OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 29 June 2011 (1)

Case C‑135/10

SCF Consorzio Fonografici
v
Marco Del Corso

(Reference for a preliminary ruling from the Corte d'appello di Torino (Italy))

(Copyright and related rights — Directives 92/100/EEC and 2006/115/EC — Rights of performers and phonogram producers — Article 8(2) — Communication to the public — Indirect communication of phonograms broadcast by radio in the waiting room of a dental practice — Need for a profit-making purpose — Equitable remuneration)

Table of contents

VIII – Conclusion

I – Introduction

1. Just as Gutenberg's invention of the printing press ultimately led to copyright protection of written works, Edison's invention of the phonograph not only increased the economic importance of copyright protection of musical works, but also paved the way for the introduction of related rights for performers and phonogram producers. If a phonogram is used, this affects not only the author's right in the communicated copyright work, but also the related rights of performers and phonogram producers.

2. The present reference for a preliminary ruling from the Corte d'appello di Torino (Court of Appeal, Turin; 'the referring court') concerns the right to equitable remuneration under Article 8(2) 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 (2) and 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 (codified version), (3) which must be paid in respect of communication to the public of a phonogram already published for commercial purposes.

3. The referring court wishes to know, first of all, whether a dentist who makes radio broadcasts audible in his practice is required to pay equitable remuneration for the indirect communication to the public of phonograms communicated in the radio broadcasts.

4. Secondly, the referring court asks whether the rules of international law on which the rules of Union law concerning the right to equitable remuneration are based are directly applicable in a dispute between private individuals and what the relationship is between those rules of international law and the rules of Union law.

5. The substance of the first question is closely connected with SGAE v Rafaeles Hoteles. (4) In that case, the Court found, first of all, that 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 certain aspects of copyright and related rights in the information society (5) exists where a hotel operator distributes a signal by means of television sets provided in its guest bedrooms, irrespective of the technique used to transmit the signal. It also found that the private nature of guest bedrooms does not preclude communication to the public. In the present case, the question arises in particular whether these principles, which concern communication to the public of copyright works under Article 3(1) of Directive 2001/29, can be applied to the concept of communication to the public within the meaning of Article 8(2) of Directive 92/100 and of Directive 2006/115, which concerns the related rights of performers and phonogram producers.

6. In addition, the present case is closely connected with Case C‑162/10 Phonographic Performance, in which I am delivering my Opinion on the same date as the Opinion in the present case. In Phonographic Performance the question arises in particular whether the operator of a hotel or a guesthouse which provides televisions and/or radios in bedrooms to which it distributes a broadcast signal is required to pay equitable remuneration for the indirect communication to the public of the phonograms which are used in the radio and television broadcasts.

II – Applicable law

A – International law

1. The Rome Convention

7. Article 12 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961 ('the Rome Convention') (6) provides:

'If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.'

8. Article 15(1)(a) of the Rome Convention provides:

'1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

(a) private use'.

9. Article 16(1)(a) of the Rome Convention states:

'1. Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:

(a) as regards Article 12:

(i) it will not apply the provisions of that Article;

(ii) it will not apply the provisions of that Article in respect of certain uses;

(iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;

(iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection;

…'

10. Italy is a Contracting Party to the Rome Convention and has made a declaration pursuant to Article 16(1)(a)(ii), (iii) and (iv).

11. The European Union is not a Contracting Party to the Rome Convention. Only States are able to accede to the Convention.

2. The WPPT

12. The WIPO Performances and Phonograms Treaty (WPPT) of 20 December 1996 (7) contains rules of international law on related rights, which go further than the Rome Convention.

13. Article 1 of the WPPT provides:

‘Relation to Other Conventions

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations done in Rome, October 26, 1961 (hereinafter the “Rome Convention”).

(2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

(3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.’

14. Article 2 of the WPPT, which lays down definitions, provides in points (f) and (g):

‘For the purposes of this Treaty:

(f) “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof;

(g) “communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.’

15. Chapter II of the WPPT lays down the rights of performers and Chapter III the rights of producers of phonograms. Chapter IV of the WPPT contains common provisions for performers and producers of phonograms. Article 15 of the WPPT, which is contained in that chapter, concerns the right to remuneration for broadcasting and communication to the public, and provides:

‘(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may, in a notification deposited with the Director-General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.'

16. Article 16 of the WPPT, which is entitled 'Limitations and Exceptions', provides:

'(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.'

17. Under Article 23(1) of the WPPT, Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

18. Italy and the European Union are Contracting Parties to the WPPT. Neither Italy nor the European Union has made a declaration pursuant to Article 15(3) of the WPPT.

3. TRIPs

19. Article 14 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), (8) which regulates the protection of performers, producers of phonograms (sound recordings) and broadcasting organisations, provides:

'1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorisation: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorisation: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.

