JUDGMENT OF THE COURT (Third Chamber)

7 December 2006 *

In Case C-306/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Audiencia Provincial de Barcelona (Spain), made by decision of 7 June 2005, received at the Court on 3 August 2005, in the proceedings

Sociedad General de Autores y Editores de España (SGAE)

v

Rafael Hoteles SA,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J. Malenovský (Rapporteur), U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 May 2006,

* Language of the case: Spanish.

after considering the observations submitted on behalf of:

— the Sociedad General de Autores y Editores de España (SGAE), by R. Gimeno-Bayón Cobos and P. Hernández Arroyo, abogados,

— Rafael Hoteles SA, by R. Tornero Moreno, abogado,

— the French Government, by G. de Bergues and J.-C. Niollet, acting as Agents,

— Ireland, by D.J. O'Hagan, acting as Agent, assisted by N. Travers BL,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Polish Government, by K. Murawski, U. Rutkowska and P. Derwicz, acting as Agents,

— the Commission of the European Communities, by J.R. Vidal Puig and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 3 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).

2 This reference was made in the context of proceedings between the Sociedad General de Autores y Editores de España (SGAE) and Rafael Hoteles SA ('Rafael'), concerning the alleged infringement, by the latter, of intellectual property rights managed by SGAE.

Legal context

Applicable international law

3 The Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement'), as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, was approved on behalf of the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

4 Article 9(1) of the TRIPs Agreement provides:

'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.'

5 Article 11 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('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.'

6 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;

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

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

7 The World Intellectual Property Organisation (WIPO) adopted in Geneva, on 20 December 1996, the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty. Those two treaties were approved on behalf of the Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

8 Article 8 of the WIPO Copyright Treaty provides:

'Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(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.'

9 Joint declarations concerning the WIPO Copyright Treaty were adopted by the Diplomatic Conference on 20 December 1996.

10 The joint declaration concerning Article 8 of that Treaty provides:

'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).'

Community legislation

11 The ninth recital in the preamble to Directive 2001/29 states:

'Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.'

12 The 10th recital in the preamble to that directive states:

'If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.'

13 The 15th recital in the preamble to that directive states:

'The Diplomatic Conference held under the auspices of the [WIPO] in December 1996 led to the adoption of two new Treaties, the [WIPO Copyright Treaty] and the [WIPO Performances and Phonograms Treaty], dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.'

14 The 23rd recital in the preamble to that directive states:

'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 communica-

tion 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.'

15 The 27th recital in the preamble to Directive 2001/29 states:

'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.'

16 Article 3 of that directive 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.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

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.'

National legislation

17 The codified text of the Law on intellectual property, which rectifies, clarifies and harmonises the legislative provisions in force in that area ('the LIP'), was approved by Royal Legislative Decree No 1/1996 of 12 April 1996 (BOE No 97 of 22 April 1996).

18 Article 17 of the LIP provides:

'The author has the exclusive rights of exploitation of his works regardless of their form and, inter alia, the exclusive rights of reproduction, distribution, public communication and conversion which cannot be exercised without his permission except in circumstances laid down in this Law.'

19 Article 20(1) of the LIP provides:

'Public communication shall mean any act by which a number of persons can have access to the work without prior distribution of copies to each of those persons.

Communication which takes place within a strictly domestic location which is not integrated into or connected to a distribution network of any kind shall not be classified as public.'

The main proceedings and the questions referred for a preliminary ruling

20 SGAE is the body responsible for the management of intellectual property rights in Spain.

21 SGAE took the view that the use of television sets and the playing of ambient music within the hotel owned by Rafael, during the period from June 2002 to March 2003, involved communication to the public of works belonging to the repertoire which it manages. Considering that those acts were carried out in breach of the intellectual property rights attached to the works, SGAE brought an action for compensation against Rafael before the Juzgado de Primera Instancia (Court of First Instance) No 28, Barcelona (Spain).

