

Court of Justice EU, 16 March 2017, AKM v Zurs



COPYRIGHT LAW

Full and unaltered transmission of programmes broadcast by the national broadcasting corporation, by means of cables on national territory, is not subject to the requirement that authorisation be obtained from the author, provided that it is merely a technical means of communication and was taken into account by the author of the work when the latter authorised the original communication

• Article 5(1) of the Copyright Directive precludes national legislation which provides that a broadcast made by means of a communal antenna installation, when the number of subscribers connected to the antenna is no more than 500, is not subject to the requirement that authorisation be obtained from the author

44. In the light of all of the foregoing considerations, the answer to the question referred is that: – Article 3(1) of Directive 2001/29 and Article 11bis of the Berne Convention must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that the simultaneous, full and unaltered transmission of programmes broadcast by the national broadcasting corporation, by means of cables on national territory, is not subject, under the exclusive right of communication to the public, to the requirement that authorisation be obtained from the author, provided that it is merely a technical means of communication and was taken into account by the author of the work when the latter authorised the original communication, this being a matter for the national court to ascertain. – Article 5 of Directive 2001/29, in particular paragraph (3)(o) thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a broadcast made by means of a communal antenna installation, when the number of subscribers connected to the antenna is no more than 500, is not subject, under the exclusive right of communication to the public, to the requirement that authorisation be obtained from the author, and as meaning that that legislation must, therefore, be applied consistently with Article 3(1) of that directive, this being a matter for the national court to ascertain. ;

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Court of Justice EU, 16 March 2017

(M. Vilaras, M. Safjan and J. Malenovský (rapporteur))

JUDGMENT OF THE COURT (Eighth Chamber)

16 March 2017 (*)

(Reference for a preliminary ruling — Intellectual property — Copyright and related rights in the

information society — Directive 2001/29/EC — Right of communication of works to the public — Article 3(1) — Exceptions and limitations — Article 5(3)(o) — Broadcast of television programmes through a local cable network — National law laying down exceptions for installations allowing access to a maximum of 500 subscribers and for the retransmission of broadcasts of the public broadcaster in national territory)

In Case C-138/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Handelsgericht Wien (Commercial Court, Vienna, Austria), made by decision of 16 February 2016, received at the Court on 7 March 2016, in the proceedings

Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM)

v

Zürs.net Betriebs GmbH,

THE COURT (Eighth Chamber),

composed of M. Vilaras, President of the Chamber, J. Malenovský (Rapporteur) and M. Safjan, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM), by M. Walter, Rechtsanwalt,

– Zürs.net Betriebs GmbH, by M. Ciresa, Rechtsanwalt,

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

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

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

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1. The present request for a preliminary ruling concerns the interpretation of, first, Article 3(1) and Article 5 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) and, second, Article 11bis(1)(ii) of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, in the version resulting from the Paris Act of 24 July 1971, as amended on 28 September 1979 (“the Berne Convention”).

2. The request has been made in proceedings between Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (“AKM”) and Zürs.net Betriebs GmbH (“Zürs.net”) concerning AKM’s request that Zürs.net provide it with information as to the number of subscribers connected to the cable network which it

operates, and, where appropriate, pay to it a fee, together with default interest, for making available works protected by copyright and related rights.

Legal context

International law

WIPO Copyright Treaty

3. The World Intellectual Property Organisation (“WIPO”) adopted in Geneva on 20 December 1996 the WIPO Copyright Treaty, which entered into force on 6 March 2002. That treaty was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

4. Article 1(4) of the WIPO Copyright Treaty provides that Contracting Parties are required to comply with Articles 1 to 21 of the Berne Convention.

Berne Convention

5. Article 11bis(1) of the Berne Convention provides: *“Authors of literary and artistic works shall enjoy the exclusive right of authorising:*

[...]

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

European Union law

Directive 2001/29

6. Recital 9 of Directive 2001/29 reads as follows:

“Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. ...”

7. Under Article 3(1) of that directive:

“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.”

8. Article 5(3)(o) of that directive provides:

“Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

[...]

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.”

Austrian law

9. Paragraph 17 of the Urheberrechtsgesetz (Law on copyright, BGBl. 111/1936), in the version in BGBl. I 99/2015, provides:

“(1) The author has the exclusive right to transmit the work via broadcast or similar means.