…

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, mutatis mutandis, to the rights of performers and producers of phonograms in phonograms.'

B – European Union law (9)

1. Directive 92/100

20. The 5th, 7th to 10th, 15th to 17th and 20th recitals in the preamble to Directive 92/100 read as follows:

‘(5) Whereas the adequate protection of copyright works and subject-matter of related rights protection by rental and lending rights as well as the protection of the subject-matter of related rights protection by the fixation right, reproduction right, distribution right, right to broadcast and communication to the public can accordingly be considered as being of fundamental importance for the Community’s economic and cultural development;

…

(7) Whereas the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky; whereas the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned;

(8) Whereas these creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons; whereas the pursuit of such activities must be made easier by providing a harmonised legal protection within the Community;

(9) Whereas, to the extent that these activities principally constitute services, their provision must equally be facilitated by the establishment in the Community of a harmonised legal framework;

(10) Whereas the legislation of the Member States should be approximated in such a way so as not to conflict with the international conventions on which many Member States’ copyright and related rights laws are based;

…

(15) Whereas it is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must retain the possibility to entrust the administration of this right to collecting societies representing them;

(16) Whereas the equitable remuneration may be paid on the basis of one or several payments a[t] any time on or after the conclusion of the contract;

(17) Whereas the equitable remuneration must take account of the importance of the contribution of the authors and performers concerned to the phonogram or film;

…

(20) Whereas Member States may provide for more far-reaching protection for owners of rights related to copyright than that required by Article 8 of this Directive.’

21. Article 8 of Directive 92/100 is entitled ‘Broadcasting and communication to the public’. It 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.’

22. Article 10 of Directive 92/100 provides:

‘Limitations to rights

1. Member States may provide for limitations to the rights referred to in Chapter II in respect of:

(a) private use;

…

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention.

3. Paragraph 1(a) shall be without prejudice to any existing or future legislation on remuneration for reproduction for private use.’

2. Directive 2006/115

23. Directive 92/100 has been consolidated in Directive 2006/115. Recitals 3, 5 to 7, 12, 13 and 16 in the preamble to Directive 2006/115 read as follows:

‘(3) The adequate protection of copyright works and subject-matter of related rights protection by rental and lending rights as well as the protection of the subject-matter of related rights protection by the fixation right, distribution right, right to broadcast and communication to the public can accordingly be considered as being of fundamental importance for the economic and cultural development of the Community.

…

(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

(6) These creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons. The pursuit of such activities should be made easier by providing a harmonised legal protection within the Community. To the extent that these activities principally constitute services, their provision should equally be facilitated by a harmonised legal framework in the Community.

(7) 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.

…

(12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them.

(13) The equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract. It should take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.

…

(16) 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.'

24. Chapter II of the directive governs rights related to copyright. Article 8 of the directive, which concerns broadcasting and communication to the public, 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.'

25. Article 10 of the directive is entitled ‘Limitations to rights’ and reads as follows:

‘1. Member States may provide for limitations to the rights referred to in this Chapter in respect of:

(a) private use;

…

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.

However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention.

3. The limitations referred to in paragraphs 1 and 2 shall be applied only in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

26. Article 14 of the directive is entitled ‘Repeal’ and provides:

‘Directive 92/100/EEC is hereby repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives as set out in Part B of Annex I.

References made to the repealed Directive shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex II.’

3. Directive 2001/29

27. Recitals 9 to 12, 15, 23, 24 and 27 in the preamble to Directive 2001/29 read as follows:

‘(9) 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. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as “on-demand” services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.

…

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy worldwide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

…

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

…

(27) 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.'

28. Article 3(1) and (2) of Directive 2001/29 provides:

'1. 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. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

…

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.'

C – National law

29. Article 72 of Italian Law No 633 of 22 April 1941 on the protection of copyright and other rights relating to its exercise ('the Law on copyright') provides:

'Without prejudice to the rights conferred on the author under Title I, the producer of phonograms shall have the exclusive right, for the period and under the conditions laid down in the articles that follow:

(a) to authorise the direct or indirect, temporary or permanent reproduction, by any means and in any form, in whole or in part, of his phonograms, and by any process of duplication;

(b) to authorise the distribution of copies of his phonograms. The exclusive distribution right shall not be exhausted within the territory of the European Community, except in relation to the first sale of the medium containing the phonogram by the producer or with his consent in a Member State;

(c) to authorise the rental or lending of copies of his phonograms. That right shall not be exhausted by the sale of the copies or their distribution in any form; and

(d) to authorise the making available to the public of his phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them. That right shall not be exhausted by any act making them available to the public.'

