

**Case C-723/22**

**Request for a preliminary ruling**

**Date lodged:**

24 November 2022

**Referring court:**

Oberlandesgericht München (Germany)

**Date of the decision to refer:**

24 November 2022

**Appellant:**

Citadines Betriebs GmbH

**Respondent:**

MPLC Deutschland GmbH

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**OBERLANDESGERICHT MÜNCHEN (HIGHER REGIONAL COURT,  
MUNICH, GERMANY)**

[...]

**ORDER**

In the proceedings

**MPLC Deutschland GmbH, [...]** Wachenheim

– applicant and respondent –

[...]

v.

**Citadines Betriebs GmbH, [...]** Eschborn

– defendant and appellant –

[...]

for breach of copyright ‘Wickie und die starken Männer [(‘Vic the Viking’)], season 1 episode 3 (Der Donnergott [(Thor’s Thunder)])’:

on 24 November 2022, the 29th Civil Chamber of the Higher Regional Court, Munich, [...] after hearing the parties on 24 November 2022,

**made the following order:**

- I. The proceedings are [...] stayed.
- II. The following question concerning the interpretation of
  - Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 March 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (‘the InfoSoc Directive’)

is referred to the Court of Justice of the European Union for a preliminary ruling in accordance with Article 267(2) TFEU:

- Must Article 3(1) of the InfoSoc Directive be interpreted as precluding a national provision or practice according to which the provision of physical facilities for enabling or making a communication – such as television sets in hotel rooms or in hotel fitness rooms – is regarded as communication to the public when, while the transmission signal, in addition, is retransmitted to the physical facilities via the hotel’s own cable distribution system, that cable retransmission takes place lawfully on the basis of a licence acquired by the hotel?

**Grounds:**

The parties are in dispute before the referring court concerning whether the defendant, a hotel operator, has infringed the right of communication to the public of an episode of the television series ‘Wickie und die starken Männer’, which the applicant claims to hold, in that, due to its broadcast on a public-service television station, it could be seen in a hotel room and a fitness room on television sets provided by the defendant to which the defendant had lawfully retransmitted the transmission signal via a cable distribution system belonging to the hotel on the basis of a licence that it acquired.

**1. Legal framework**

**a. European Union law**

The recitals of the InfoSoc Directive read, in extract, as follows:

(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.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

The InfoSec Directive provides, *inter alia*:

*Article 1*

**Scope**

(1) This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

*Article 3*

**Right of communication to the public of works and right of making available to the public other subject matter**

(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.

**b. National law**

Paragraph 15 of the Urheberrechtsgesetz (Law on Copyright and Related Rights, UrhG) reads, in extracts, as follows:

- (2) The author has the exclusive right to communicate his or her work to the public in non-material form (right of communication to the public). The right of communication to the public shall include, in particular:
1. the right of recitation, performance and presentation (Paragraph 19),
  2. the right of making work available to the public (Paragraph 19a),
  3. the right of broadcasting (Paragraph 20),
  4. the right of communication by video or audio recordings (Paragraph 21),
  5. the right of communication of broadcasts and of works made available to the public (Paragraph 22).

Paragraph 20 of the UrhG provides:

‘Right of broadcasting’ means the right to make a work available to the public by broadcasting, such as radio and television transmission, satellite transmission, cable transmission or by similar technical means.

Paragraph 20b of the UrhG provides, inter alia:

- (1) The right to retransmit a work transmitted in the context of a simultaneous, unaltered and unabridged retransmission of a programme (retransmission) may be asserted only by a collecting society. This does not apply to
1. rights in a work which is transmitted exclusively via the internet,
  2. rights asserted by a broadcasting organisation in relation to its own programmes.

Paragraph 22 of the UrhG provides:

‘Right of communication of broadcasts and of works made available to the public’ means the right to make perceivable to the public, by screen, loudspeaker or similar technical device, broadcasts and communications of works that are based on their being made available to the public. Paragraph 19(3) applies accordingly.

## **2. Circumstances of the main proceedings**

- a.** The applicant, an independent, for-profit collecting society under German law, brought an action against the defendant, a hotel operator, to cease and desist the public broadcasting of an episode of the television series ‘Wickie

und die starken Männer' by means of a broadcast via television sets installed by the defendant in the rooms and the fitness room of its hotel in Munich in so far as the transmission signal is transmitted to the television sets via coaxial or data cables.

The action is based on an incident that occurred on 17 November 2019 at 6.20 a.m. when a Mr. X and three other persons watched the episode broadcast by a public-service television broadcaster, as guests in their rooms on a television set provided by the hotel. Mr. X also watched the episode in the fitness area of the hotel.

The receiving devices were not switched on by the defendant; the television signal was transmitted to the devices, simultaneously and unaltered, by the hotel's own cable distribution system. The defendant had concluded comprehensive licensing agreements for cable retransmission with the German collecting societies.

