Court of Justice EU, 16 February 2017, Rundfunk v Hettegger Hotel Edelweiss

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The communication of television and radio broadcasts by means of TV sets installed in hotel rooms does not constitute a communication made in a place accessible to the public against payment of an entrance fee

- **The fact remains that, as the Advocate General stated in points 26 to 30 of his Opinion, the price of a hotel room is not, like the price of a restaurant service, an entrance fee specifically requested in return for a communication to the public of a TV or radio broadcast, but constitutes the consideration for, principally, the accommodation service, to which, according to the hotel category, certain additional services are added, such as the communication of TV and radio broadcasts by means of receiving equipment in the rooms, which are normally included in the price of the overnight stay.**

25. Therefore, although the distribution of a signal by means of TV and radio sets installed in hotel rooms constitutes an additional service which has an influence on the hotel's standing and, therefore, on the price of rooms, as pointed out by the Court in its judgments of 7 December 2006, SGAE (C‑306/05, EU:C:2006:764, paragraph 44) and of 15 March 2012, Phonographic Performance (Ireland) (C‑162/10, EU:C:2012:141, paragraph 44), in the context of the examination of the existence of an act of communication to the public within the meaning of Article 3(1) of Directive 2001/29 and of Article 8(2) of Directive 2006/115, it cannot be considered that that additional service is offered in a place accessible to the public against payment of an entrance fee within the meaning of Article 8(3) of that directive.

26. Consequently, the communication to the public of TV and radio broadcasts by means of TV and radio sets installed in hotel rooms does not fall within the scope of the exclusive right of broadcasting organisations provided for in Article 8(3) of Directive 2006/115.

27. In the light of all of the foregoing, the answer to the question referred is that Article 8(3) of Directive 2006/115 must be interpreted as meaning that the communication of television and radio broadcasts by means of TV sets installed in hotel rooms does not constitute a communication made in a place accessible to the public against payment of an entrance fee.

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Court of Justice EU, 16 February 2017
(M. Ilešič, A. Prechal, A. Rosas, C. Toader, E. Jarašiūnas (Rapporteur))

In Case C‑641/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Handelsgericht Wien (Commercial Court, Vienna, Austria), made by decision of 24 November 2015, received at the Court on 2 December 2015, in the proceedings

Verwertungsgesellschaft Rundfunk GmbH

v

Hettegger Hotel Edelweiss GmbH,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General : M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Verwertungsgesellschaft Rundfunk GmbH, by S. Korn, Rechtsanwalt,

– Hettegger Hotel Edelweiss GmbH, by G. Kucsko, Rechtsanwalt,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by T. Scharf and J. Samnadda, acting as Agents,

after hearing the **Opinion of the Advocate General at the sitting on 25 October 2016**,

gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 8(3) of 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 2006 L 376, p. 28).

2. The request has been made in proceedings between Verwertungsgesellschaft Rundfunk GmbH and Hettegger Hotel Edelweiss GmbH concerning the communication by the latter of television and radio broadcasts by means of TV sets installed in its hotel rooms.

Legal context

International law

3. Article 13 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961 ('the Rome Convention'), entitled 'Minimum Rights for Broadcasting Organizations' provides:

'Broadcasting organisations shall enjoy the right to authorise or prohibit:

([…])

(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to

determine the conditions under which it may be exercised.'

EU law

4. 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), provides:

'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.'

5. Recital 7 of Directive 2006/115 states:

'The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.'

6. Under recital 16 of that directive:

'Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.'

7. Article 8 of that directive provides:

'1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

3 Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.'

Austrian law

8. Paragraph 76a of the Urheberrechtsgesetz (Law on copyright, 'the UrhG'), entitled 'Transmitted broadcasts', which seeks to transpose Article 8(3) of Directive 2006/115 into Austrian law, provides:

'1. Any person who airs, by broadcasts or in a similar manner, sounds or images (a broadcasting organisation within the meaning of Paragraph 17) shall, within the limits laid down by law, have the exclusive right to air the broadcast simultaneously by means of another transmitter and to use the broadcast for communication to the public within the meaning of Paragraph 18(3) in places accessible to the public against payment of an entrance fee […]

[…]'

The dispute in the main proceedings and the question referred for a preliminary ruling

9. Verwertungsgesellschaft Rundfunk is a collecting society whose beneficiaries are numerous broadcasting organisations established in the territory of the Republic of Austria or in other Member States. It is authorised to exercise certain intellectual property rights belonging to its beneficiaries, in particular in the case of communication to the public by means of broadcasts.

10. Hettegger Hotel Edelweiss, a company incorporated under Austrian law, operates the Edelweiss Hotel in Grossarl (Austria) which has a cable TV connection from which various television and radio programmes, including those produced and broadcast by the beneficiaries of the Verwertungsgesellschaft Rundfunk, are simultaneously redirected, unaltered and in full, via cable, to the TV sets installed in the hotel rooms.

