewinski, *The WIPO Treaties 1996*, pp. 105 to 107, point 11, and Ficsor, op. cit. footnote 14, pp. 494 and 495, point C8.03.

39. The Austrian Government submits that it is for national law to define 'the public'. It refers to Explanatory Note 10.17 in the Basic Proposal, which states: 'The term "public" has been used in Article 10 as it has been used in the present provisions of the Berne Convention. It is a matter for national legislation and case-law to define what is "public".' The Austrian Government refers also to academic sources supporting its view that it is for national law to define 'public' [35] and to the Commission Staff working paper on the review of the EC legal framework in the field of copyright and related rights [36] which states: 'At this point, there does not seem to be any need to re-assess the line taken so far and the term "public" should remain a matter determined by national legislation and jurisprudence.'

40. In a variation on that theme, Rafael submits that Directive 93/83, [37] and not the Copyright Directive, is applicable to the present case. In accordance with the judgment of the Court in *EGEDA*, [38] it is thus for national law to define 'communication to the public'.

41. I do not agree with those submissions.

42. As the Commission points out, the Court has recognised that 'the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question'. [39]

43. It is clear that the Copyright Directive is intended to be a harmonising directive, designed above all to 'help to implement the four freedoms of the internal market' and 'provid[e] for a high level of protection of intellectual property'. [40] The right to authorise communication to the public is one of the four issues which the Commission considered, when submitting its proposal for the Directive, to require immediate legislative action at Community level in view of their relevance for the internal market. [41] Recital 23 in the preamble explicitly states that the Directive 'should harmonise further the

35 — Including Reinbothe & von Lewinski, op. cit., at p. 107, points 12 and 13.

36 — 19 July 2004, SEC(2004) 995, p. 15.

37 — Cited in footnote 19.

38 — See point 22 above.

39 — Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 23.

40 — Recitals 3 and 4 in the preamble.

41 — See point 2.II.4 of the Explanatory Memorandum to the Proposal, cited in footnote 33. The other three issues were the right of reproduction (Article 2 of the Directive), technological measures and rights-management information (Articles 6 and 7) and the right of distribution of physical copies, including its exhaustion (Article 4).

author's right of communication to the public'. It is manifest that that harmonisation would be a dead letter if Member States were free to define one of the two fundamental elements of the substance of that right. [42] Moreover the Court in *EGEDA* [43] assumes that Article 3(1) is based on a uniform concept of 'communication to the public'.

44. I do not consider that that view is in conflict with the Explanatory Note referred to by Austria. In the context of the WCT, to which the Community is a signatory, the 'national legislation' is the Copyright Directive (rather than the national legislations of the various Member States) and the 'case-law' is that of this Court.

45. With regard to the Commission Working Paper, the agent for the Commission indicated at the hearing that it was only a draft which had never been approved by the Commission. In any event, the Commission's own view of the effect of Community legislation, while it will be of interest and may have some weight, is clearly not binding on the Court.

46. Since the WCT, like the Directive, contains no definition of 'the public', the meaning of that term must be determined by reference to the aim of Article 8. As I have indicated, [44] that provision seeks to clarify and supplement Article 11*bis*(1) of the Berne Convention.

47. The history of Article 11*bis*(1) of the Berne Convention can be seen as a series of attempts to enhance protection of authors' rights in the light of technological developments. The author's right to authorise a performance of his dramatic or musical work had been granted from the outset in 1886. [45] In 1928 Article 11*bis* was added, which in its original form simply conferred on authors of literary and artistic works 'the exclusive right of authorising the communication of their

42 — As the Commission noted in its Green Paper on Copyright and Related Rights in the Information Society (COM(95) 382 final, 19 July 1995), which paved the way for the Directive, 'The fact that particular activities should be lawful in certain Member States and not in others could cause difficulties for the functioning of the Internal Market' (Section IV.3).

43 — Cited in footnote 18, paragraphs 26 to 28 of the judgment.

44 — See point 36 above.