22 By decision of 6 June 2003, that court partially rejected the claim. It took the view that the use of television sets in the hotel's rooms did not involve communication to the public of works managed by SGAE. It considered, on the other hand, that the claim was well founded as regards the well-known existence in hotels of communal areas with television sets and where ambient music is played.

23 SGAE and Rafael both brought appeals before the Audiencia Provincial (Provincial Court) de Barcelona, which decided to stay the proceedings and to refer the following questions to the Court of Justice 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]?

(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]?

(3) For the purposes of protecting copyright in relation to acts of communication to the public provided for in Directive [2001/29], 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?'

The request to have the oral procedure reopened

24 By letter received at the Court of Justice on 12 September 2006, Rafael requested the reopening of the oral procedure, pursuant to Article 61 of the Rules of Procedure of the Court of Justice.

25 That request is based on the alleged inconsistency of the Advocate General's Opinion. Rafael submits that the negative response in the Opinion to the first question unavoidably implies a negative response to the second and third questions, whereas the Advocate General suggests that the answer to the latter questions should be in the affirmative.

26 On that point, it is appropriate to recall that neither the Statute of the Court of Justice nor the Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see, in particular, Case C-259/04 *Emanuel* [2006] ECR I-3089, paragraph 15).

27 The Court may, certainly, of its own motion, on a proposal from the Advocate General or at the request of the parties, order that the oral procedure should be reopened in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 19, and Case C-30/02 *Recheio — Cash & Carry* [2004] ECR I-6051, paragraph 12).

28 However, the Court finds that in the present case it has all the information necessary to give judgment.

29 Consequently, there is no need to order the reopening of the oral procedure.

The questions

Preliminary observations

30 It should be stated at the outset that, contrary to Rafael's submissions, the situation at issue in the main proceedings does not fall within 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), but within Directive 2001/29. The latter applies to all communications to the public of protected works, whereas Directive 93/83 only provides for minimal harmonisation of certain aspects of protection of copyright and related rights in the case of communication to the public by satellite or cable retransmission of programmes from other Member States. As the Court has already held, unlike Directive 2001/29, this minimal harmonisation does not provide information to enable the Court to reply to a question concerning a situation similar to that which is the subject of the questions referred for a preliminary ruling (see, to that effect, Case C-293/98 *Egeda* [2000] ECR I-629, paragraphs 25 and 26).

31 Next, it should be noted that the need for uniform application of Community law and the principle of equality require that where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, as is the case with Directive 2001/29/EC, they must normally be given an autonomous and uniform interpretation throughout the Community (see, in particular, Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26, and Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 23). It follows that the Austrian Government cannot reasonably maintain that it is for the Member States to provide the definition of 'public' to which Directive 2001/29 refers but does not define.

The first and third questions

32 By its first and third questions, which it is appropriate to examine together, the referring court asks, essentially, whether the distribution of a signal through television sets to customers in hotel rooms constitutes communication to the public within the meaning of Article 3(1) of Directive 2001/29, and whether the installation of television sets in hotel rooms constitutes, in itself, an act of that nature.

33 In that respect, it should be noted that that Directive does not define 'communication to the public'.

34 According to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, in particular, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 50, and Case C-53/05 *Commission* v *Portugal* [2006] ECR I-6215, paragraph 20).

35 Moreover, Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community (see, in particular, Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20 and the case-law cited).

36 It follows from the 23rd recital in the preamble to Directive 2001/29 that 'communication to the public' must be interpreted broadly. Such an interpretation is moreover essential to achieve the principal objective of that directive, which, as can

be seen from its ninth and tenth recitals, is to establish a high level of protection of, inter alios, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public.

37 The Court has held that, in the context of this concept, the term 'public' refers to an indeterminate number of potential television viewers (Case C-89/04 *Mediakabel* [2005] ECR I-4891, paragraph 30, and Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, paragraph 31).

