

Bonadio, E. & Santo, M. (2012). 'Communication to the Public' in FAPL v QC Leisure and Murphy v Media Protection Services (Joined Cases C-403/08 and C-429/08). *European Intellectual Property Review*, 34(4), pp. 277-279.



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Original citation: Bonadio, E. & Santo, M. (2012). 'Communication to the Public' in FAPL v QC Leisure and Murphy v Media Protection Services (Joined Cases C-403/08 and C-429/08). *European Intellectual Property Review*, 34(4), pp. 277-279.

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**‘Communication to the Public’ in FAPL v QC Leisure and Murphy v Media Protection Services
(Joined Cases C-403/08 and C-429/08)**

Enrico Bonadio – Mauro Santo *

Abstract

On 4 October 2011 the Court of Justice of the European Union released its decision in *FAPL v QC Leisure* and *Murphy v Media Protection Services* (Joined Cases C-403/08 and C-429/08). Amongst the many aspects dealt with, the Court gave its interpretation of ‘communication to the public’ under Article 3(1) of the Info Society Directive and concluded that the showing of live Premier League matches in pubs does amount to such communication.

Introduction and legal framework

This case originates from UK legal proceedings. A first set of proceedings was instituted in the UK by *inter alia* the Football Association Premier League Ltd (FAPL), which organizes the filming of Premier League matches and the licensing of the rights to broadcast them. These proceedings refer to the use of foreign decoder cards in the UK to access foreign satellite transmissions of live Premier League football matches. FAPL was convinced that this activity infringed its copyrights on various works embodied in the matches. Two actions had been instituted against suppliers of foreign decoder cards to bars and pubs and another action had been brought against licensees and publicans who showed live matches broadcast on the channels of a foreign broadcaster. A referral was then made to the Court of Justice of the European Union (CJEU) (*Football Association Premier League v QC Leisure*, Case C-403/08). A second proceeding was instituted by Media Protection Services Ltd (entrusted by FAPL to monitor the use of satellite systems which broadcast Premier League football matches illegally) against a publican, Ms Karen Murphy, who showed Premier League football matches in her pub by using a Greek decoder card. The latter was fined on the ground that the above decoder card was an illicit access device. Ms Murphy appealed to the High Court, which then referred the case to the CJEU (*Karen Murphy v Media Protection Services Ltd*, Case C-429/08). The CJEU then heard and decided the cases jointly.

On 4 October 2011 the CJEU released its decision. Among the many issues dealt with (including conditional access devices, temporary storage and reproduction rights, free movement of services and competition aspects), the Court interpreted the concept of “communication to the public” under Article 3(1) of the Directive 2001/29 (“Info Society Directive”) ¹. As is known, authors are given an exclusive right to authorise or prohibit such act. On 3 February 2011 the Advocate General, Professor Juliane Kokott, had stated in her opinion that the showing of live football matches in pubs does not amount to “communication to the public” ².

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¹ 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 L 167/10, 22.6.2001.

² On the part of the opinion related to this point see Enrico Bonadio, ‘Communication to the Public’ in FAPL v QC Leisure and Murphy v Media Protection Services: the Advocate General’s Opinion, *Journal of Intellectual Property Law & Practice*, 2011, p. 370-371; Tanya

The CJEU took an opposite stance, concluding that such showing has to be interpreted as “communication to the public” under the provision in question.

The other provisions quoted and commented by the CJEU were Recital 23 of the Info Society Directive and Article 11-bis(1)(iii) of the Berne Convention³. In particular, the latter provides that authors are given the exclusive right to authorise “*the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sound or images, the broadcast of the work*”.

Analysis

In essence the question posed to the Court was whether “communication to the public” within the meaning of Article 3(1) of the Info Society Directive must be interpreted as covering transmission of broadcast works, via television screen and speakers, to the customers present in a public house. This is an important issue, because – as already mentioned – copyright owners such as FAPL are offered an exclusive right to authorize or prohibit this act.