45 — Originally in Article 9, and initially only by requiring any protection afforded by national law to be extended to non-nationals. This was changed in the 1948 Brussels revision, when it was made explicit that the right was protected as such by the Convention. In the meantime Article 9 had become Article 11 after the Berlin revision of 1908.

works to the public by radio-diffusion'.[46] That provision was clearly intended to extend the existing right to authorise a performance in the light of the technological development of radio transmission.[47] The diffusion of signals over wire was not covered.

48. In 1948 Article 11*bis*(1) was revised to (substantially) its current wording. The rights to authorise public performance (Article 11(1)) and communication to the public by broadcasting (existing Article 11*bis*(1), which essentially became Article 11*bis*(1)(i)) were supplemented by the rights to authorise communication to the public of a broadcast, by wire or by rebroadcasting, by an organisation other than the original one (Article 11*bis*(1)(ii)) and public communication[48] of a broadcast by loudspeaker or analogous instrument (Article 11*bis*(1)(iii)). The WIPO Glossary[49] defines 'rebroadcasting' as either 'simultaneous broadcasting of a broadcast received from another source, or a new, deferred broadcast of a former broadcast transmitted or received and recorded earlier'. It also makes clear that the 'authorisation to broadcast a work does not necessarily cover rebroadcasting of the work'.

49. Thus again the revision extended protection in the light of technological advances.[50] The concern throughout was clearly to ensure that authorisation given for one stage (for example performance or first broadcast) was not automatically regarded as extending to subsequent stages (for example first broadcast of a performance, communication of that broadcast by another organisation or by loudspeaker etc.).

46 — Article 11*bis*(1). Article 11*bis*(2) concerned the conditions which could be imposed on the exercise of that right by national law.

47 — The Records of the 1948 Brussels Revisions Conference note of the original Article 11*bis*(1): 'By laying down the principle in an elliptical fashion, the Convention wording was appropriate for the state of an invention whose development was only just starting at the time' (p. 263). The term 'radio-diffusion' used in the version adopted was generally understood to include television broadcasting: see S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, p. 439. Ricketson describes 'radio-diffusion' in 1928 as 'a new technological development which had profound implications for authors' rights' (p. 103).

48 — Nothing seems to turn on the different formulations 'communication to the public' and 'public communication'. Both are rendered as 'communication publique' in the French text, which by virtue of Article 37(1)(c) is to prevail in case of differences of opinion on the interpretation of the various texts.

49 — Glossary of terms of the law of copyright and neighbouring rights (1980). The introduction to the Glossary states that the general purpose of the Glossary is 'to help in the understanding of the legal terms most frequently used in the fields of the law of copyright and neighbouring rights'.

50 — The Rapporteur to the Brussels Conference stated: 'Taking due account of the prodigious development of radio, the program proposed [a revised Article 11*bis*] that broke down the right according to the latest forms of its exploitation ... with an attempt to encompass the improvements or extensions that could yet be made to [television]' (Records, cited in footnote 47, p. 263). Similarly, Ricketson states that at the time of the Brussels Revision, authors' rights 'were in danger of being outflanked by the rapid and revolutionary changes in technology that were occurring' (op. cit., p. 113 (point 3.48)). See also Ricketson, p. 424, point 8.63.

50. It appears that the criterion of communication 'by an organisation other than the original one', used in Article 11*bis*(1)(ii) of the Convention, was adopted as a 'purely functional' distinction: the option of requiring a fresh authorisation wherever a retransmission 'procured a fresh circle of listeners' was deliberately rejected. [51] None the less, that seems to be the essence of the provision's effect. The WIPO Guide [52] moreover confirms that interpretation. It states, in the context of Article 11*bis*(1)(iii):

'Finally, the third case dealt with in [Article 11*bis*(1)] is that in which the work which has been broadcast is publicly communicated e.g., by loudspeaker or otherwise, to the public. This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft etc.) the practice is growing of providing broadcast programmes. There is also an increasing use of copyright works for advertising purposes in public places. The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.

The Convention's answer is "no". *Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1)(ii))*, so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an

51 — Ricketson, op. cit., p. 449.