11. Verwertungsgesellschaft Rundfunk brought an action before the Handelsgericht Wien (Commercial Court, Vienna, Austria) seeking an order that Hettegger Hotel Edelweiss, first, provide it with information on the radio and television programmes that could be received and the number of hotel rooms concerned and, second, pay it damages.

12. It claims, before that court, that Hettegger Hotel Edelweiss, by making available TV sets in its hotel rooms and by communicating the television and radio broadcasts by means of those TV sets, performs an act of communication to the public within the meaning of Paragraph 76a of the UrhG and Article 8(3) of Directive 2006/115. According to the applicant, the price of the room must be regarded as an entrance fee within the meaning of those provisions, in so far as the offer of a television in the hotel has an influence on that price. It submits, as a consequence, that that communication to the public of the broadcasts of the beneficiaries that it represents must be subject to the authorisation of those beneficiaries and to the payment of fees.

13. Hettegger Hotel Edelweiss contests those claims by arguing that the existence of a communication to the public within the meaning of Paragraph 76a of the UrhG presupposes a communication in places accessible to the public against payment of an entrance fee and that that expression refers to an entrance fee demanded specifically for that communication. Therefore, the price that the hotel guest must pay in consideration for the overnight stay cannot, in its view, be regarded as an entrance fee.

14. The referring court takes the view that the interpretation of Article 8(3) of Directive 2006/115 is necessary in order to resolve the dispute in the case in the main proceedings and that that interpretation is not

so obvious as to leave no scope for any reasonable doubt.

15. In those circumstances, the Handelsgericht Wien (Commercial Court, Vienna) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the condition of "against payment of an entrance fee" laid down in Article 8(3) of Directive 2006/115 satisfied where

– through the TV set made available in each room of a hotel, the hotel operator provides access to the signal for various television and radio channels ('hotel room TV'), and

– for use of the room (including hotel room TV), the hotel operator charges a fee per room per night (room rate) which also includes use of the TV set and the television and radio channels to which access is thereby provided?'

Consideration of the question referred

16. By its question, the referring court asks, in essence, whether Article 8(3) of Directive 2006/115 must be interpreted as meaning that the communication of television and radio broadcasts by means of TV sets installed in hotel rooms constitutes a communication made in a place accessible to the public against payment of an entrance fee.

17. It should be borne in mind that, in the judgment of 7 December 2006, SGAE (**C-306/05, EU:C:2006:764, paragraphs 47 and 54**), the Court held that the distribution of a signal by means of TV sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29, and that the private nature of hotel rooms by such a hotel does not preclude the communication of a work by those means from constituting a communication to the public within the meaning of Article 3(1) of Directive 2001/29.

18. As regards Directive 2006/115, of which an interpretation is sought, the Court also held, in the judgment of 15 March 2012, Phonographic Performance (Ireland) (**C-162/10, EU:C:2012:141, paragraph 47**) that a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal makes a communication to the public for the purposes of Article 8(2) of Directive 2006/115.

19. As the concepts used by those directives must have the same meaning, unless the EU legislature has expressed a different intention (see, to that effect, judgments of 4 October 2011, **Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraph 188**, and of 31 May 2016, **Reha Training, C-117/15, EU:C:2016:379, paragraph 33**), the provision of a signal by means of television or radio sets installed in hotel rooms must also, **as the Advocate General stated in point 16 of his Opinion**, constitute a communication to the public of broadcasts from broadcasting organisations within the meaning of Article 8(3) of Directive 2006/115.

20. However, unlike, in particular, the exclusive right of performers and the right of phonogram producers provided for in Article 8(1) and (2) of Directive 2006/115 respectively, the exclusive right of broadcasters provided for in Article 8(3) is limited to cases of communication to the public in places accessible to the public against payment of an entrance fee.

21. As regards interpreting the concept of 'places accessible to the public against payment of an entrance fee', it is apparent from recital 7 of Directive 2006/115 that it seeks to approximate the legislation of the Member States in such a way as not to conflict, in particular, with the Rome Convention. Accordingly, although that convention does not form part of the legal order of the European Union, concepts appearing in Directive 2006/15 must be interpreted in particular in the light of that convention, in such a way that they are compatible with the equivalent concepts contained in that convention, taking account also of the context in which those concepts are found and the purpose of the relevant provisions of the convention (see, to that effect, judgment of 15 March 2012**, SCT, C-135/10, EU:C:2012:140, paragraphs 53 to 56**).