Broad interpretation of “communication to the public”

The CJEU first recalled that the Info-Society Directive does not provide a definition of “communication to the public”⁴. It then stressed that the latter must be interpreted in the light of the following:

- (i) the objectives of the Info Society Directive and the context of the provision, *i.e.* a high level of protection of the authors, as it is confirmed by the above mentioned Recital 23: such recital states that the author’s 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 ...*”. It thus provides authors with a high level of protection, so as to permit them to get a fair reward for the use of their works⁵.
- (ii) the principles and rules laid down in other copyright-related directives, including Directive 92/100 on Related Rights (as is also mentioned in Recital 20 of the Info Society Directive) as well as Article 11-bis(1) of the Berne Convention⁶.

In particular, the CJEU recalled that a similar concept of “communication to the public” is defined in Article 8(3) of the Related Rights Directive⁷: “*Member States shall provide for broadcasting organizations the exclusive right to authorize or prohibit ... the communication to the public of their broadcast, if such communication is made in places accessible to the public ...*”. Moreover, the Court stressed, it is clear from the above provision as well as from Articles 2(g) and 15 of the WIPO Performance and Phonograms Treaty that the concept of communication to the public includes “...*making the sounds or representations of sounds*

Aplin, “Reproduction” and “Communication to the Public” Right in EU Copyright Law: *FAPL v QC Leisure*, King’s Law Journal, 2011, 22, pp. 215-219.

³ Berne Convention for the protection of literary and artistic works (Paris text 1971).

⁴ See paragraph 184 of the CJEU’s ruling.

⁵ See paragraph 186 of the CJEU’s ruling.

⁶ See paragraphs 187 and 189 of the CJEU’s ruling.

⁷ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346/61, 27.11.1992, repealed by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006, on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376/28, 27.12.2006.

fixed in a phonogram audible to the public and that it encompasses broadcasting or any communication to the public ...”⁸. As mentioned above, the CJEU also took into consideration Article 11bis(1)(iii) of the Berne Convention. According to the Court, this provision clarifies that the concept in question includes “communication by loudspeaker or any other instrument transmitting by signs, sounds or images, covering ... a means of communication such as display of the works on a screen”⁹; and this is a scenario comparable to the case at issue - it includes the presentation of radio or TV programmes in places where people gather, such as bars, restaurants, hotels, cafes, trains, etc. In this specific regard, it should be noted that in her opinion the Advocate General had taken a different view, by stating that Article 3 of the Info Society Directive does not include the acts referred to in Article 11-bis(1)(iii) of the Berne Convention. In particular, Professor Kokott had held that the latter provision had not been transposed into EU law, and specifically into the Info Society Directive, as Article 3(1) of such Directive was intended to specifically implement Article 8 of the WIPO Copyright Treaty, that omits to mention communication to the public by means of public presentation¹⁰. In its final ruling the CJEU took a different view. It held in essence that the concept of “communication to the public” referred to in the above provision of the Berne Convention was not different from the concept referred to in Article 3 of the Info Society Directive (in other words: the latter should be considered as an implementation of the former). It follows, according to the Court, that the concept of communication to the public must be interpreted broadly, and in particular as referring to any transmission of the protected works, irrespective of the technical means or process used¹¹.

Analogies with SGAE v Rafael Hoteles

The CJEU quoted *SGAE v. Rafael Hoteles* (C-306/05)¹². In the latter case the Court gave a broad interpretation of “communication to the public”. It held that a hotel proprietor carries out an act of communication when he gives his customers access to the broadcast works via television sets, by distributing in the hotel rooms, with full knowledge of the position, the signal received carrying the protected works. This act indeed refers to any indeterminate number of viewers. It is for this reason that 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 the Info Society Directive. The facts of *SGAE v Rafael Hoteles* therefore – according to the CJEU - are comparable to the facts in the present case. As a matter of fact, the proprietor of a public house intentionally gives the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers. And, as in *SGAE v Rafael Hoteles*, without the intervention of the

⁸ See paragraph 191 of the CJEU's ruling.

⁹ See paragraph 192 of the CJEU's ruling.

