

Case C-127/24

Request for a preliminary ruling

Date lodged:

15 February 2024

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

8 February 2024

Applicant and appellant on a point of law:

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)

Defendant and respondent on a point of law:

VHC 2 Seniorenresidenz und Pflegeheim GmbH

BUNDESGERICHTSHOF

ORDER

...

Made on:
8 February 2024

...

in the case of

GEMA Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, ...

... Berlin,

Applicant and appellant on a point of law,

...

v

VHC 2 Seniorenresidenz und Pflegeheim gGmbH, ...

... Unterschleißheim,

Defendant and respondent on a point of law,

...

The First Civil Chamber of the Bundesgerichtshof has ...

made the following order:

- I. The proceedings are stayed.
- II. The following questions concerning the interpretation of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) are hereby referred to the Court of Justice of the European Union for a preliminary ruling:
 1. Do residents of a commercially operated retirement home who have television and radio connections in their rooms, to which the operator of the retirement home simultaneously retransmits via its cable network, unaltered and unabridged, broadcast programmes received by means of its own satellite receiving system, constitute an ‘indeterminate number of potential recipients’ for the purposes of the definition of ‘communication to the public’ under Article 3(1) of Directive 2001/29/EC?
 2. Is the definition used to date by the Court of Justice of the European Union, according to which ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29/EC requires the protected work to be communicated using technical means different from those previously used or, failing that, to a ‘new public’, that is to say, a public that was not already taken into account by the copyright holders when they authorised the original communication of their work to the public, still generally applicable, or is the technical means used only relevant in cases where content initially received terrestrially or via satellite or cable is retransmitted over the Internet?
 3. Is there a ‘new public’ for the purposes of the definition of ‘communication to the public’ under Article 3(1) of Directive 2001/29/EC when the operator of a retirement home, for profit-

making purposes, simultaneously retransmits via its cable network, unaltered and unabridged, broadcast programmes received by means of its own satellite receiving system to the television and radio connections in the rooms of the residents of the retirement home? For the purposes of this assessment, is it relevant whether or not residents are able to receive the television and radio programmes in their rooms terrestrially, irrespective of the cable transmission? Furthermore, for the purposes of this assessment, is it relevant whether the right holders already receive remuneration for consenting to the original broadcast?

Grounds:

- 1 A. The applicant is the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA). It exercises the rights of use granted to it by composers, songwriters and music publishers under copyright.
- 2 The defendant operates a retirement/nursing home in Dahn, Germany, which has 88 single rooms and 3 double rooms in 4 residential areas for nursing care. 89 elderly persons who are reliant on care live permanently at the home. In addition to accommodation, they also receive extensive nursing assistance and care. As well as nursing care accommodation, the defendant's establishment also has various communal areas, such as dining rooms and day rooms.
- 3 The defendant receives broadcast programmes (television and radio) in the establishment via its own satellite receiving system and retransmits these simultaneously via its cable network, unaltered and unabridged, to the television and radio connections in the rooms of the residents. Thus, all resident rooms and nursing rooms at the retirement/care home are supplied with television and radio signals.
- 4 The applicant holds that the retransmission of broadcast programmes by the defendant is subject to licensing and unsuccessfully requested the defendant to enter into a licensing agreement.
- 5 At the applicant's request, the Landgericht (Regional Court) ordered the defendant, on pain of penalty set out in more detail,

to refrain from retransmitting, without the applicant's consent, broadcast works of musical art with or without text from the applicant's repertoire as part of a programme that is retransmitted simultaneously, unaltered and unabridged, via the cable network located at the establishment (...) operated by the defendant, in particular from the satellite receiving system to connections in the resident and nursing rooms.
- 6 On appeal by the defendant, the appellate court dismissed the action (Higher Regional Court Zweibrücken, GRUR 2023, 722). By its appeal on a point of law

(‘Revision’), for which the appellate court granted leave and which the defendant seeks to have dismissed, the applicant is pursuing its action.