22. In the present case, the scope of the right of communication to the public laid down in Article 8(3) of Directive 2006/115 is equivalent to that of the right provided for in Article 13(d) of the Rome Convention, which, in accordance with the wording of Article 8(3), limits it to 'places accessible to the public against payment of an entrance fee' (see, to that effect, judgment of 4 September 2014, **Commission v Council, C-114/12, EU:C:2014:2151, paragraphs 94 to 96**). The intention of the EU legislature was — as confirmed by the amended proposal for a directive, of 30 April 1992 (COM(92) 159 final, p. 12), which led to the adoption of 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 1992 L 346, p. 61), which was repealed and codified by Directive 2006/115 — to follow to a large extent the provisions of the Rome Convention introducing minimum protection in order to achieve uniform minimum protection in the European Union and, by modelling Article 6a(3) of the proposed Directive on Article 13(d) of the Rome Convention, to provide for an exclusive right to communicate television broadcasts to the public under the conditions set out in that convention.

23. As regards the condition for the payment of an entrance fee provided for in Article 13(d) of the Rome Convention, it should be pointed out that, according to the Guide to the Rome Convention and to the Phonograms Convention of the World Intellectual Property Organisation (WIPO), a document prepared by the WIPO which, without being legally binding, provides explanations as to the origin, purpose, nature and scope of that convention, points 13.5 and 13.6 of which relate to Article 13 of the Rome Convention, that

condition presupposes a payment specifically requested in return for a communication to the public of a TV broadcast and that, accordingly, the fact of payment for a meal or drinks in a restaurant or in a bar where TV broadcasts are aired is not to be regarded as a payment of an entrance fee within the meaning of that provision.

24. The fact remains that, as the Advocate General stated in points 26 to 30 of his Opinion, the price of a hotel room is not, like the price of a restaurant service, an entrance fee specifically requested in return for a communication to the public of a TV or radio broadcast, but constitutes the consideration for, principally, the accommodation service, to which, according to the hotel category, certain additional services are added, such as the communication of TV and radio broadcasts by means of receiving equipment in the rooms, which are normally included in the price of the overnight stay.

25. Therefore, although the distribution of a signal by means of TV and radio sets installed in hotel rooms constitutes an additional service which has an influence on the hotel's standing and, therefore, on the price of rooms, as pointed out by the Court in its judgments of 7 December 2006, SGAE (C-306/05, EU:C:2006:764, paragraph 44) and of 15 March 2012, Phonographic Performance (Ireland) (C-162/10, EU:C:2012:141, paragraph 44), in the context of the examination of the existence of an act of communication to the public within the meaning of Article 3(1) of Directive 2001/29 and of Article 8(2) of Directive 2006/115, it cannot be considered that that additional service is offered in a place accessible to the public against payment of an entrance fee within the meaning of Article 8(3) of that directive.

26. Consequently, the communication to the public of TV and radio broadcasts by means of TV and radio sets installed in hotel rooms does not fall within the scope of the exclusive right of broadcasting organisations provided for in Article 8(3) of Directive 2006/115.

27. In the light of all of the foregoing, the answer to the question referred is that Article 8(3) of Directive 2006/115 must be interpreted as meaning that the communication of television and radio broadcasts by means of TV sets installed in hotel rooms does not constitute a communication made in a place accessible to the public against payment of an entrance fee.

Costs

28. 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 (Second Chamber) hereby rules:

Article 8(3) of 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 must be interpreted as meaning that the communication of television and radio broadcasts by means of TV sets installed in hotel rooms does not constitute a communication made in a place accessible to the public against payment of an entrance fee.

OPINION OF ADVOCATE GENERAL SZPUNAR
delivered on 25 October 2016 (1)

Case C-641/15

Verwertungsgesellschaft Rundfunk GmbH

v

Hettegger Hotel Edelweiss GmbH

(Request for a preliminary ruling from the Handelsgericht Wien (Commercial Court, Vienna, Austria))

(Reference for a preliminary ruling — Intellectual property — Directive 2006/115/EC — Article 8(3) — Exclusive right of broadcasting organisations — Communication to the public — Places accessible to the public against payment of an entrance fee — Television sets installed in hotel rooms)

Introduction

1. The present request for a preliminary ruling concerns the interpretation of Article 8(3) of 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. (2) That provision provides for broadcasting organisations the exclusive right to authorise or prohibit, inter alia, the communication to the public of their broadcasts in places accessible to the public against payment of an entrance fee.

2. Whilst the interpretation of the term 'communication to the public' does not appear to raise any fundamental issues, the correct interpretation of the term 'places accessible to the public against payment of an entrance fee' is less clear-cut. The question in particular is whether a room in a hotel can be regarded as such a place. In order to answer that question, it is necessary to carry out a more precise analysis of the drafting history and purpose of that exclusive right laid down in that provision, which goes beyond its wording.

Legal framework

3. Under Article 8(3) of Directive 2006/115:

'Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.'

4. That provision was transposed into Austrian law in Paragraph 76a of the Urheberrechtsgesetz (Law on copyright), which has the same wording as the provision of Directive 2006/115 cited above.