30. Article 73 of the Law on copyright (last amended by Article 12(1) of Legislative Decree No 68 of 9 April 2003) provides:

'1. Irrespective of the royalties for distribution, rental and lending to which they are entitled, producers of phonograms, as well as performers whose performance has been fixed or reproduced on phonograms, shall be entitled to receive remuneration for the use for profit of the phonograms, by means of cinematography, radio and television broadcasting, including communication to the public, via satellite, at public dances, in public establishments and on the occasion of any other public use of the phonograms themselves. It is for the producer to exercise that right, sharing the remuneration with the performers concerned. …'

31. The following Article 73a of the Law on copyright (introduced by Article 9(1) of Legislative Decree No 685 of 16 November 1994) provides:

'The performers and producer of the phonogram of which use has been made shall be entitled to equitable remuneration even where the use to which Article 73 refers was not for profit. …'

III – Facts, procedure before the national courts and questions referred for a preliminary ruling

32. Società Consortile Fonografici (SCF) is a copyright management society for Italy and abroad. It represents performers and phonogram producers.

33. Being responsible for managing, collecting and distributing the royalties of its associated phonogram producers in Italy and abroad, SCF performs the following activities in particular:

(a) collection of remuneration for the commercial use of phonograms in radio and television, including communication to the public via satellite, in cinematography, at public dances, in public commercial concerns and on the occasion of any other use,

(b) collection of remuneration for non-commercial uses,

(c) management of licensing rights for the retransmission of phonograms by cable, and

(d) management of reproduction rights for phonograms.

34. SCF conducted negotiations with the Associazione Dentisti Italiani (Association of Italian Dentists) with a view to concluding a collective agreement quantifying the relevant equitable remuneration within the meaning of Articles 73 or 73a of the Law on copyright for the communication of phonograms, including distribution in private professional practices whatever the technique used.

35. As those negotiations were unsuccessful, SCF brought an action before the Tribunale di Torino (Turin District Court) against Dr Del Corso, a dentist, claiming that he was broadcasting protected phonograms as background music in his private dental practice in Turin, and that that activity, inasmuch as it constituted 'communication to the public' within the meaning of the Italian Law on copyright, international treaty law and Union law, required the payment of equitable remuneration. The amount of remuneration was to be fixed in subsequent proceedings.

36. Marco Del Corso claimed that the action should be dismissed. He argued, first, that SCF could claim copyright only if he used the phonograms himself; however, the phonograms were being broadcast on the radio in his private practice. The broadcaster was therefore liable to pay equitable remuneration, but no equitable remuneration was owed for listening to the broadcast. Secondly, there was no communication to the public, since a private dental practice could not be regarded as a public place. Patients could attend the practice only by appointment.

37. The Tribunale di Torino dismissed the application. It based its ruling on the grounds that there was no communication for profit and that the dental practice was also private, and thus not a public place or a place open to the public.

38. SCF appealed against that judgment to the referring court. Marco Del Corso claimed that the appeal should be dismissed.

39. The Public Prosecutor of the Italian Republic at the referring court intervened in the proceedings, maintaining that the appeal should be dismissed.

40. The referring court takes the view that the provisions of international, Union and national law all provide for a right on the part of phonogram producers to receive remuneration for the use of the phonograms they have produced, as a result of their communication to the public. The right to equitable remuneration for further communication to the public is neither excluded by nor encompassed by the equitable remuneration already paid by the broadcaster. While the authorisation issued to a broadcaster presupposes that the broadcast may be privately enjoyed by persons in possession of the technical means of reception, use in a public context, either because it takes place in a public establishment or because it can be enjoyed by a great many people as a result of potential and indiscriminate access, gives rise to an additional use for which separate remuneration must be paid. The question arises, however, whether the concept of communication

to the public of phonograms also includes their transmission within private professional practices, such as dental practices, which patients generally attend by prior appointment and in which the radio programme is played irrespective of the will of the patient.

41. It is against that background that the referring court has asked the following questions:

‘(1) Are the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961, the TRIPs Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights) and the WIPO Treaty on Performances and Phonograms (WPPT) directly applicable within the Community legal order?

(2) Are the abovementioned sources of uniform international law also directly effective within the context of private-law relationships?

(3) Do the concepts of “communication to the public” contained in the abovementioned treaty-law texts mirror the Community concepts contained in Directives 92/100 and 2001/29 and, if not, which source should take precedence?

(4) Does the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, for the benefit of patients of those practices and enjoyed by them without any active choice on their part, constitute “communication to the public” or “making available to the public” for the purposes of the application of Article 3(2)(b) of Directive 2001/29?

(5) Does such an act of transmission entitle the phonogram producers to the payment of remuneration?’

IV – Procedure before the Court

42. The order for reference was received at the Registry of the Court on 15 March 2010.

43. In the written procedure, observations were submitted by SCF, Marco Del Corso, the Italian Government, Ireland, and the Commission.

