COMMUNICATION TO THE PUBLIC AND COPYRIGHT IN THE INFORMATION SOCIETY

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Abstract: This article proposes an analysis of the definitions and the interpretations of the concept of communication to the public in the Romanian legislation and the European jurisprudence. In particular, it presents and analyzes the Preliminary Ruling of the Court of Justice of the European Union in Luxembourg on the interpretation of the Article 3, par. (1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

Keywords: communication to the public, copyright, intellectual property rights, information society.

1. Introduction

The Preliminary Ruling of the Court of Justice of the European Union in Luxembourg on the interpretation of Article 3, par. (1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society was made in the case C-283/10 24 November 2011. The Judgment was made at a request invoked in a dispute between the Union of Composers and Musicologists in Romania - Association for Copyright, on the one hand, and the Globus Circus of Bucharest, on the other hand, regarding the alleged violation by the latter of the intellectual property rights. The Judgment imposes an interpretation of the concept of communication to the public, which is fundamentally different from that contained in the Romanian legislation and has significant consequences on the understanding and the application of the copyright laws.

2. Subject, object and content of copyright in the Romanian legislation

The copyright in a literary, artistic or scientific work, as well as in other works of intellectual creation is recognized and guaranteed by *Law no. 8 of 1996 on copyright and related rights*. This right belongs to the author person and involves moral and patrimonial prerogatives.

An important clarification of the law refers to the fact that the work of intellectual creation is acknowledged and protected independently of its being made publicly known, simply by virtue of its creation, even in unfinished form.

The author is the natural person or persons having created the work. Unless proven otherwise, the author is presumed to be the person under whose name the work was made publicly known for the first time. When the work was made publicly

known in an anonymous form or under a pen name that does not allow the identification of the author, the copyright shall be exercised by the natural or the legal entity that makes it publicly known only with the consent of the author, as long as the latter does not disclose his or her identity.

According to *Law no. 8 of 1996 on copyright and related rights,* there shall constitute an object of the copyright the original works of intellectual creation in the literary, artistic or scientific domain, regardless of the manner of creation, the mode or form of expression and independently of their value and destination, such as:

a) literary and journalistic writings, conferences, sermons, pleadings, lectures and any other written or oral works, as well as computer programs;
b) scientific works, written or oral, such as: communications, studies, university textbooks, school textbooks, scientific projects and documentation;
c) musical compositions, with or without lyrics;
d) dramatic, dramatic-musical works, choreographic and pantomimic works;
e) cinematographic works and any other audiovisual works;
f) photographic works and any other works expressed by a process analogous to photography;
g) works of graphic or plastic art, such as: works of sculpture, painting, engraving, lithography, monumental art, scenography, tapestry, ceramics, glass and metal plastics, drawing, design, as well as other works of art applied to products designed for practical use;
h) works of architecture, including sketches, layouts and graphic works that form an architectural project;
i) plastic works, maps and drawings in the field of topography, geography and science in general.

Without being prejudicial to the rights of the original work's author, there shall also constitute an object of the copyright derived works that were created originating from one or more pre-existing works, namely:

- translations, adaptations, annotations, documentary works, musical arrangements, and any other conversions of a literary, artistic or scientific work, representing an intellectual creative work;
- collected literary, artistic or scientific works, such as: encyclopedias and anthologies, collections or compilations of materials or data, protected or not, including databases which, by selection or arrangement of the material, constitute intellectual creations.

The following shall not benefit from the legal copyright protection:

a) ideas, theories, concepts, scientific discoveries, procedures, methods of operation or mathematical concepts and inventions, contained in a work, whatever might be the manner of the adoption, writing, explanation or expression;
b) official texts of a political, legislative, administrative or judicial nature and their official translations;

c) official symbols of the State, public authorities and organizations, such as: coat of arms, seals, flags, emblems, escutcheons, badges and medals;
d) means of payment;
e) news and press information;
f) simple facts and data.

According to art. 10 of *Law no. 8 of 1996*, the author of a work has the following moral rights:

a) to decide if, how and when the work will be made known to the public;
b) to claim acknowledgement of the authorship of the work;
c) to decide under what name the work will be made known to the public;
d) to claim the observance of the integrity of the work and to object to any changes, as well as any impairment of the work, if it is prejudicial to his or her honor or reputation;
e) to withdraw the work, indemnifying, if necessary, the holders of the exploitation rights, prejudiced by the exercise withdrawal right.

The moral rights cannot form the object of renunciation or alienation. After the author's death, the exercise of the rights provided under Art. 10 lett. a), b) and d) shall be transmitted through inheritance, according to the civil legislation, over an unlimited period of time. If there are no heirs, these rights shall revert to the collective management organisation that managed the rights of the author or, where appropriate, the organisation with the largest number of members in that domain of creation.
The author of a work shall have the exclusive patrimonial right to decide whether, how and when his or her works is used, including to consent to the use of the work by others.