Facts, procedure and question referred

5. Hettegger Hotel Edelweiss GmbH ('Hettegger Hotel Edelweiss'), the defendant in the main proceedings, is a company incorporated under Austrian law. It operates inter alia a hotel in the town of Grossarl (Austria). The

rooms in that hotel are furnished with television sets which enable broadcasts from a variety of television broadcasters to be received by means of a communal aerial belonging to the hotel.

6. Verwertungsgesellschaft Rundfunk GmbH ('Verwertungsgesellschaft Rundfunk'), the applicant in the main proceedings, is a collecting society for the management of copyright and related rights. It manages inter alia the rights of many national and foreign television organisations, including broadcasters, whose broadcasts can be received in the rooms of the hotel belonging to Hettegger Hotel Edelweiss.

7. Verwertungsgesellschaft Rundfunk considers that Hettegger Hotel Edelweiss, by enabling a television signal to be received in the rooms of the hotel which it operates, is communicating to the public in a place accessible to the public against payment of an entrance fee — within the meaning of the provisions transposing Article 8(3) of Directive 2006/115 — the broadcasts of television broadcasters whose interests that collecting society represents. In its view, the activity of Hettegger Hotel Edelweiss, consisting in the installation of television sets in hotel rooms and providing a television signal there, is consequently subject to the exclusive right of television broadcasters. Therefore, that company must pay the appropriate fees in return for consent for that activity.

8. In the light of the foregoing, Verwertungsgesellschaft Rundfunk brought before the referring court an action against Hettegger Hotel Edelweiss, claiming that it should order Hettegger Hotel Edelweiss to provide information on the number of rooms in the hotel which it operates and the number of television channels which can be received in them, and also to pay damages for the communication thereof to date.

9. Hettegger Hotel Edelweiss disputes the validity of the claim, arguing in particular that hotel rooms are not places accessible to the public against payment of an entrance fee within the meaning of the provisions transposing Article 8(3) of Directive 2006/115, and therefore communicating the broadcasts of television broadcasters in them is not subject to the exclusive right laid down in those provisions.

10. In those circumstances, the Handelsgericht Wien (Commercial Court, Vienna) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the condition of "against [payment] of an entrance fee" laid down in Article 8(3) of Directive [2006/115] satisfied where;

– *through the TV set made available in each room of a hotel, the hotel operator provides access to the signal for various television and radio channels ("hotel room TV"), and*

– *for use of the room (including hotel room TV), the hotel operator charges a fee per room per night (room rate) which also includes use of the TV set and the television and radio channels to which access is thereby provided?'*

11. The order for reference was received by the Court on 3 December 2015. Observations were submitted by the parties to the main proceedings, the Polish Government and the European Commission. The Court decided, pursuant to Article 76(2) of the Rules of Procedure, not to hold a hearing.

Analysis

12. By its question in this case the referring court is essentially seeking to ascertain whether Article 8(3) of Directive 2006/115 must be interpreted as meaning that the communication of a television or radio signal through television sets installed in hotel rooms constitutes communication to the public of the broadcasts of broadcasting organisations in places accessible to the public against payment of an entrance fee within the meaning of that provision and is consequently subject to the exclusive right of those organisations laid down in that provision.

Term 'communication to the public'

13. As regards the term 'communication to the public', the Court has ruled that installing television sets in hotel rooms and providing a television signal via them constitutes 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 copyright and related rights in the information society, (3) concerning the copyright to their works, (4) and also within the meaning of Article 8(2) of Directive 2006/115, concerning the rights of performers and phonogram producers to equitable remuneration. (5)

14. As the defendant in the main proceedings rightly notes in its observations in the present case, the object and scope of protection laid down in the provisions to which the abovementioned judgments relate is different from that in Article 8(3) of Directive 2006/115. Article 3(1) of Directive 2001/29 relates to the very broad right of authors to authorise or prohibit any communication to the public of their works in whatever form and by whatever medium. Article 8(2) of Directive 2006/115 merely provides a right of phonogram producers (6) and performers to a single remuneration for use of a published phonograph in order to communicate it to the public.

15. However, radio and television broadcasts form a rather particular object of protection where the right to communicate to the public is concerned. For a broadcast to exist it requires an airing and thus a form of communication to the public. (7) Therefore, unlike in the case of works or performances or recordings thereof, (8) communication to the public is not only one of the forms of using broadcasts but also an inherent element of the actual object of protection.

16. Nonetheless, I do not consider that the particular nature of radio and television broadcasts as an object of protection justifies an interpretation of the term 'communication to the public', in the context of providing a signal for television sets installed in hotel rooms, which differs from that which the Court adopted in the judgments cited above. (9) Consequently, I consider that, in the light of that case-law, the provision

of a television or radio signal by means of television sets installed in hotel rooms must be regarded as communication to the public of broadcasts from broadcasting organisations within the meaning of Article 8(3) of Directive 2006/115.