- 7 B. The success of the appeal on a point of law depends on the interpretation of Article 3(1) of Directive 2001/29/EC. For that reason, prior to a decision on the appeal on a point of law, the proceedings must be stayed and a preliminary ruling obtained from the Court of Justice of the European Union pursuant to the first paragraph, point (b), and the third paragraph of Article 267 TFEU.
- 8 I. The appellate court held that the right to claim injunctive relief asserted by the applicant did not exist as there was no ‘communication to the public’.
- 9 It found that although there was an act of communication, there was no communication to the public because, in the present case, communication was restricted to a limited group of people, namely the residents of the establishment who, like the members of a property owners’ association, constitute a consistent group of people which is structurally very homogeneous and intends to stay permanently in the establishment, with a rather low fluctuation rate.
- 10 II. The applicant’s appeal against this judgment must be upheld if the appellate court has incorrectly held that the retransmission via cable in the present case does not constitute communication to the public within the meaning of Section 15(2) first sentence and second sentence subparagraph 3, Section 20 and Section 20b(1) first sentence of the German Copyright Act (UrhG). The applicant is entitled to claim injunctive relief (see B II 1 below). The question of whether, in the present case, the cable retransmission meets the conditions for communication to the public needs to be clarified in several respects under EU law. First of all, it needs to be clarified whether the residents of the defendant’s retirement home are an indeterminate number of potential recipients for the purposes of the definition of ‘communication to the public’ under Article 3(1) of Directive 2001/29/EC (see B II 2 below). It also needs to be clarified whether the definition of ‘communication to the public’ under Article 3(1) of Directive 2001/29/EC used by the Court of Justice of the European Union, is still generally applicable, given the nature of the technical means used, or is applicable only in certain cases of transmission (see B II 3 below). Finally, it needs to be clarified whether the residents of the retirement home constitute, in the present case, a ‘new public’ for the purposes of the definition of ‘communication to the public’ under Article 3(1) of Directive 2001/29/EC (see B II 4 below).
- 11 1. The applicant is entitled to claim injunctive relief pursuant to Section 97(1) first sentence UrhG. Authors, performers, broadcasting organisations and film producers have the exclusive right to retransmit by cable. In the event of an unlawful infringement of their rights, they can claim injunctive relief pursuant to Section 97(1) first sentence UrhG (in relation to Section 97(2) UrhG see BGH, judgment of 18 June 2020 – I ZR 171/19, GRUR 2020, 1297 [juris para. 9] = WRP 2020, 1573 – Broadcasting in holiday homes, with further references). The

applicant is exercising this right in its capacity as author on behalf of composers and songwriters.

- 12 2. First of all, it needs to be clarified whether the residents of a commercially operated retirement home who have television and radio connections in their rooms, to which the operator of the retirement home simultaneously retransmits via its cable network, unaltered and unabridged, broadcast programmes received by means of its own satellite receiving system constitute an ‘indeterminate number of potential recipients’ for the purposes of the definition of ‘communication to the public’ under Article 3(1) of Directive 2001/29/EC (first question referred for a preliminary ruling). This depends on whether the appellate court was correct in holding that the act of exploitation in the present case does not constitute communication to the public within the meaning of Section 15(2) first sentence and second sentence subparagraph 3, Section 20 and Section 20b(1) first sentence UrhG.
- 13 a) The exclusive right of the author to communicate their work to the public (Section 15(2) first sentence UrhG) includes the right of broadcasting (Section 15(2) second sentence subparagraph 3 UrhG), i.e. the right to make the work available to the public by broadcasting, such as radio and television transmission, satellite transmission, cable transmission or similar technical means (Section 20 UrhG). The right of broadcasting includes the right to cable retransmission pursuant to Section 20b(1) first sentence UrhG, i.e. the right to retransmit a broadcast work in the context of a simultaneous, unaltered and unabridged retransmission of a programme by cable systems or microwave systems (see BGH, GRUR 2020, 1297 [juris para. 11] – Broadcasting in holiday homes, with further references). The right of cable retransmission is a special case of the right of broadcasting and therefore constitutes a special case of communication to the public. Pursuant to Section 15(3) first sentence UrhG, communication is deemed to be to the public if it is intended for a plurality of members of the public. Pursuant to Section 15(3) second sentence UrhG, the public includes anyone who is not connected by a personal relationship with the person exploiting the work or with the other persons to whom the work is made perceivable or made available in non-material form. The same applies to performers, broadcasting organisations and film producers, in so far as they enjoy the exclusive right to cable retransmission (see Section 78(1) subparagraph 2, Section 87(1) subparagraph 1 first scenario, Section 94(4) and Section 95 UrhG).
- 14 b) The exclusive rights of the authors and beneficiaries of the related rights at issue in the present case on account of communication to the public of their works and performances by cable retransmission are based on EU directives. The concept of ‘communication to the public’ must therefore be interpreted in accordance with the provision that is applicable to authors in Article 3(1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, and in accordance with the provision that is applicable to beneficiaries of rights related to copyright in Article 8(1) of Directive 2006/115/EC on rental right and lending right and on certain rights