52 — Guide to the Berne Convention (1978). According to its Preface, the Guide, while not 'intended to be an authentic interpretation of the provisions of the Convention', aims 'to present, as simply and clearly as possible, the contents of the Berne Convention and to provide a number of explanations as to its nature, aims and scope'.

additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work.' [53]

51. It seems clear in the light of the above that Article 8 of the WCT seeks to supplement Article 11*bis*(1) of the Berne Convention by enhancing the right of authors to authorise communication of their works in circumstances where advances in technology have enabled a communication which has itself been authorised to be relayed to a circle of persons going beyond the intended recipients of the initial communication.

52. The transmission of broadcasts to hotel bedrooms by means of television sets to which is fed a signal initially received by the hotel falls squarely within that concept. As Advocate General La Pergola put it in his Opinion in *EGEDA*, [54] '[I]t is all too clear — given that such retransmission is not just a technical means to ensure or improve reception of the original broadcast in the catchment area, as in the case, for example, of the installation and use of transceivers — that [the hotel proprietor] gave the hotel guests access to the protected work. If [it] had not made secondary use of the broadcasts, the clients — although physically within the satellite catchment area — would not have been able to enjoy the broadcast work in any other way; they therefore constitute, in this sense, a "new" public that differs from the primary broadcast public'.

53. It will be noted that the 'purely functional' criterion in fact adopted by Article 11*bis*(1)(ii), namely that the communication must be 'made by an organisation other than the original one', is in any event satisfied in circumstances such as those of the present case. As the French Government points out, the hotel owner is in the same situation as a third party who relays original programmes broadcast or transmitted by cable.

54. The Commission submits that the decisive factor for determining whether a communication is 'to the public' is the extent of the circle of potential recipients of the communication and its economic significance for the author. I agree that both those factors should enter into the equation. An interpretation reflecting those factors would

53 — Points 11*bis*11 and 11*bis*12; emphasis added.

54 — Cited in footnote 18; point 22.

be consistent with the aim of the provision, which is to confer on the author the right to authorise exploitation of his work by communication to the public. [55]

55. Admittedly, in the case of the communication of television signals by a hotel to different bedrooms the only recipients of each individual communication at a particular moment in time are the occupants of each bedroom, usually only one or two people. However, the cumulative effects of all communications of the same type must be taken into consideration, bearing in mind the objective of the Directive articulated in recital 9 of 'a high level of protection' of rightholders and the statement in recital 23 that the right of communication to the public 'should be understood in a broad sense'. Advocate General La Pergola dealt adroitly in his Opinion in *EGEDA* with the argument 'that the economic weight of the guests of a hotel room is so slight that they cannot constitute a "new" public that differs from the primary transmission public. Consequently the retransmission of the broadcast work by television does not have the economic importance necessary to constitute an independent act of communication'. I agree with his response, which is 'that all the clients in a hotel at a given time constitute the "public" within the meaning and for the purpose of copyright. In other words the "spatial discontinuity" of the individuals involved, who constitute the circle of addressees to which the work is made accessible by the person responsible for each act of secondary use, is not large enough to negate the economic importance of the new public reached'. [56]

56. For the Commission, the profit-making nature of the communication is not decisive. The Commission cites the examples of broadcasting music over loudspeakers or images on a giant screen at charitable or political events. In its view, there would in such cases be a 'communication to the public' notwithstanding the absence of an economic motive. In contrast, Advocate General La Pergola, while agreeing on the relevance of 'the economic importance of the new public', considered in his Opinion in *EGEDA* that the Berne Convention 'lays down the principle that the author must authorise all secondary use of the broadcast work if this gives rise to independent economic exploitation for financial profit by the person responsible'. [57] He also expressed the view, with which I agree, that

55 — See Reinbothe & von Lewinski, op. cit., p. 107, point 12.

56 — Point 26.

