The Recent Judgment of the General Court in Case C-135/23 on the Interpretation of 'the right of communication to the public'

A. **Background**
B. **General Court's Examination**
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A. Background

1. Directive 2001/29/EC (**InfoSoc**)[1] provides for the harmonisation of certain aspects of copyright and related rights in the information society. A recent case, originally brought before a German Court, has clarified the meaning of the right of *'communication to the public'* and is relevant to operators of short-term accommodation, such as AirBnB.
2. The right of *'communication to the public'* constitutes an exclusive right of authors of copyrighted works to authorise or prohibit the use of their works.
3. Although InfoSoc does not specifically define '*communication to the public*', it does state[2] 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 Directive*'.
4. A Local German Court[3] heard a case brought by GEMA[4], the German collective management organisation that handles music copyright, against an operator of a building made up of 18 apartments (**GL**) for copyright infringement. The grounds for the case were that GL had installed televisions in the apartments it managed, each one of which was equipped with an

[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
[2] Recital 27
[3] Amtsgericht Potsdam
[4] Gesellschaft für musikalische Aufführungs-und mechanische Vervielfältigungsrechte eV

indoor, built-in antenna enabling the reception of signals and broadcasts, mainly to music.

5. The Local German Court expressed doubt as to whether this constitutes an act of '*communication to the public*' within the meaning of Article 3(1) of InfoSoc, as the building was not equipped with a centrally installed antenna enabling signals to be distributed to the apartments.
6. The Local German Court filed a request to the General Court of the European Union (CJEU) for a preliminary ruling on the question: '*Is there a communication to the public within the meaning of Article 3(1) of InfoSoc, when the operator of an apartment building provides televisions in that apartment building which each receives broadcasts via an indoor antenna without a central reception for transmitting the signals?*'.

B. General Court's Examination

1. The CJEU held that the operator of an apartment building consciously intervenes by providing television sets and indoor antennas that enable broadcasts, including of music, in rented apartments.
2. This intervention is considered an additional, profit-driven service that benefits the operator by enhancing the prestige and attractiveness of the apartments, which in turn affects rental prices and occupancy rates.
3. The CJEU deemed the distinction between central and indoor antenna irrelevant for the purposes of assessing the nature of the service provided. It stressed the importance of adhering to the principle of technological neutrality, ensuring the equal treatment of different technologies to prevent favoritism.
4. The CJEU has not provided details on how many people can access the works simultaneously or successively. National Courts must determine if the works are truly communicated to the '*public*', and the CJEU can offer guidance on this matter.
5. In order for the '*communication to the public*' right to fall within InfoSoc, protected works should actually be communicated to an indeterminate number of potential recipients.
6. The concept of '*public*' entails a significant number of people and excludes groups that are too small or insignificant.
7. If the apartments are rented out for short-term stays, such as tourist accommodation, their tenants would be considered as '*public*' because they form an indeterminate group of potential recipients.

C. Settled Case-Law

1. Various cases have been heard in National Courts and the CJEU dealing with the meaning of the right of '*communication to the public*':
    a. for a work to be considered as '*communication to* the *public*' under InfoSoc, it must be

communicated through specific technical means or to a '*new public*';

b. this includes tenants of short-term rental apartments, such as tourist accommodations, who may constitute a '*new public*' if they cannot access broadcasts without the building operator's intervention;

c. tenants who take up residence in the apartments do not qualify as '*new public*'.

2. The CJEU ruled that the provision of television sets with indoor antennas by apartment building operators can fall under the concept of '*communication to the public*' if the tenants are considered as '*new public*', according to case law, including the CJEU's rulings of:

a. 7 December 2006 in case C-306/05[5] in which the CJEU concluded that although the simple act of providing physical facilities does not amount to a '*communication to the public*'[6], the distribution of a signal by a hotel to its guests via television sets, regardless of the method of transmission, does; and

b. 18 March 2010 in case C-136/09[7] in which it held that the installation of television sets in hotel rooms and their connection to the hotel's *'central antenna',* which enables the television sets to receive broadcasts, constitutes an act of *'communication to the public'*.

D. Key Takeaways

1. The CJEU's judgment in this case clarifies that providing tenants of rented apartments with TVs with indoor antennas that allow broadcasting copyrighted works without further intervention is '*communication to the public*' for short-term lets.

2. This is particularly relevant to tourist accommodations, such as Airbnb, as this type of rental may impact the number of people accessing the works.

3. Operators of short term let apartments must compensate the relevant copyright collecting management organisations.

4. The CJEU also held that the:

a. difference between central antenna and indoor, built-in antennas is of minor importance; and

b. provision of television broadcasting by GL in this case falls within the exclusive right of authors to authorise or prohibit the '*communication to the public*' of their works, unless tenants take up principal or secondary residence in the apartments at issue.

[5] Spanish Society of Authors and Publishers (Sociedad General de Autores y Editores, SGAE) v Rafael Hoteles SA
[6] Article 3(1) of InfoSoc
[7] Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon ATHINA – the Society of Authors of Dramatic and Audiovisual works' v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia



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