The use of a work gives rise to patrimonial, distinct and exclusive rights of the author to authorize or prohibit:

a) the reproduction of the work;
b) the distribution of the work;
c) the import with a view to trading of copies from the work, made with the author's consent;
d) the renting of the work;
e) the lending of the work;
f) the communication to the public, directly or indirectly, of the work, by any means, including by providing the work to the public, so that it can be accessed from anywhere and at any time, individually, by the public;
g) the broadcasting of the work;
h) the retransmission of the work by cable;
i) the creation of derivative works.

According to Art. 15 of *Law no. 8 of 1996 on copyright and related rights*, any communication of a work, directly or by any technical means, shall be considered public if it is made in a place open to the public or in any place in which a number of people are gathering in excess of the normal circle of the members of a family or of its acquaintances.

Any communication of a work shall also be considered public, by wire or wireless means, by providing it to the public, including via Internet or other computer networks, in such a way that any members of the public may access them from any place or at any time, chosen individually.

3. Communication to the public in the interpretation of the Court of Justice of the European Union

In Case C-283/10 24 November 2011the Court of Justice of the European Union was requested to establish whether the Directive 2001/29 and in particular Article 3, par. (1) should be interpreted as considering only the communication to the public not present at the place where the communication originates and any communication of a work made directly in a place open to the public, through any public performance or direct presentation of the work. The decision of the Court and, therefore, the interpretation of the concept of communication to the public was generated by a civil dispute regarding copyright.

Thus, according to the Judgment made by the Court, between May 2004 - September 2007, the Globus Circus, in its capacity as organiser of circus and cabaret performances, publicly disseminated musical works for commercial purposes, without obtaining a "non-exclusive" licence from the Union of Composers and Musicologists in Romania - Association for Copyright (UCMR-ADA), the collective management organisation of copyright in the music field, and without paying the appropriate copyright fee.

On the view that the Globus Circus had infringed its rights, UCMR-ADA brought proceedings before the Court of Bucharest. In support of its action, it argued that, in accordance with the provision of the Copyright Law, the exercise of the right of communication to the public of musical works is subject to compulsory collective management.

The Globus Circus responded that it had entered into contracts with the authors of the musical works used in the performances which it had organised and for that use it had paid the appropriate fees to the authors. As the copyright holders had opted for the individual management of their rights under Article 123, par. (l) of *Law no. 8 of 1996 on copyright and related rights*, there was no legal basis for the claim for payment made by the collective management organisation.

The Civil Section IV of the Court of Bucharest upheld the action in part and ordered the Globus Circus to pay the sums due for the communication to the public of the musical works, for commercial purposes, between May 2004 and September 2007, as well as the corresponding late payment penalties. The appeal of the Globus Circus was dismissed by the Court of Appeal of Bucharest. Both at first instance and on appeal, it was held that Article 123^1, par. (1), letter (e) of the *Law. 8 of 1996 on copyright and related rights* expressly provided that the collective management is mandatory for the right of communication to the public of the musical works. Accordingly, the defendant was required to pay to the applicant the fee calculated

according to the methodology negotiated by the collective management organisation, no account being taken of the contracts concluded by the defendant with the authors for different performances organised between 2004 and 2007.

Under these conditions, the Globus Circus brought an appeal against the decision of the Court of Appeal Bucharest before the High Court of Cassation and Justice, in which it argued, inter alia, the incorrect implementation into the national law of Directive 2001/29. It stated that, even though the right of communication to the public was clearly defined in recitals 23 and 24 to Directive 2001/29, in the broad sense of covering all communication to the public not present at the place where the communication originates, the Article 123^1 of *Law no. 8 of 1996 on copyright and related rights* had not been amended and continued to require mandatory collective management of the right of communication to the public of the musical works, without making any distinction between direct and indirect communication.

In that way, a limitation additional to those provided for under Directive 2001/29 had been placed on the exercise of the right of communication to the public. Thus, the collective management organisation was placing itself between the authors of the musical works and the organizers of performances, with the result that the author was paying the commission charged by that collective management organisation and the user was making a double payment since, even if it paid the copyright fees, it was obliged to pay them again through the collective management organisation.

In response to those assertions, UCMR-ADA contends that there is no discrepancy between the national law and Directive 2001/29, because the scope of that directive covers only acts of communication to the public of musical works specific to the information society. Regarding the right of direct communication to the public, at issue in the case before the referring court, recital (18) to Directive 2001/29 left the Member States free to legislate and the Romanian legislature has opted for a compulsory collective management.

According to the decision of the referring court, even if the author of the musical works that is used is not a member of the collective management organisation, the user has the obligation to obtain a non-exclusive licence and to pay a fee to the collective management organisation, under Article 123^1, par. (2) of *Law no. 8 of 1996 on copyright and related rights*, which provides that, in respect of the categories of rights referred to in paragraph (1) of the same article, the collective management organisations also represent the copyright holders who have not commissioned them to do so. Moreover, there is no provision in the law enabling those copyright holders to exclude their works from collective management, whereas express provision is made to that effect in, for example, Article 3, par. (2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and the related rights applicable to satellite broadcasting and cable retransmission (OJ L 248, page 15, Special Edition, 17/vol. 1, page 134), in the case of the right of communication to the public via satellite.