(2) It is equivalent to a broadcast when a work from a site located in Austria or abroad is made perceivable by the domestic public, similar to by broadcasting, but using cables.

(3) The transmission of broadcasts

[...]

2. via a communal antenna installation

[...]

(b) when the number of subscribers connected to the installation does not exceed 500,

does not constitute a new broadcast.

Furthermore, the simultaneous, complete and unaltered transmission of broadcasts of [the national broadcasting corporation (ORF)] using cables in Austria constitutes part of the original broadcast.”

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

10. AKM is a copyright collecting society.

11. Zurs.net operates a cable network installation in Zurs (Austria), by means of which it transmits television and radio broadcasts, some of which are broadcast initially by the national broadcasting corporation (ORF) and others are initially broadcast by other broadcasters. The referring court states that, at the time when the order for reference was made, approximately 130 subscribers were connected to Zurs.net’s cable network.

12. AKM requires Zurs.net to provide it with information as to the number of subscribers connected, at several reference dates, to the cable network that it operates and as to the content broadcast. It also requests that, after the information to be provided has been checked, Zurs.net should pay the appropriate fee.

13. Zurs.net takes the view that, under Paragraph 17(3)(2)(b) of the Austrian Law on copyright, in the version in BGBl. I 99/2015, concerning small installations for a maximum of 500 subscribers, the broadcasts which it distributes cannot be regarded as new broadcasts and that it is therefore under no obligation to provide the information required by AKM.

14. AKM considers that provision to be incompatible both with EU law and with the Berne Convention.

15. In those circumstances, the Handelsgericht Wien (Commercial Court, Vienna, Austria), seised of the dispute between AKM and Zurs.net, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling.

“Are Article 3(1) or Article 5 of Directive [2001/29] and Article 11bis(1)(ii) of the Berne Convention to be interpreted as meaning that a rule which provides that the transmission of broadcasts by “communal antenna installations”, such as those of the defendant in the main proceedings,

(a) does not constitute a new broadcast when no more than 500 subscribers are connected to the installation, and/or

(b) constitutes part of the original broadcast when it involves the simultaneous, full and unaltered transmission of broadcasts of the Österreichischer Rundfunk using cable services within the country (Austria),

and these uses are also not covered by any other exclusive right of communication to the public at a distance within the meaning of Article 3(1) of Directive 2001/29, and are therefore not subject to authorisation

by the author and are also not subject to the obligation to pay a fee, is contrary to EU law or to the law of the Berne Convention as an international agreement which forms part of EU law?”

Consideration of the question referred

16. By its question the referring court asks, in essence, whether Article 3(1) or Article 5 of Directive 2001/29 or Article 11bis(1)(ii) of the Berne Convention must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that neither

– a simultaneous, full and unaltered transmission of programmes broadcast by the national broadcasting corporation, by means of cables in the national territory, nor

– a broadcast by means of an communal antenna installation, where the number of subscribers connected to that antenna does not exceed 500, is subject to the requirement that authorisation be obtained from the author pursuant to the exclusive right of communication to the public.

17. It is appropriate to examine this question in two stages.

18. In the first place, it is necessary to determine whether a simultaneous, full and unaltered transmission of programmes broadcast by the national broadcaster, by means of cables in the national territory, such as that at issue in the main proceedings, may constitute a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29 or Article 11bis(1)(ii) of the Berne Convention.

19. In that regard, it must be recalled that Article 11bis(1)(ii) of the Berne Convention provides that authors of literary and artistic works are to enjoy the exclusive right of authorising any communication to the public, whether by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one.

20. For its part, Article 3(1) of Directive 2001/29 provides that Member States must 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.

21. It should be noted that Article 3(1) of Directive 2001/29 corresponds in substance to Article 11bis(1)(ii) of the Berne Convention. Thus, when the Court interprets the concept of “communication to the public” within the meaning of Article 3(1), it does so in conformity with that convention provision, pursuant to the Court’s consistent case-law (see, to that effect, [judgment of 7 December 2006, SGAE, C-306/05, EU:C:2006:764](#), paragraphs 40 and 41).

22. The Court has previously held that the concept of “communication to the public”, within the meaning of Article 3(1) of Directive 2001/29, includes two cumulative criteria, namely, an “act of communication” of a work and the communication of that work to a

“public” ([judgment of 31 May 2016, Reha Training, C-117/15, EU:C:2016:379](#), paragraph 37).