The defendant considers that it is entitled to make available free-to-air programmes broadcast on public-service television to its guests, on the television sets installed in the rooms and fitness area, on the basis of its licences for cable retransmission.

In contrast, the applicant holds the view that the defendant has committed a copyright infringement, both with regard to the television sets installed in the rooms and the television set provided by it in the fitness area because its retransmission of the transmission signal via the hotel's own cable distribution system interferes with the right of communication to the public. The fact that the defendant has clarified the issue of the right of cable retransmission with the collecting societies is irrelevant.

- b.** The referring court is inclined to find that the national provisions transposing Article 3(1) of the InfoSoc Directive in Paragraph 22 of the UrhG and Paragraph 20b (1) of the UrhG, in conjunction with Paragraph 15(2) Nos. 3 and 5 of the UrhG, when interpreted in a manner consistent with the directive, mean that, in view of recital 27, while the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication to the public (see Court of Justice EU:C:2020:268 paragraph 35 – *Stim and SAMI/Fleetmanager*, EU:C:2006:764 paragraph 46 – *SGAE*), an interference with this right takes place nonetheless, due to the upstream retransmission of the signal to the receiving devices by means of the hotel's own cable distribution system (Court of Justice EU:C:2006:764 paragraph 42 – *SGAE* – EU:C:2016:379 paragraphs 47 and 54 – *Reha Training*).

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' (Court of Justice EU:C:2017:218 –

*AKM*; EU:C:2018:634 – *Renckhoff* EU:C:2019:1111 paragraphs 61 – *Nederlands Uitgeversverbond*). The user's role and the deliberate nature of its action are central when it intervenes, in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers, particularly where, in the absence of that intervention, its customers would not be able to enjoy the works broadcast, or would be able to do so only with difficulty (Court of Justice EU:C:2012:140 paragraph 82 – *SCF*, EU:C:2012:141 paragraph 31 – *Phonographic Performance Ireland*, EU:C:2017:456 paragraph 26 – *Stichting Brein*).

The mere provision of receiving devices differs essentially from acts of communication by which service providers intentionally broadcast protected work to their clientele by additionally and intentionally distributing a signal by means of television or radio sets that they have installed in their establishment (Court of Justice EU:C:2020:268 paragraph 35 – *Stim and SAMI/Fleetmanager*, EU:C:2016:379 – paragraph 47 and 54 – *Reha Training*).

- c. However, in the present case, the referring court considers that the assumption that an 'act of communication' exists in accordance with the above-mentioned principles is called into question by the fact that the defendant's conduct beyond the mere provision of receiving devices consisted only in the retransmission of the television signal via the hotel's own cable distribution system, which the defendant was entitled to do on the basis of its undisputed licence granted by the collecting societies. Given that the concept of communication to the public within the meaning of Article 3(1) of the InfoSoc Directive is divided, in national law, into the right under Paragraph 20b of the UrhG ('retransmission') and the right under Paragraph 22 of the UrhG ('right of communication of broadcasts'), it appears doubtful whether it may be concluded from a user's conduct to which that user is entitled on the basis of a licence under Paragraph 20b of the UrhG, namely cable retransmission within the hotel, that the user intended to perform an 'act of communication' when that user's conduct in all other respects comprises only the provision of receiving devices, which is not an infringement criterion.

The view is taken in the context of Article 3(1) of the InfoSoc Directive that, in principle, the issue in question is not the lawfulness or unlawfulness of the source in the context of the act of communication [...]. This appears to be problematic, however, because in the present case the separate evaluation of two aspects of communication to the public under Article 3(1) of the InfoSoc Directive would occur against the background of full harmonisation of collecting rights in the directive, which also lays down the binding upper limit of the level of protection (Court of Justice EU:C:2014:76 paragraphs 37, 40 [...]).

The referring court takes the view that the public character of the communication is established in the present case because the guests of a hotel constitute a fairly large number of persons, such that they must be considered to be a new and distinct public since hotel guests quickly succeed each other, both in rooms and also in the fitness area (see Court of Justice EU:C:2006:764 paragraphs 38, 39, 42 – *SGAE*; EU:C:2012:141 paragraphs 41, 42, 51 – *Phonographic Performance Ireland*).

By the following question referred, the referring court asks the Court of Justice for its interpretation of Article 3(1) of the InfoSoc Directive. It does so because it has doubts concerning the existence of an ‘act of communication’ where the user of a protected work has a licence for the right to cable retransmission under national law and, in all other respects, its conduct is limited to the provision of receiving devices:

**Must Article 3(1) of the InfoSoc Directive be interpreted as precluding a national provision or practice according to which the provision of physical facilities for enabling or making a communication – such as television sets in hotel rooms or hotel fitness rooms – is regarded as communication to the public when, while the transmission signal, in addition, is retransmitted to the physical facilities via the hotel’s own cable distribution system, that cable retransmission takes place lawfully on the basis of a licence acquired by the hotel?**

[...]