

JACOBACCI

AVVOCATI • AVOCATS A LA COUR • ABOGADOS

CJEU, C-753/18: The rental of cars equipped with radio receivers does not constitute a communication to the public

Background to the case and parties to the dispute

On 2 April 2020, the Court of Justice delivered a decision in case C-753/18 on the interpretation of Art. 3 (1) of Directive 2001/29/EC¹ ('the Infosoc Directive') and Art. 8 (2) of Directive 2006/115/EC² ('the Rental Directive'), in the context of two disputes:

- (i) The first concerned Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. ('STIM'), the Swedish organisation managing copyright in music, against Fleetmanager Sweden AB ('Fleetmanager'), a Swedish car rental company offering directly or through intermediaries motor vehicles equipped with radio receivers. **STIM brought a copyright infringement suit against Fleetmanager** – claiming that, by making those vehicles available to car rental companies, Fleetmanager contributed to the copyright infringement committed by those companies making musical works available to the public without proper authorisation. The Court concluded that the rental of cars equipped with radios was a 'communication to the public'.
- (ii) The second dispute concerned Svenska artisters och musikers intresseorganisation ek. för. ('SAMI'), the Swedish organisation managing the rights of performers, against Nordisk Biluthyrning AB ('NB'), a Swedish car rental company. **NB sought a declaration** from the Swedish Patents and Market Court **that it was not required to pay fees to SAMI for the use of sound recordings**, just because the vehicles that it hired out were equipped with radio receivers and CD players. The Court concluded that the availability of radios on motor vehicles, which allowed customers to listen to music recordings, should be considered a 'communication to the public'.

The questions referred to the CJEU

Appeals were brought before the Supreme Court, which requested a preliminary ruling to the CJEU asking:

- (i) Whether the hiring out of vehicles with radio receivers constitutes a 'communication to the public' within the meaning of Art. 3 (1) of the InfoSoc Directive and Art. 8 (2) of the Rental Directive;
- (ii) The relevance of the scope of the motor vehicle business activity (e.g. the rental period).

¹ Pursuant to Art. 3 (1) of Dir. 2001/29/EC 'Member States shall provide authors with the exclusive right to authorise or prohibit any **communication to the public** of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them'.

² Art. 8 (2) of Dir. 2006/115/EC reads: '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'.

The findings of the CJEU

Firstly, the CJEU recalled that the expression 'communication to the public' must be interpreted as having the same meaning in both the above-mentioned provisions. Moreover, that expression must be interpreted in light of the equivalent provisions of international law. In particular, according to case law, the notion at hand combines two features: the 'act of communication' of a work and the communication to a 'public'.

Secondly, the CJEU stated that, in order to determine whether the rental of vehicles equipped with radio receivers constitutes an act of communication, an assessment which takes into account complementary criteria, among which the key role of the service provider and the intentional nature of his intervention, must be made. In the Court's view, the service provider carries out an act of communication when it allows its customers, with full knowledge of the consequences of its own behavior, to access a protected work, in particular when, in the absence of such intervention, the customers could not have benefited from the work.

Referring to recital 27 of the InfoSoc Directive³, which reflects the agreed statement on Art. 8 of the WIPO Copyright Treaty⁴, the CJEU held that **the supply of a radio receiver forming an integral part of a hired motor vehicle, which makes it possible to receive the terrestrial radio broadcast without any additional intervention by the leasing company, does not constitute a 'communication to the public'.**

In the light of the above, the CJEU concluded that Art. 3 (1) of Directive 2001/29 and Art. 8 (2) of Directive 2006/115 must be interpreted as meaning that **the rental of motor vehicles equipped with radio receivers does not constitute communication to the public, within the meaning of the above-mentioned provisions.**

³ 'The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this directive'.

⁴ 'It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2)'.