¹⁰ Such interpretation is supported by Aplin, quoted above at note 2, p. 216. Indeed, she takes the view that “the ECJ should follow the Advocate General on this question and conclude that Article 3 of Directive 2001/29/EC does not embrace the acts that fall within Article 11bis(1)(iii) of the Berne Convention. The express language of the relevant provisions supports this interpretation. ... the provision relates to communication or reception in public. Whereas it is clear from the language of Article 3 and Recital 23 ... that the Directive is seeking to harmonise communication to the public and is not seeking to address communication in public.”

¹¹ See paragraph 193 of the CJEU's ruling.

¹² Case C-306/05 - Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, CJEU decision of 7 December 2006, OJ C 331/3, 30.12.2006.

establishment's owner, the customers could not enjoy the works broadcast, even if they are physically within the broadcast's catchment area¹³.

Meaning of "public"

The CJEU made clear that, in order for there to be a 'communication to the public' within the meaning of Article 3(1) of the Info Society Directive, it is also necessary for the work broadcast to be transmitted to a new public, i.e. "to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public"¹⁴. The Court indeed held that authors authorise a broadcast of their works only to the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts. And, the CJEU pointed out, where a broadcast work is transmitted, in a place accessible to the public, for an additional public which is allowed by the owner of the television set to hear or see the work, an intentional intervention of that kind must be deemed as an act through which the work in question is communicated to a new public¹⁵.

The CJEU also recalled that - in order for there to be a 'communication to the public' - the work broadcast has to be transmitted to a "public not present at the place where the communication originates", as required by Recital 23 of the Info Society Directive. Of course, the above concept does not refer to direct performances or representations, i.e. when the public is in direct physical contact with the actor performer. And the element of "direct physical contact" is clearly absent in case of public houses which transmit broadcast works via television screen and speakers to a public which is just present at the place of that transmission, but not at the place where the communication takes origin, i.e. at the place of the representation or performance which is broadcast¹⁶. This part of the CJEU's decision is at odds with AG's opinion, according to which the requirement in question would not be met in the case at issue: indeed, in her eyes, where pub landlords show TV programmes to their customers, the relevant public would be present at the place where the communication originates, as such communication should be considered as taking origin in TV screens, and not at the place where the represented or performed event takes place¹⁷.

Profit-making nature of the communication

The CJEU also held that the fact that in the case at issue the owner of the pub transmits the broadcast works with a view to making profits cannot be considered irrelevant: such transmissions are indeed liable to increase pubs' customers and thus publicans' financial results. The profit making nature of such activity has

¹³ See paragraphs 194-195 of the CJEU's ruling.

¹⁴ See paragraph 197 of the CJEU's ruling. See also the Court's decision in *SGAE v Rafael Hoteles* (paragraphs 40 and 42), quoted above at note 12.

¹⁵ See paragraph 198 of the CJEU's ruling. See also the Court's decision in *SGAE v Rafael Hoteles* (paragraph 41) quoted above at note 12.

¹⁶ See paragraph 200-203 of the CJEU's ruling. See also the Court's decision in *SGAE v Rafael Hoteles* (paragraph 40) quoted above at note 12.

¹⁷ See paragraph 144 of the Advocate General's Opinion. The view taken by the AG is also shared by Aplin, quoted above at note 2, p. 218.

therefore to be taken into consideration when it comes to applying and interpreting Article 3(1) of the Info Society Directive¹⁸.

Concluding remarks

In the case at issue the CJEU gave a broad interpretation of “communication to the public” and by doing so confirmed *SGAE v. Rafael Hoteles*. It seems that the legal reasoning given by the Court – focused on the need to ensure to the fullest the protection of authors’ exclusive right to authorize any diffusion of their work - is clearer than AG’s one. The CJEU relied on a systematic interpretation of EU copyright law, by also referring to the concept of “communication to the public” in Article 8(3) of the Related Rights Directive. It also relied on analogous provisions of the Berne Convention and the WIPO Performance and Phonograms Treaty. The Court’s decision is also important as it clarifies a relevant issue: *i.e.* the meaning of “public”.

¹⁸ See paragraphs 204-206 of the CJEU's ruling. See also *SGAE v Rafael Hoteles*, quoted above at note 12, in which however the Court clarified that “*the pursuit of profit is not a necessary condition for the existence of a communication to the public*” (paragraph 44).