17. However, the EU legislature limited the exclusive right of broadcasting organisations to cases of communication to the public in places accessible to the public against payment of an entrance fee. It thus remains to be examined whether hotel rooms constitute places accessible to the public against payment of an entrance fee within the meaning of that provision.

Term 'places accessible to the public against payment of an entrance fee'

18. In the main proceedings the applicant claims that, since hotel rooms are usually accessible only to hotel customers, that is to say persons who have paid or undertaken to pay for accommodation, and making it possible to view television broadcast by means of television sets installed in the rooms is an essential element of the service provided by a hotel and affects the price of that service, hotel rooms must be regarded as places accessible to the public against payment of an entrance fee within the meaning of Article 8(3) of Directive 2006/115.

19. The wording of that provision may in fact suggest that it must be interpreted as having the above meaning. If account is taken of the actual expression 'places accessible to the public against payment of an entrance fee', in isolation from the drafting history, purpose and role of Article 8(3) of Directive 2006/115 in the system of copyright and related rights, a hotel room can be regarded as such a place.

20. However, I consider, like the defendant in the main proceedings, the Polish Government and the Commission, that such an interpretation would not be compatible with the intention of the Union legislature at the time it laid down that provision or with the role which must be attributed to it under current technical and market conditions.

Interpretation of Article 8(3) of Directive 2006/115 in the light of its drafting history

21. Directive 2006/115 is the codified version of 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. (10) Article 8(3) of Directive 92/100 corresponded to the current Article 8(3) of Directive 2006/115.

22. That provision was modelled on Article 13(d) of the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations done in Rome on 26 October 1961 (hereinafter the 'Rome Convention'). This is confirmed in particular by the explanatory memorandum to the amended proposal for Directive 92/100, which states in relation to the relevant provision (referred to in the proposal as Article 6 bis, paragraph 3): *'paragraph 3, modelled on Article 13 […] (d) of the Rome Convention, provides […] for an exclusive right of communication to the public of television broadcasts under the conditions already mentioned in the Rome Convention'*. (11) That drafting history of the provision was also confirmed by the Court which found that *'the scope of the right of communication to the public would be modelled on the right provided for in Article 13(d) of the Rome Convention, which restricts it to places accessible to the public against payment of an entrance fee'*. (12) When Directive 92/100 was being drafted, a proposal to extend the protection of broadcasting organisations to authorise or prohibit the communication to the public of their broadcasts beyond the scope laid of the Rome Convention was not accepted. (13)

23. Therefore, the intention of the legislature was to protect the right of broadcasting organisations to authorise or prohibit the communication to the public of their broadcasts to the extent to which that right is protected by the Rome Convention. Thus, the term 'places accessible to the public against payment of an entrance fee' must be interpreted in the light of the same term in Article 13(d) of that convention.

24. The parties which submitted observations in this case, including the applicant in the main proceedings, agree that the term 'places accessible to the public against payment of an entrance fee' within the meaning of the Rome Convention means, and in any event meant at the time that convention was adopted, the place where a fee is levied precisely for the possibility of viewing a television broadcast communicated to the public at that place. (14) The need to establish that right, as laid down in Article 13(d) of the Rome Convention, was linked to the practice, which was common in an earlier period of television development, of organising collective showings of television broadcasts, entry to which was subject to a fee. It concerned the possibility of prohibiting the organisation of such showings where such organisation was incompatible with the interests of the broadcasters or the organisers of the televised event. In this regard the term 'payment of an entrance fee' must not be interpreted literally. Naturally, as is so in the case of other kinds of event, for example in a cinema or theatre, entry to the auditorium in which the showing takes place is possible only on presentation of proof of payment of a fee, for example in the form of a ticket. However, the price of the ticket does not constitute a fee for 'entrance' to the auditorium but for the possibility of watching the show.

25. However, when we not are dealing with a fee directly linked to the possibility of viewing a television broadcast, and fees are merely being levied for other services, such as catering services, that situation does not fall within the scope of the term 'places accessible to the public against payment of an entrance fee' within the meaning of Article 13(d) of the Rome Convention. That interpretation of that provision in confirmed by the authorities recognised in academic legal writings. (15)

26. Consequently, how should a service, which consists in making a television signal available by means of television sets installed in hotel rooms, be assessed in the light of Article 13(d) of the Rome Convention? Above all, I do not agree with the view expressed by

the applicant in the main proceedings that a hotel room is a place accessible to the public against payment of an entrance fee within the meaning of that provision since rooms in a hotel are accessible solely on condition that a fee is paid for them. As I pointed out above, it was the intention of authors of the Rome Convention for the term 'entrance' fee to relate in fact not to the physical entry into a particular place, but merely to the possibility, after entry, to view the broadcast communicated there. However, a fee for a room in a hotel is not a fee for the possibility of viewing television broadcasts there, but for accommodation. Making television broadcasts available is merely an additional service which a customer expects, in the same way as running water, drinks and an internet connection.