related to copyright in the field of intellectual property (codified version) and the relevant case-law of the Court of Justice of the European Union (see BGH, judgment of 17 September 2015 – I ZR 228/14, BGHZ 206, 365 [juris paras. 30 to 41] – Ramses; judgment of 11 January 2018 – I ZR 85/17, GRUR 2018, 608 [juris para. 22] – Hospital radio; BGH, GRUR 2020, 1297 [juris para. 11] – Broadcasting in holiday homes, each with further references).

- 15 c) The concept of ‘communication to the public’ under Article 3(1) of Directive 2001/29/EC and Article 8(1) of Directive 2006/115/EC comprises two constituent elements, namely an act of communication and the public nature of that communication. This concept also requires assessment on an individual basis. For the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since these criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another (established case-law; see CJEU, judgment of 20 April 2023 – C-775/21 and C-826/21, GRUR 2023, 717 [juris para. 47 et seq.] = WRP 2023, 681 – Blue Air Aviation/ UCMR – ADA and others, with further references).
- 16 aa) The appellate court was correct in holding that the retransmission of broadcast radio and television programmes by means of a distribution system to the rooms of the residents of a retirement/care home constitutes an act of communication.
- 17 (1) In the light of the principal objective of Directive 2001/29/EC, which is to ensure a high level of protection for authors, the concept of communication must be understood broadly, namely as including any transmission of protected works, irrespective of the technical means or method used. ‘Communication’ requires the user to intervene in full knowledge of the consequences of their action – that is to say, intentionally and deliberately – in order to provide access to the protected work to third parties which they would not have in the absence of the user’s intervention. In this regard, it is sufficient that third parties have access to the protected work, irrespective of whether or not they use it (BGH, GRUR 2020, 1297 [juris para. 17] – Broadcasting in holiday homes, with further references).
- 18 (2) Accordingly, the retransmission, at issue in the present case, of broadcast programmes to the rooms of the residents of a retirement/care home by a technical means such as a distribution system is to be regarded as an ‘act of communication’ within the meaning of Article 3(1) of Directive 2001/29/EC and Article 8(1) of Directive 2006/115/EC. When the programmes are being retransmitted via the distribution system, the defendant has intervened in full knowledge of the consequences of its action, that is to say, intentionally and deliberately, in order to enable the residents of its establishment to access broadcast programmes which they would not have had in that form in the absence of its intervention.
- 19 bb) Whether the appellate court was correct in holding that, in the present case, there is no communication to the public needs to be clarified under EU law.

- 20 (1) The appellate court held that cable retransmission to the rooms of the residents of the retirement/care home does not constitute communication to the public. Although the criterion of ‘a fairly large number of people’ set out in the case-law of the Court of Justice of the European Union is fulfilled where there are 88 single rooms and 3 double rooms, the fact remains that the residents of the establishment are not, as is also required, ‘persons in general’. In the present case, the communication is restricted to ‘specific individuals’, since it is to a limited group of people. Like the members of a property owners’ association, the residents of the establishment form a consistent group of people which is structurally very homogeneous and intends to stay permanently in the establishment, with a rather low fluctuation rate. The communal areas enable the residents to have meals together, to have personal contact with others and to interact socially. Unlike at a hotel or a rehab centre, a close bond is established between residents as a result of the choice of retirement facility in which to spend their final stage of life. The defendant’s providing of short-term care and carer-replacement care does not do anything to change the nature of the establishment in this respect. The fact that the defendant carries out cable retransmission for profit-making purposes does not alter this assessment.
- 21 (2) According to the case-law of the Court of Justice of the European Union, the concept of ‘to the public’ is fulfilled only when there is an indeterminate number of potential recipients and a fairly large number of people.
- 22 There is an ‘indeterminate number of potential recipients’ when the communication is to persons in general, i.e. it is not limited to specific individuals belonging to a private group (see, in relation to Article 3(1) of Directive 2001/29/EC, CJEU, judgment of 31 May 2016 – C-117/15, GRUR 2016, 684 [juris para. 42] – Reha Training/GEMA; see, in relation to Article 8(2) of Directive 92/100/EEC [now Directive 2006/115/EG], CJEU, judgment of 15 March 2012 – C-135/10, GRUR 2012, 593 [juris para. 85] = WRP 2012, 689 – SCF/Del Corso; judgment of 15 March 2012 – C-162/10, GRUR 2012, 597 [juris para. 34] – PPL/ Ireland).
- 23 The criterion of a ‘fairly large number of people’ is intended to indicate that the concept of ‘to the public’ encompasses a certain de minimis threshold, which excludes from the concept a group of people concerned which is too small or insignificant. In order to determine this number of people, the cumulative effect of making the works available to potential recipients should be taken into account. In this regard, it is important how many people have access to the same work at the same time and successively (see CJEU, GRUR 2016, 684 [juris paras. 40 to 44] – Reha Training/GEMA; CJEU, GRUR 2023, 717 [juris para. 54] – Blue Air Aviation/UCMR – ADA and others, each with further references).
- 24 (3) The appellate court was correct in holding that the number of residents in the 88 single rooms and 3 double rooms provided by the defendant fulfils the criterion of ‘a fairly large number of people’. This assessment is accepted in the appeal on a point of law; there is no error of law in this regard.