23. More specifically, it is evident from the Court’s case-law, first, that the act of communication refers to any transmission of the protected works, irrespective of the technical means or process used, and every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question (see judgment of 31 May 2016, Reha Training, C-117/15, EU:C:2016:379, paragraph 38 and 39).

24. Second, in order to come within the concept of “communication to the public”, within the meaning of Article 3(1) of Directive 2001/29, it is also necessary that protected works be actually communicated to a “public”, the term “public” being understood to mean an indeterminate number of potential recipients and, moreover, a fairly large number of persons (see judgment of 31 May 2016, Reha Training, C-117/15, EU:C:2016:379, paragraph 40 and 41).

25. Furthermore, the Court has already held that the transmission of protected works by a body other than that which had obtained the original authorisation of communication is a “communication to the public”, within the meaning of that provision, when such works are transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they granted the original authorisation for the use of their works (see, to that effect, judgment of 31 May 2016, Reha Training, C-117/15, EU:C:2016:379, paragraph 45 and the case-law cited).

26. In the present case, the fact that, in the main proceedings, the transmission at issue is made through cables, that is to say, by a technical means different from that used for the initial broadcast transmission, permits the finding that Zurs.net is making a communication within the meaning of Article 3 of Directive 2001/29.

27. It remains, however, to be determined whether that communication is intended for a new public, different from that for which the broadcasts by ORF were intended.

28. It is clear from Zurs.net’s observations, which are not contested on this point by AKM, that when they grant a broadcasting authorisation to ORF, the rightholders concerned are aware that the broadcasts made by that national corporation may be received by all persons within the national territory.

29. Given that the distribution of the protected works by means of cables is carried out, as is clear from the wording of the question referred, on the national territory and that the persons concerned have therefore been taken into account by the rightholders when they granted the original authorisation for the national broadcaster to broadcast those works, the public to which Zurs.net distributes those works cannot be regarded as a new public.

30. It follows that the transmission of broadcasts made in the circumstances set out in paragraph 18 of the present judgment does not constitute a communication

to the public within the meaning of Article 3(1) of Directive 2001/29. Hence, such a transmission is not subject to the requirement, provided for in that provision, that authorisation be obtained from the rightholders.

31. In the second place, the referring court expresses uncertainty as to whether national legislation, such as that at issue in the main proceedings, which provides that the transmission of broadcasts by means of a communal antenna installation, to which a maximum of 500 subscribers are connected, is not regarded as being a new broadcast, is covered by Article 5 of Directive 2001/29 and, more specifically, by paragraph 3(o) thereof, and as to whether the distributors of such broadcasts transmitted by means of such antennae may therefore avoid the requirement that authorisation be obtained from the rightholder. It appears from the explanations provided by the referring court that Zürs.net may be regarded as using a “small communal antenna installation” within the meaning of that national legislation.

32. In that regard, it must be recalled, first of all, that, as the Court has pointed out in paragraph 25 of the present judgment, the transmission of protected works by a body other than that which had obtained the original authorisation of communication is a “communication to the public”, within the meaning of that provision, when such works are transmitted to a new public, that is to say, to a public which was not taken into account by the rightholders concerned when they granted the original authorisation for the use of their works.

33. In the present case, it is clear from the order for reference that Zürs.net’s “small communal antenna installation” enables, in addition to the ORF broadcasts, the broadcasts of other broadcasters established in other Member States to be transmitted, with the result that such transmissions may be regarded as communications to the public within the meaning of Article 3(1) of Directive 2001/29. It is for the national court to carry out the necessary determinations in that regard.

34. In those circumstances, it is necessary to examine whether the operators of those small communal antennae installations may avoid the requirement that authorisation be obtained from the rightholders under one of the exceptions provided for in Article 5 of Directive 2001/29.

35. In that regard, Article 5(3)(o) of Directive 2001/29 states that Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 of that directive in certain cases of minor importance where exceptions or limitations already exist under national legislation, provided that they concern analogue uses only and do not affect the free circulation of goods and services within the European Union, without prejudice to the other exceptions and limitations contained in that article.

36. By referring in particular to Article 3 of Directive 2001/29, Article 5(3)(o) of that directive is a provision that may derogate from the right of communication to the public provided for in Article 3.