27. That leads us to the second aspect which is relevant from the point of view of interpreting Article 13(d) of the Rome Convention in the context of communicating television broadcasts in hotel rooms. As I pointed out at point 25 above, a fee levied for services other than communication of those broadcasts, such as catering services, is not sufficient to classify that situation as covered by the exclusive right laid down in that provision. The same is true in the case of hotel rooms where the customer pays for the accommodation service and possibly for the availability of television broadcasts as a non-essential element.

28. In that regard I am unconvinced by the argument of the applicant in the main proceedings that the accessibility of television in a room makes it possible to raise the price of the accommodation and consequently part of that price must be regarded as a fee for the possibility of viewing television broadcasts. Firstly, the fact that the accessibility of television broadcasts in a room can raise the standard of a hotel, and consequently affect the price of accommodation, does not alter the fact that it is the overall price of the accommodation service, of which the accessibility of television broadcasts is merely one of many elements. The amount of the price of that service depends on a large number of factors and it would certainly be difficult to indicate the extent to which that price is formed by the accessibility of television broadcasts.

29. It should be noted in that respect that the accessibility of a television signal in a hotel room is an additional service to the basic accommodation service, and not vice versa. The argument of the applicant in the main proceedings, contained in its observations in this case, which is based on a comparison of the accommodation service in a hotel room and additional services, such as catering services, provided during showings at places such as cinemas and the like, is therefore incorrect. Naturally, the provision of such additional services for an additional charge does not rule out classification of communication of broadcasts to the public as effected in a place accessible to the public against payment of an entrance fee where a fee for the actual possibility of attending a showing is levied as well, for example in the form of a cinema ticket. However, that situation is entirely different from the case of an accommodation service in a hotel.

30. Consequently, I do not share the view of the applicant in the main proceedings that a fee for hotel accommodation is, from the point of view of the interpretation of the above provisions, fundamentally different in nature from, for example, a fee for catering services. The owner of a catering establishment fitted with a television set can also raise the price of his services by dint of that fact, particularly during the broadcasting of programmes of particular interest to the public, such as sports broadcasts. It should be recalled that ordering a place at a table in that establishment will not normally be possible without ordering the food or drink on offer there. That does not mean, however, that the price of a glass of beer can be regarded as a fee for viewing that broadcast and the establishment can be regarded as accessible to the public against payment of an entrance fee within the meaning of Article 13(d) of the Rome Convention. A fee for an accommodation service in a hotel room is precisely the same in nature.

31. In that regard it is pretty common for the de facto purpose of a visit to a catering establish to be to view a television programme and for consumption to be only ancillary in nature, but a room in a hotel will not normally be booked for the purpose of viewing television there. Consequently, the service of making a television signal available in a hotel room is not, contrary to the contention of the applicant in the main proceedings, economically independent in nature.

32. To sum up, I consider that, as in catering establishments and other places which can be fitted with television sets, but where any fees are levied not in connection with the possibility of viewing television broadcasts but in connection with other services provided there, hotel rooms are not places accessible to the public against payment of an entrance fee within the meaning of Article 13(d) of the Rome Convention; therefore communication to the public in those rooms of the broadcasts of broadcasting organisations are not covered by the exclusive of right of those organisations protected under the abovementioned provision.

33. Since in laying down Article 8(3) of Directive 92/100 (now Article 8(3) of Directive 2006/115) the Union legislature did not intend to extend that protection beyond the scope laid down in the Rome Convention, that provision must be interpreted, in the light of that convention, as meaning that the term 'places accessible to the public against payment of an entrance fee' used therein does not cover hotel rooms.

Interpretation of Article 8(3) of Directive 2006/115 under current technical and market conditions

34. If I understand correctly the observations of the applicant in the main proceedings, it also puts forward the argument that the restriction laid down in Article 13(d) of the Rome Convention on the scope of the protection of the right of broadcasting organisations to decide on communication of their broadcasts to the public arose from the technical and market conditions which prevailed at the time the convention was adopted and which have now changed completely. It points out

in particular that at that time having a television set in the home was much less common than now and they were never, or virtually never, to be found in hotel rooms. For this reason, it considers that the organisation of public showings of television broadcasts, accessible against payment of an entrance fee, was common practice, and that justified the incorporation into the Rome Convention of the right of broadcasting organisations which is worded to fit that reality. Now however, as a result of the change to that reality, the high level of protection of copyright and related rights which Directive 2006/115 is intended to provide, requires, in the view of the applicant in the main proceedings, a different interpretation of Article 8(3) of the directive.