- 25 (4) The question of whether the appellate court was correct in holding that, in the present case, the communication is not made for an indeterminate number of potential recipients within the meaning of the case-law of the Court of Justice of the European Union, but is restricted to specific individuals belonging to a private group, requires clarification under EU law.
- 26 (a) The Court of Justice of the European Union has held that guests of a hotel, where the operator provides, in its guest bedrooms, television and/or radio sets to which the operator transmits a broadcast signal, constitute an indeterminate number of potential recipients, in so far as the access of those guests to the services of that establishment is the result of their own choice and is limited only by the capacity of the establishment in question. In such a situation they are thus ‘persons in general’ (CJEU, GRUR 2012, 597 [juris, para. 41] – PPL/Ireland). The Court of Justice followed the same reasoning in the case of patients of a rehabilitation centre (CJEU, GRUR 2016, 684 [juris para. 57] – Reha Training/GEMA; with regard to hospital patients see also BGH, GRUR 2018, 608 [juris para. 34 et seq.] – Hospital radio). In all these cases, access to the services being provided is the result of a personal choice of each individual guest to whom the service may be offered and is limited only by the capacity of the establishment in question.
- 27 In contrast, the Court of Justice of the European Union found that patients of a dentist for whom background music was played in the waiting room were not ‘persons in general’ because they constituted a group of persons whose composition was very consistent and were thus a determinate group of potential recipients, as other persons did not, as a rule, have access to treatment by that dentist (CJEU, GRUR 2012, 593 [juris para. 95] – SCF/Del Corso). Communication to a clearly defined and closed group of persons holding public service functions within a court is not made to an indeterminate number of potential recipients either, but to specific individual professionals (see, in relation to Article 3(1) of Directive 2001/29/EC, CJEU, judgment of 28 October 2020 – C-637/19, GRUR 2020, 1295 [juris para. 28 et seq.] = WRP 2021, 27 – BY [Photographic evidence]).
- 28 (b) It needs to be clarified whether the mere fact that, as found by the appellate court, the group of residents at the establishment is structurally very homogeneous and has a rather low fluctuation rate justifies the assumption that communication is made only to ‘specific individuals’ and not to ‘persons in general’. The Chamber’s opinion is that this question should be answered in the negative, since access to the services of the retirement home is fundamentally available to all persons to whom the service may be offered and is restricted only by the capacity of the home.
- 29 Contrary to the view taken by the appellate court, the mere possibility for residents to have meals together, to have personal contact with others and to interact socially, does not, in itself, justify the conclusion that residents have a close bond with one another. In any event, in the context of the analysis to be

carried out, the existence of a personal bond between individual residents as a result of making use of this possibility would likely merely be a (welcome) by-product of utilising the defendant's residential and care services, without the entirety of the residents thus becoming a 'private group', as required (see CJEU, GRUR 2016, 684 [juris para. 57] – Reha Training/GEMA) (see Higher Regional Court, order of 10 June 2020 – 24 U 164/19, [juris para. 26]; Higher Regional Court Dresden, GRUR-RR 2023, 149 [juris para. 26]).