37. According to the Court’s settled case-law, provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly ([judgments of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465](#), paragraph 56, and of [10 April 2014, ACI Adam and Others, C-435/12, EU:C:2014:254](#), paragraph 22).

38. It follows that the various exceptions and limitations provided for in Article 5(3) of Directive 2001/29, including that laid down in point (o) of that provision, must be interpreted strictly (see, to that effect, [judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798](#), paragraph 109).

39. In the case in the main proceedings, the case file submitted to the Court states that the national legislation at issue in the main proceedings permits economic operators to pursue an activity broadcasting protected works by means of communal antennae installations, without an obligation, inter alia, to seek authorisation from the authors of those works in accordance with the right of communication to the public which those authors hold, on condition that the number of subscribers connected to such an antenna is no more than 500.

40. That option, set out in the legislation, is likely to attract economic operators wishing to take advantage of it, and to lead to the continuous and parallel use of a multiplicity of communal antenna installations. Consequently, this could result, over the whole of the national territory, in a situation in which a large number of subscribers have parallel access to the broadcasts distributed in that way.

41. The Court has already held that the criteria of the cumulative number of potential audiences with access to the same work at the same time is an important element in the concept of the “public” and, consequently, a relevant element in communication to the public that is subject to the requirement that authorisation be obtained from the rightholder concerned (see, to that effect, judgment of 31 May 2016, Reha Training, C-117/15, EU:C:2016:379, paragraphs 42 to 44).

42. Thus, regard being had to the fact that a strict interpretation must be given to Article 5(3)(o) of Directive 2001/29, and in view of the objective of a high level of protection for copyright set out in recital 9 of that directive, national legislation, such as that at issue in the main proceedings, which permits a multiplicity of economic operators to distribute, without having obtained the authorisation of the authors, protected works in parallel by means of communal antenna installations with a limited capacity for connected subscribers, cannot be regarded, in particular due to its cumulative effect noted in paragraph 40 above, as being “a use in certain ... cases of minor importance” within the meaning of Article 5(3)(o).

43. In those circumstances, without it being necessary to examine whether the other conditions laid down in Article 5(3)(o) of Directive 2001/29 are satisfied, it

must be held that national legislation, such as that at issue in the main proceedings, could not be adopted under the power granted to Member States to lay down exceptions or limitations to the rights provided for in Articles 2 and 3 of that directive. Consequently, such legislation must respect the principle laid down in Article 3(1) of Directive 2001/29, according to which the authors of protected works have the exclusive right to authorise or prohibit the communication of their works to the public.

44. In the light of all of the foregoing considerations, the answer to the question referred is that: – Article 3(1) of Directive 2001/29 and Article 11bis of the Berne Convention must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that the simultaneous, full and unaltered transmission of programmes broadcast by the national broadcasting corporation, by means of cables on national territory, is not subject, under the exclusive right of communication to the public, to the requirement that authorisation be obtained from the author, provided that it is merely a technical means of communication and was taken into account by the author of the work when the latter authorised the original communication, this being a matter for the national court to ascertain. – Article 5 of Directive 2001/29, in particular paragraph (3)(o) thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a broadcast made by means of a communal antenna installation, when the number of subscribers connected to the antenna is no more than 500, is not subject, under the exclusive right of communication to the public, to the requirement that authorisation be obtained from the author, and as meaning that that legislation must, therefore, be applied consistently with Article 3(1) of that directive, this being a matter for the national court to ascertain.

Costs

45. 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 (Eighth Chamber) hereby rules:

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 and Article 11bis of the Berne Convention for the Protection of Literary and Artistic Works, in the version resulting from the Paris Act of 24 July 1971, as amended on 28 September 1979, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that the simultaneous, full and unaltered transmission of programmes broadcast by the national broadcasting corporation, by means of cables on national territory, is not subject, under the exclusive right of communication to the public, to the

requirement that authorisation be obtained from the author, provided that it is merely a technical means of communication and was taken into account by the author of the work when the latter authorised the original communication, this being a matter for the national court to ascertain.

Article 5 of Directive 2001/29, in particular paragraph 3(o) thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a broadcast made by means of a communal antenna installation, when the number of subscribers connected to the antenna is no more than 500, is not subject, under the exclusive right of communication to the public, to the requirement that authorisation be obtained from the author, and as meaning that that legislation must, therefore, be applied consistently with Article 3(1) of that directive, this being a matter for the national court to ascertain.