The national court concludes from this that such legislation seems to impose too harsh a limitation on contractual freedom and is not consistent with the dual objective

pursued by means of the compulsory collective management of the right of communicating musical works to the public, which is both to enable works to be used and to ensure that the authors receive payment in return. In that context, the national court asks in particular whether such collective management is consistent not only with the aim of protecting copyright, but also with the aim of Directive 2001/29, which seeks to maintain a fair balance between the rights of copyright holders and those of users.

In those circumstances, the High Court of Cassation and Justice decided to suspend the proceedings and to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

"1) Is Article 3, par. (1) of Directive 2001/29 [...] to be interpreted to the effect that "communication to the public" means:

a) exclusively communication to the public not present at the place where the communication originates, or

b) also any other communication of a work which is carried out directly, in a place open to the public, using any means of public performance or direct presentation of the work?

2. In the event that, in answer to Question 1, point (a) represents the correct meaning, does that mean that the acts, referred to in point (b), by which works are communicated directly to the public do not fall within the scope of that directive or that they do not constitute communication of a work to the public, but rather the public performance of a work, within the meaning of Article 11(1)(i) of the Berne Convention?

3. In the event that, in answer to Question 1, point (b) represents the correct meaning, does Article 3(1) of Directive [2001/29] permit Member States to make statutory provision for the compulsory collective management of the right to communicate musical works to the public, irrespective of the means of communication used, even though that right can be and is managed individually by authors, no provision being made for authors to be able to exclude their works from collective management?"

Analyzing the questions addressed, the Court of Justice of the European Union in Luxembourg points that neither Article 3, par. (1) of Directive 2001/29 nor any other provisions of that directive defines the concept "communication to the public". In those circumstances, for the purposes of interpreting a concept of EU law, account should be taken not only of the wording of the provision in which it appears, but also of the context in which it is used and of the aims of the legislation of which it is part.

Regarding the context, the Court notes that the second sentence of recital (23) to Directive 2001/29 provides that the 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".

The Court points out that recital (23) to that Directive follows from the proposal of the European Parliament, which wished to specify, in that recital, that communication to the public for the purposes of that directive does not cover "direct representation or performance", a concept referring to that of ”public representation and performance”

which appears in Article 11, first paragraph, of the Berne Convention and encompasses the interpretation of the works before the public that is in direct physical contact with the actor or the performer of the works.

Thus, according to the Court, in order to exclude such direct public representation and performance from the scope of the concept "communication to the public" in the context of Directive 2001/29, that recital explains that communication to the public covers all communication to a public that is not present at the place where the communication originates.

However, in a situation such as that at issue in the case before the referring court, where – as is clear from the order for reference – musical works communicated to the public in the context of circus and cabaret performances are performed live, that element of direct physical contact exists, with the result that, contrary to the requirement referred to in the second sentence of recital 23 to Directive 2001/29, the public is present at the place where the communication originates.

Regarding the aim of Directive 2001/29, the Court notes that the directive seeks to create a general and flexible framework at EU level in order to foster the development of the information society and to adapt and supplement the current law on copyright and related rights in order to respond to technological development, which has created new ways of performing protected works.

It follows that the harmonisation sought by Directive 2001/29, to which the first sentence of recital 23 thereto makes reference, is not intended to cover ”conventional” forms of communication to the public, such as the live presentation or performance of a work.

This is borne out, moreover, by the third and fourth sentences of recital 23 to Directive 2001/29, according to which the right of communication to the public should cover any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting, and should not cover any other acts. Accordingly, that right does not cover any activity which does not involve a ”transmission” or a ”retransmission” of a work, such as live presentations or performances of a work.

Directive 2001/29 and, more specifically, Article 3, par. (1) thereof, must be interpreted according to the Court as referring only to communication to a public which is not present at the place where the communication originates, to the exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work.

4. Conclusions

The Court of Justice of the European Union concludes that Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society and, more specifically, Article 3 par. (1) thereof, must interpreted as referring only to communication to a public which is not present at the place where the communication originates, to the exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct

presentation of the work. Therefore, the provision of the Romanian law on copyright, which establishes a compulsory collective management of the right to communicate the musical works to a public which is physically present at the place where the communication originates is contrary to EU law.

The Judgment of the Court of Justice of the European Union in Case C-283/10 24 November 2011 is a strong argument for the Romanian legislators to amend *Law no. 8 of 1996 on copyright and related rights* in order to amend the current definition of the communication to the public, in order to harmonize it with the European interpretation.

References

1. *** Law n. 8 of 1996 on copyright and related rights.
2. *** Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.
3. *** The Preliminary Ruling of the Court of Justice of the European Union in Luxembourg on the interpretation of Article 3, par. (1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society in Case C-283/10 24 November 2011.