- 30 The Chamber's opinion is that the provisions of public law relied on in the response by the respondent on a point of law, which take account of the fact that the residents of a care home are particularly in need of protection and assistance, also have no bearing on the classification for the purposes of copyright of the cable transmission used to supply residents with broadcast programmes. In this regard, the response relies on federal legislation, namely the Act on Residential Facilities, which, according to Section 2(1) subparagraph 1 thereof, is intended to protect the dignity, interests and needs of residents in residential facilities and provides, in Section 10, for the establishment of a residents' advisory committee as a body to represent residents' interests. In addition, the response refers to the Rhineland-Palatinate Act on Types of Residential Facilities and Participation (LWTG RP) which, according to Section 1(1) thereof, is intended to protect, respect and support elderly people, adults with disabilities and adults in need of care, and which requires, in Section 1(1) subparagraph 4 thereof, that the participation of these target groups in society and participation in the establishment in which they live be strengthened.
- 31 3. As regards the other conditions for communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC required by the Court of Justice of the European Union, it needs to be clarified whether the definition used to date by the Court of Justice of the European Union, according to which 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC requires the protected work to be communicated using technical means different from those previously used or, failing that, to a 'new public', that is to say, a public that was not already taken into account by the copyright holders when they authorised the original communication of their work to the public, is still generally applicable, or whether the technical means used is only still relevant in cases where content initially received terrestrially or via satellite or cable is retransmitted over the Internet (second question referred for a preliminary ruling).
- 32 a) The Court of Justice of the European Union has required, for the purposes of categorising communication as 'communication to the public', that the protected work be communicated using technical means different from those previously used or, failing that, to a 'new public', that is to say, a public that was not taken into account by the copyright holders when they authorised the original communication of their work to the public (CJEU, judgment of 7 August 2018, – C-161/17, GRUR 2018, 911 [juris 4] = WRP 2018, 1052 – Land Nordrhein-Westfalen/Renckhoff, with further references). Where the subsequent communication is by means of specific technical means different from those used

- for the original communication, it does not need to be examined whether the work is communicated to a new public; in such a case, the communication automatically requires the authorisation of the author (see CJEU, judgment of 7 March 2013 – C-607/11, GRUR 2013, 500 [juris paras. 24 to 26] = WRP 2013 18 ITV Broadcasting/TVC; order of 21 October 2014 – C-348/13, GRUR 2014, 1196 [juris para. 14] = WRP 2014, 1441 – BestWater International).
- 33 However, the Court of Justice of the European Union has held that the simultaneous, unaltered and unabridged transmission of broadcasts of the national broadcaster by means of cables in the national territory is not subject to authorisation, regardless of whether the technical means were different from that of the original communication, because there was no ‘new public’ (CJEU, judgment of 16 March 2017 – C-138/16, GRUR 2017, 510 [juris paras. 26 to 30] = WRP 2017, 682 – AKM). According to one statement by the rapporteur in the AKM proceedings, the ‘technical’ aspect was irrelevant in that case (Malenovský, *medien und recht* 3/18, Supplement, p. 14, 17 et seq.).
- 34 Also when examining communication to the public in the case of guests in hotels (CJEU, judgment of 7 December 2006 – C-306/05, ECR 2006, I-11519 = GRUR 2007, 225 [juris paras. 37 to 47] – SGAE/Rafael) and pubs (CJEU, judgment of 4 October 2011 – C-403/08 and C-29/08, ECR 2011, I-09083 = GRUR 2012, 156 [juris paras. 197 to 199] – Football Association Premier League und Murphy) and patients in spa establishments (CJEU, judgment of 27 February 2014 – C-351/12, GRUR 2014, 473 [juris paras. 27 to 33] = WRP 2014, 418 OSA/Léčebné lázně) and rehab establishments (CJEU, GRUR 2016, 684 [juris paras. 57 to 62] – Reha Training/GEMA) the Court of Justice of the European Union only examined the ‘new public’ aspect, not the ‘technical means’ aspect.
- 35 b) The present case concerns specific technical means within the meaning of the case-law of the Court, because, according to the findings of the appellate court, the defendant receives the broadcast programmes via a satellite receiving system and feeds these into its cable network (see CJEU, GRUR 2013, 500 [juris para. 26] – ITV Broadcasting/TVC; GRUR 2017, 510 [juris para. 26] – AKM). However, the technical aspect cannot be decisive – as per the AKM decision – if the role of the retransmitter is limited to the mere simultaneous, unaltered and unabridged retransmission of the terrestrial signal by means of cables (see Malenovský, *medien und recht* 3/18 – Supplement, p. 14, 17 et seq.). One interpretation expressed in the legal literature is that the use of specific technical means only justifies the assumption of communication to the public in cases where the retransmission of content initially received terrestrially, by satellite or cable is over the open Internet, because it is only for online uses that the types of communication always require separate authorisation (see Peukert, ZUM 2017, 881, 887 to 890 [under e]).
- 36 4. Finally, having regard to the other conditions for communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC required by the Court of Justice of the European Union, it needs to be clarified whether there is a