57 — Ibid., point 24.

the internal retransmission service to hotel rooms undoubtedly 'constitutes an economically quantifiable benefit to the hotel'. [58]

57. It is clear that in the present case first, the circle of potential recipients of the communication is both extensive and of economic significance for the author and, second, the intervening organisation making the communication does so for its own economic benefit. In such circumstances, the communication should be regarded as being made 'to the public'. I do not consider that it is necessary or appropriate to decide in the context of the present case whether economic benefit to the person responsible for making the communication is always required in order for a communication to be regarded as 'to the public' within the meaning of Article 3 of the Directive.

58. I need finally to deal with four further detailed arguments advanced by Rafael and the Austrian and Irish Governments.

59. First, Rafael submits, if I correctly understood its counsel at the hearing, that recital 35 in the preamble to, and Article 5 of, the Copyright Directive envisage exceptions to the authors' rights protected thereby, and that in any event recital 35 provides only that in such cases 'rightholders *should* receive fair compensation' [59] for the use made of their works. Rafael submits that, since the verb is in the conditional tense, compensation is not mandatory. The Irish Government also referred to the Member States' right to provide for exceptions.

60. It is correct that Article 5 of the Directive contains 'an *exhaustive* enumeration of exceptions and limitations to ... the right of communication to the public'. [60] No explanation has been given, however, [61] as to which of those exceptions might apply in the present case. The argument from use of the conditional tense in Spanish (which in any event is normal usage in recitals) survives neither teleological interpretation nor a comparison with other language versions.

61. Second, Rafael and the Austrian Government submit that the act of retransmission by the hotel to the hotel rooms does not fall

58 — Point 25.

59 — Emphasis added. The equivalent in Spanish, which presumably prompted the submission, is 'deberían'. It is however 'doivent' in French.

60 — Recital 32 in the preamble; emphasis added.

61 — Even in response to a question at the hearing.

within the scope of Article 3(1) since that provision, by using the phrase 'by wire or wireless means', focuses on communication over distance. That interpretation is confirmed by recital 23, which states that the right covers *only* 'communication to the public not present at the place where the communication originates'. It follows that there is no complete harmonisation of the provisions relating to communication to the public and that only communication over distance — such as radio broadcasting ('by ... wireless means') or cable broadcasting ('by wire') — has been harmonised. Rafael and the Austrian Government conclude that, if every act of communication, even if only successive, is public and therefore constitutes an act of communication to the public, the (probably unintended) consequence would be that the private reception of television broadcasts would also amount to an act of communication to the public.

62. I have already explained why I consider the argument that the Directive does not fully harmonise the notion of 'communication to the public' to be untenable.

63. Nor do I accept the argument that 'communication to the public' requires physical distance. Quite apart from the obvious difficulties inherent in making such an arbitrary condition workable — where would one draw the line? — the history of Article 11*bis*(1) of the Berne Convention provides no support for that view. On the contrary, and as discussed above, it indicates that the relevant criterion is the extension of the circle of recipients of the original transmission by an organisation other than the original one. It is clear that a given technique for transmission will need to be able to operate over distance, [62] but the fact that in a given case the distance is small does not undermine that criterion. Conversely, the criterion used in recital 23 in the preamble to the Directive, namely that 'communication to the public' covers 'all communication to the public *not present at the place where the communication originates*', [63] is a workable test which does not involve any quantification of distance.

64. As for Rafael and Austria's remaining suggestion that, if 'successive' communications are nevertheless 'public', private reception of television broadcasts will be caught by the definition, it seems clear from the WIPO Guide and Glossary that (as common sense would suggest) such a consequence would not follow. As the Guide states, 'the author thinks of his licence to broadcast as covering only the direct audience receiving

62 — The WIPO Glossary defines 'Diffusion of signs, sounds and images' for the purpose of Article 11*bis*(1)(i) as 'any technique for transmitting works or other sound and/or visual programs and information for public reception at a distance by wireless means or by wire'.