35. That argument is worthy of consideration. I myself am also an advocate of a dynamic interpretation of the provisions of law, which is capable of adapting the wording thereof to the changing conditions in fact and thus allowing the objective sought by those provisions to be attained. (16) However, I do not consider that such an approach is either necessary or possible in this case for two reasons.

36. First, I do not think that even though it is modelled on a provision of a convention signed in 1961 Article 8(3) of Directive 2006/115 is as obsolete as the applicant in the main proceedings suggests. Of course, the fact that private television sets have become more widespread has changed the practice of viewing television. However, public showings of television broadcasts have not disappeared. In particular, the broadcasts of sporting events are often communicated to the public in various kinds of 'fan zones', cinemas, and outdoor cinemas, etc. There is often a charge for those showings and they therefore fall within the scope of the right protected under Article 8(3) of Directive 2006/115.

37. Secondly, a dynamic interpretation of the provisions of law is justified only on condition that it takes account of the objective which the legislature sought to attain in laying down those provisions and serves to realise that objective in changed conditions, but not to replace it with another objective. From that point of view, it would not be justified to find that since it was not the aim of the signatories to the Rome Convention to exclude television sets in hotel rooms from the scope of the exclusive right of broadcasting organisations, because normally there were no such sets there, it is now necessary to interpret that convention as meaning that television sets in hotel rooms are covered by the scope of that right.

38. On the contrary, although the signatories to the convention took no account of the television sets in hotel rooms, they did aim to exclude from the scope of the exclusive law cases of communication to the public of broadcasts in places such as catering establishments where no special fees are levied for communicating those broadcasts, and the situation of hotel rooms is similar to that of catering establishments. (17) Therefore, a dynamic interpretation requires precisely that hotel rooms also be excluded from the scope of the exclusive right, in accordance with the objective sought by the signatories to the convention.

39. Consequently, I do not consider that a change in factual circumstances, as has occurred since the signing of the Rome Convention, justifies an interpretation of Directive 2006/115 which diverges entirely from the objectives and intention of the signatories to that convention.

Other arguments of the applicant in the main proceedings

40. In its observations in this case the applicant in the main proceedings put forward a further argument of an economic nature. That argument is that hotel operators derive economic benefit from the fact that they offer access to television broadcasts in rooms (the accessibility of television raises the standard of the hotel and thus the price of the accommodation), which would not be possible without the services provided by the broadcasters; yet those broadcasters do not share appropriately in those benefits.

41. As regards that argument, it should be noted firstly that if the services provided by television broadcasters did not exist there would in fact be no supply or demand for those services, also in hotel rooms. That statement is therefore self-evident and applies equally to all services provided in a hotel.

42. As regards sharing in the economic benefits, it should be recalled that most television broadcasts are 'free-to-air', that is to say the broadcaster levies no fee for receiving the television broadcast. The broadcaster is funded by advertisements and other commercial communications (or, in the case of public-service broadcasters, a variety of subsidies), the cost of which (that is to say the cost of the air time which the broadcaster charges the advertiser) depends inter alia on the expected number of viewers. The growth in the potential number of viewers, as a result of the fact that the broadcaster's broadcast can also be received in hotel rooms, therefore has a beneficial effect on the broadcaster's revenue, even though in practice that effect is negligible. Therefore, it cannot be claimed that broadcasters in no way share in the economic benefits arising from the accessibility of television broadcasts in hotel rooms. (18)

43. Finally, as regards the effect of the accessibility of television in hotel rooms on the standard of hotels, which is emphasised very heavily by the applicant in the main proceedings, it should be noted that in actual fact that service is now so common that it is absent from only the hotels of the lowest standard. In other words, the possibility of communicating television broadcasts in rooms is virtually an essential condition for conducting hotel activity at the medium and upper level.

44. However, Article 8(3) of Directive 2006/115 gives broadcasting organisations not only the right to remuneration, such as provided, for example, in Article 8(2) thereof, but also the exclusive right to authorise or prohibit the communication to the public of their broadcasts. This means that broadcasting organisations have the right to oppose communication to the public

of their broadcasts by a particular person. A finding that that right also includes communication of broadcasts in hotel rooms would be tantamount to allowing broadcasters to decide whether or not someone could provide hotel services. While the objective of the signatories to the Rome Convention was in fact to enable broadcasters to prohibit showings of their broadcasts for a fee, it was nonetheless certainly not their objective to confer on broadcasters the right to decide whether or not other persons can carry on other types of activities where the communication of television broadcasts is merely incidental. (19) Therefore, the interpretation of that provision proposed by the applicant in the main proceedings would evidently be contrary to the objectives of the Rome Convention, and thus also the intention of the Union legislature.

45. Lastly, the applicant in the main proceedings puts forward the argument that the right of broadcasting organisations to decide whether or not their broadcasts are communicated to the public must be subject to the same protection, with regard to communication to the public, as other objects protected by copyright are under Article 3 of Directive 2001/29. In my view, that argument is incorrect.