‘new public’ for the purposes of the definition of ‘communication to the public’ under Article 3(1) of Directive 2001/29/EC when the operator of a retirement home, for profit-making purposes, simultaneously retransmits via its cable network, unaltered and unabridged, broadcast programmes received by means of its own satellite receiving system to the television and radio connections in the rooms of the residents of the retirement home. In this context, the question also arises of whether it is relevant for the purposes of this assessment whether or not residents are able to receive the television and radio programmes in their rooms terrestrially, irrespective of the cable transmission and whether the right holders already receive remuneration for consenting to the original broadcast (third question referred for a preliminary ruling).

- 37 a) According to the case-law of the Court of Justice of the European Union, a ‘new public’ for the purposes of the definition of communication to the public under Article 3(1) of Directive 2001/29/EC is a public that was not already taken into account by the copyright holders when they authorised the original communication of their work to the public (CJEU, GRUR 2018, 911 [juris para. 24] – Land Nordrhein- Westfalen/Renckhoff, with further references). The Court of Justice takes the view that an author who authorises the broadcast of their work considers as the public only the owners of reception equipment who receive the broadcast personally or within their own private or family circles. The owner of reception equipment who, like the operator of the hotel or the owner of the pub in the cases submitted to the Court, enables an additional public to listen to or watch the work then communicates the work for a new public (see CJEU, GRUR 2007, 225 [juris para. 41 et seq.] SGAE/Rafael; GRUR 2012, 156 paras. 197 to 199 – Football Association Premier League and Murphy; also see BGH, order of 16 August 2012 I ZR 44/10, GRUR 2012, 1136 [juris para. 18] = WRP 2012,1402 – Broadband cables).
- 38 The Court of Justice of the European Union has also stated that although it is true that the profit-making nature of the transmission of a protective work does not determine conclusively whether a transmission is to be categorised as a ‘communication to the public’ (see CJEU, GRUR 2013, 500 [juris para. 43] – ITV Broadcasting/TVC), it is not, however, irrelevant – including for the purpose of determining any remuneration due in respect of that transmission (see CJEU, GRUR 2012, 156 [juris para. 204] – Football Association Premier League and Murphy; GRUR 2016, 684 [juris para. 49] – Reha Training/GEMA).
- 39 b) In the present case, it therefore needs to be clarified whether the residents of the retirement home operated by the defendant constitute a ‘new public’ because they receive the television and radio programmes in their rooms, that is to say, personally or within their own private or family circles, and the defendant, who is not the original broadcasting organisation, provides broadcast signals to the residents in the course of operating the retirement home for profit-making purposes.

- 40 According to the Chamber, the question of whether the residents of the retirement home receive the programmes in their rooms within the meaning of the case-law of the Court personally or within their own private or family circles arises even if the residents of the retirement home do not belong to a private group within the meaning of the case-law of the Court of Justice (see para. 19 et seq. above).
- 41 Since the defendant has argued that it is open to residents to receive television and radio programmes in their rooms on a terrestrial basis, irrespective of cable retransmission, it also needs to be clarified whether this fact has any bearing on the legal assessment, because findings may have to be made in this regard.
- 42 It also needs to be clarified whether, for the purposes of this assessment, it is relevant whether the right holders already receive remuneration for consenting to the original broadcast. This concerns right holders who are remunerated by the original broadcaster for the broadcasting licence (see Loewenheim/Flechsig, Handbuch des Urheberrechts, 3rd Ed. Section 47 para. 31), but not broadcasting organisations making the original broadcast themselves, with respect to whose related rights the Member States may provide for more far-reaching protection with regard to broadcasting and communication to the public in accordance with recital 16 of Directive 2006/115/EC. In this respect, the assessment when analysing the ‘new public’ criterion could be that, in the case of right holders who already receive remuneration for the original broadcast, the residents of the retirement home are more likely to belong to the public that the right holders took into account when granting consent to publication, compared to in the case of broadcasting organisations that have not yet received remuneration for the original broadcast and for which a ‘new public’ could be concerned in the event of retransmission for profit-making purposes by another organisation.

...