38 In a context such as that in the main proceedings, a general approach is required, making it necessary to take into account not only customers in hotel rooms, such customers alone being explicitly mentioned in the questions referred for a preliminary ruling, but also customers who are present in any other area of the hotel and able to make use of a television set installed there. It is also necessary to take into account the fact that, usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved, so that they may be considered to be a public, having regard to the principal objective of Directive 2001/29, as referred to in paragraph 36 of this judgment.

39 In view, moreover, of the cumulative effects of making the works available to such potential television viewers, the latter act could become very significant in such a context. It matters little, accordingly, that the only recipients are the occupants of rooms and that, taken separately, they are of limited economic interest for the hotel.

40 It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11*bis*(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other

than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.

41 As is explained in the Guide to the Berne Convention, an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention, when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public reception falls within the scope of the author's exclusive authorisation right.

42 The clientele of a hotel forms such a new public. The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.

43 It follows from Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive, contrary to the submissions of Rafael and Ireland, that customers who have not switched on the television have not actually had access to the works.

44 Moreover, it is apparent from the documents submitted to the Court that the action by the hotel by which it gives access to the broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit. It cannot be seriously disputed that the provision of that service has an influence on the hotel's standing and, therefore, on the price of rooms. Therefore, even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature in circumstances such as those in the main proceedings.

45 With reference to the question whether the installation of television sets in hotel rooms constitutes, in itself, a communication to the public within the meaning of Article 3(1) of Directive 2001/29, it should be pointed out that the 27th recital in the preamble to that directive states, in accordance with Article 8 of the WIPO Copyright Treaty, that '[t]he mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of [that] Directive.'

46 While the mere provision of physical facilities, usually involving, besides the hotel, companies specialising in the sale or hire of television sets, does not constitute, as such, a communication within the meaning of Directive 2001/29, the installation of such facilities may nevertheless make public access to broadcast works technically possible. Therefore, if, by means of television sets thus installed, the hotel distributes the signal to customers staying in its rooms, then communication to the public takes place, irrespective of the technique used to transmit the signal.

47 Consequently, the answer to the first and second questions is that, while the mere provision of physical facilities does not as such amount to a communication within

the meaning of Directive 2001/29, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.

The second question

48 By its second question, the referring court asks, essentially, whether the private nature of hotel rooms precludes the communication of a work to those rooms by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.

49 In that respect, Ireland submits that communication or making available of works in the private context of hotel rooms should be distinguished from the same acts which take place in public areas of the hotel. This argument cannot however be accepted.

50 It is apparent from both the letter and the spirit of Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty — both of which require authorisation by the author not for retransmissions in a public place or one which is open to the public but for communications by which the work is made accessible to the public — that the private or public nature of the place where the communication takes place is immaterial.

51 Moreover, according to the provisions of Directive 2001/29 and of the WIPO Copyright Treaty, the right of communication to the public covers the making available to the public of works in such a way that they may access them from a place and at a time individually chosen by them. That right of making available to the public and, therefore, of communication to the public would clearly be meaningless if it did not also cover communications carried out in private places.

52 In support of the argument concerning the private nature of hotel rooms, Ireland also invokes the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and in particular its Article 8, which prohibits any arbitrary or disproportionate interference by a public authority in the sphere of private activity. However, this argument cannot be accepted either.

53 In that respect, it should be pointed out that Ireland does not make clear who, in a context such as that of the main proceedings, would be the victim of such an arbitrary or disproportionate intervention. Ireland can hardly have in mind the customers who benefit from the signal which they receive and who are under no obligation to pay the authors. Nor can the victim be the hotel since, even though it must be concluded that the hotel is obliged to make such payment, it cannot claim to be a victim of an infringement of Article 8 of the ECHR in so far as the rooms, once made available to its customers, cannot be considered as coming within its private sphere.

54 Having regard to all of the foregoing considerations, the answer to the second question is that the private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.

Costs

55 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 (Third Chamber) hereby rules:

1. **While the mere provision of physical facilities does not as such amount to communication within the meaning of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of copyright and related rights in the information society, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.**

2. **The private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.**

[Signatures]