46. Contrary to the contention of the applicant in the main proceedings, there is no inconsistency in the fact that the same form of use is subject to different rules depending on whether it concerns the broadcasts of broadcasting organisations or other objects protected by copyright. That difference arises from the actual rules concerning those different objects of protection. As the other parties to the proceedings correctly pointed out, unlike works which are fully protected in copyright law, the broadcasts of broadcasting organisations, like the object of protection covered by related rights, are — with regard to communication to the public — subject only to protection limited to cases of communication in places accessible the public against payment of an entrance fee. Therefore, there is no indication of any need to place the level of protection afforded to the right of broadcasting organisations in relation to communication of their programmes to the public on an equal footing with the level of protection afforded to objects protected by copyright.

47. Consequently, the analysis of Article 8(3) of Directive 2006/115 can be summed up by stating that neither the drafting history nor the objective of that provision, nor any other aspects, militate in favour of an interpretation of the term ‘places accessible to the public against payment of an entrance fee’ which would cover hotel rooms.

Conclusion

48. In the light of all the foregoing considerations, I propose that the Court give the following answer to the questions referred for a preliminary ruling by the Handelsgericht Wien (Commercial Court, Vienna, Austria):

Article 8(3) of 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 must be interpreted as meaning that the communication of a television or radio signal through television sets installed in hotel rooms does not constitute communication to the public of the broadcasts of broadcasting organisations in a place accessible to the public against payment of an entrance fee within the meaning of that provision.

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1 – Original language: Polish.

2 – OJ 2006 L 376, p. 28.

3– OJ 2001 L 167, p. 10.

4– Judgment of 7 December 2006, SGAE (C‑306/05, EU:C:2006:764, paragraph 47, and paragraph 1 of the operative part thereof).

5– Judgment of 15 March 2012, Phonographic Performance (Ireland) (C‑162/10, EU:C:2012:141, paragraph 46, and paragraph 1 of the operative part thereof).

6– That is to say recordings of performances of works of music and of words and music.

7– The Polish term ‘program’ used in Article 8(3) of Directive 2006/115 does not fully convey that particular characteristic, but the terminology of the English (‘broadcast’), French (‘émission’) and German version (‘Sendung’) leave no doubt that the object of the protection afforded in that provision are the contents broadcast by the broadcasting organisations.

8– Including recordings of radio and television broadcasts which are protected, as regards communication to the public, under Article 3(2)(d) of Directive 2001/29.

9– Nor is that conclusion altered by the judgment of 15 March 2006 (SCF, C‑135/10, EU:C:2012:140), in which the Court ruled that the broadcasting of phonograms in a dental practice does not constitute the communication thereof to the public within the meaning of Article 8(2) of Directive 2006/115. That judgment was delivered on the same day and by the same Court as the abovementioned judgment of 15 March 2012, Phonographic Performance (Ireland) (C‑162/10, EU:C:2012:141). Therefore, the fact that the Court reached different decisions in those two judgments gives a clear indication of the different situations of hotel rooms and a dental practice.

10– OJ 1992 L 346, p. 61.

11– COM(92) 159 final, p. 13 in the English and German language versions. Emphasis added.

12– Judgment of 4 September 2014, Commission v Council (C‑114/12, EU:C:2014:2151, paragraph 96).

13– See: von Lewinski, S., in: Walter, M.M., von Lewinski, S. (ed.), European Copyright Law. A Commentary, Oxford University Press, 2010, p. 327.

14– Both Article 13(d) of the Rome Convention and Article 8(3) of Directive 2006/115 concern television and radio broadcasters. However, in practice the problems in applying those provisions primarily concern television broadcasters, as in the main proceedings. Therefore, in the considerations that

follow I will deal primarily with those broadcasters. Those considerations also concern radio broadcasters to a lesser or greater degree.

15– See in particular: Masouyé, C., Guide de la Convention de Rome et de la Convention Phonogrammes, OMPI, Geneva, 1981, pp. 72, 73; von Lewinski, S., International Copyright Law and Policy, Oxford University Press, 2008, pp. 218, 219.

16– See my Opinion in Vereniging Openbare Bibliotheken (C‑174/15, EU:C:2016:459).

17– See point 30 of this Opinion.

18– The situation is different in the case of pay-tv broadcasters. They, on the other hand, can decide with whom and on what conditions they conclude contracts for the communication of broadcasts. Therefore, they can choose not to make them available to hotels or to do so at a price satisfactory to them.

19– Naturally, where, as in the main proceedings, the broadcasters' rights are exercised by a collecting society, this normally involves obtaining remuneration for communication of broadcasts to the public. The fact remains, however, that, formally speaking, broadcasters can prohibit such communication, and, moreover, that provision was laid down to that end (see point 24 of this Opinion and the literature cited in footnote 15).