63 — Emphasis added.

the signal within the family circle'.[64] That interpretation is confirmed by the definition in the WIPO Glossary of 'Communication to the public' as 'Making a work ... perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group'.[65] Moreover, to the extent that economic benefit to the providing organisation is relevant, it provides, in the words of Advocate General La Pergola in his Opinion in *EGEDA*, 'a cogent explanation for there being no communication to the public if the protected work is made accessible by the direct user of the television to his family circle or friends: in such cases there is no secondary use of the broadcast work by a third party but instead the equipment for receiving the primary transmission is shared, at no financial profit to the interested party'.[66] Finally, the Berne Convention, the WCT and the Directive are all concerned to protect authors' economic rights. It is hard to see how those rights could be prejudiced by communication to private circles.

65. Third, the Irish Government argues that the private context of hotel rooms renders the retransmission or making available of protected works to television sets in such places, where they may be seen by the guest(s) (and perhaps also by family or friends visiting the guest(s) in the room), a non-public act of communication. It notes that the Court of Justice has recognised, primarily by reference to Article 8 of the European Convention on Human Rights,[67] that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person constitutes a general principle of Community law.[68] The Community legislature must be deemed to take account of that principle when enacting secondary Community legislation, such as the Copyright Directive. It is therefore relevant for the interpretation of Article 3(1) of the Directive.

66. However, I do not see how Article 8 of the European Convention on Human Rights, which is concerned to protect individuals against interference by public authorities in the exercise of their right to respect for private and family life, can be relevant even by analogy in interpreting a provision designed to harmonise rights related to copyright. More generally, I would agree

64 — Point 11*bis*12.

65 — See to similar effect Ricketson, op. cit. footnote 47, pp. 432 and 433 (point 8.71) and 453 (point 8.88), and Reinbothe and von Lewinski, op. cit. footnote 34, p. 107, point 12.

66 — Point 24.

67 — Article 8 confers the right to respect for private and family life, and prohibits (subject to public-interest exceptions) any interference by a public authority with the exercise of that right.

68 — The Irish Government cites Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR I-2859, paragraph 19, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraphs 27 and 29.

with Advocate General La Pergola who responded to a similar argument in his Opinion in *EGEDA*.[69] While the Advocate General accepted that, for the purpose of protecting fundamental rights, 'a hotel room forms part of the purely private or domestic sphere of a person and his family', he continued: 'the legal boundary between the private and the public is not necessarily the same in the area of copyright protection. It is no chance that the criterion for establishing the public or private nature of a room is foreign not just to the letter but also to the spirit of Article 11*bis* of the Convention, which requires authorisation by the author not for retransmission to places that are public or are open to the public but for acts of communication in which the work is made accessible to the public. For this purpose the term "public" is not of fundamental importance in defining an act of communication as public, because it traditionally means the absence of special personal relationships between members of a group of persons or between group members and the organiser.'

67. Finally, Rafael and the Irish Government argue that there is no 'communication to the public' in the present case because whether there is actual reception of a given relayed television programme depends on whether a hotel guest turns on the television in his room and chooses a particular channel. Again, I am indebted to Advocate General La Pergola, who has already formulated the answer to that question. In his Opinion in *EGEDA*,[70] he stated that that argument 'contradicts one of the fundamental principles of copyright: copyright holders are remunerated on the basis not of the actual enjoyment of the work but of a legal possibility of that enjoyment. For example, publishers must pay royalties to authors for their novels on the basis of the number of copies sold, whether or not they are ever read by their purchasers. Similarly, hotels that are responsible for the — simultaneous, uncut and unchanged — internal cable retransmission of an original satellite broadcast cannot refuse to pay the author the remuneration due to him by maintaining that the broadcast work was not actually received by the potential viewers who have access to the televisions in their rooms'.

68. I am accordingly of the view that the answer to the second and third questions should be that communication by means of television sets to which is fed a signal initially received by the hotel constitutes 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive.

69 — Cited in footnote 18, point 23.

70 — Cited in footnote 18, point 22.

Conclusion

69. For the reasons give above, I am of the view that the questions referred by the Audiencia Provincial de Barcelona (Spain) should be answered as follows:

Question 1

— The installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable does not constitute a 'communication to the public' within the meaning 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.

Questions 2 and 3

— Communication by means of television sets to which is fed a signal initially received by the hotel constitutes 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.