44. Representatives of the applicant in the main proceedings, SCF, Marco del Corso, Ireland, the Italian, Greek and French Governments and the Commission took part at the joint hearing in the present case and in Case C-162/10 Phonographic Performance, which was held on 7 April 2011.

V – Preliminary remarks

45. By its questions, the referring court is essentially seeking to ascertain whether a dentist who communicates radio broadcasts in his practice indirectly communicates to the public the phonograms used in the radio broadcasts and is required to pay equitable remuneration.

46. I will begin by examining the fourth and fifth questions, which seek an interpretation of provisions of Union law. I will then consider the first to third questions, which concern provisions of international law.

VI – The fourth and fifth questions

47. By the fourth and fifth questions, the referring court would like to know whether a dentist who makes a radio programme audible in his waiting room communicates to the public or makes available to the public within the meaning of Article 3(2)(b) of Directive 2001/29 the phonograms which are used in the radio broadcast and is required to pay equitable remuneration.

A – Main arguments of the parties

48. At the hearing, all the parties — in some cases departing from their written observations — stated that Article 8(2) of Directive 2006/115 and of Directive 92/100, and not Article 3 of Directive 2001/29, is the relevant provision in the present case.

49. In the view of SCF and the French Government, there is communication to the public within the meaning of Article 8(2) of Directive 2006/115. The concept of communication to the public in Article 3(1) of Directive 2001/29 and in Article 8(2) of Directive 2006/115 must be given a uniform and consistent interpretation throughout the European Union. SGAE, which concerned Article 3(1) of Directive 2001/29, may therefore be applied by analogy to Article 8(2) of Directive 2006/115. This follows, first of all, from the wording and purpose of the directives. It is not precluded by the fact that Directive 2006/115 does not contain a recital comparable to recital 23 in the preamble to Directive 2001/29, under which the concept of communication to the public should be understood in a broad sense. Recital 23 is redundant in that respect. In so far as a different level of protection is taken to exist in the two directives, this relates to the form of the rights, but not to the concept of communication to the public. Furthermore, it does not follow from the fact that authors are granted an exclusive right under Article 3(1) of Directive 2001/29, whilst phonogram producers and performers are only granted an economic right under Article 8(2) of Directive 2006/115, that the concept of communication to the public should be given a different interpretation in those two provisions. What is more, a consistent interpretation is also suggested by the fact that in international law the WPPT and the WCT likewise provide for a consistent concept of communication to the public. Besides, the Court's judgment in SENA (10) is not applicable, because in that judgment the Court only dealt with the equitableness of the remuneration. Moreover, it is clear from the scheme of Directive 2001/29 that the interests of other interested parties should not be taken into consideration in interpreting the concept of communication to the public. Lastly, the French Government points out that a uniform interpretation of the concept of communication to the public is also necessary because it is important for the term of protection of copyright and related rights under Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights. (11)

50. In the view of SCF and the French Government, communication to the public must be taken to exist in a case like the present one.

51. First of all, SCF points out that each dentist accounts for a substantial number of patients on average. The public nature of the communication is also not precluded by the fact that the patients have access to the dental practice only by appointment and on a contractual basis.

52. In so far as, secondly, the question arises whether the pursuit of a profit‑making purpose is a condition for communication to the public, SCF points out that this question has not been asked by the referring court. In the alternative, SCF argues that such a purpose is not necessary. First, it is not provided for by the wording of Article 8(2) of Directive 2006/115. Furthermore, the scheme of Directive 2006/115 and of Directive 2001/29 suggests that this is not the case. According to Article 5 of Directive 2001/29, which, under Article 10(2) of Directive 2006/115, is also applicable to the related rights of phonogram producers and of performers, the absence of a profit-making purpose is taken into consideration only in relation to exceptions and limitations

and is not therefore to be taken into consideration in connection with the concept of communication to the public. Moreover, such a purpose is also unnecessary according to case-law. Lastly, it is also irrelevant whether communication to the public affects the choice of dentist. If the aim of a high level of protection for copyright is to be achieved, the communication of phonograms in connection with the exercise of professions cannot be automatically excluded from the scope of the protection afforded by the relevant intellectual property rights.

53. Thirdly, SCF and the French Government argue that the user of the phonogram must be considered to be, not the patients, but the dentist. The fact that communication takes places irrespective of the will of the patient and that the patient may have no interest in the communication is not therefore relevant.

54. Marco Del Corso considers the fourth and fifth questions to be inadmissible because they are not relevant to the decision. It has not been proven that he communicated works fixed in phonograms to his patients or that he charged an entrance fee.

55. Furthermore, there is neither communication to the public nor making available to the public in this instance. Communication to the public of a phonogram exists only where the phonogram is actually communicated to an audience in a public place or a place open to the public or where the phonogram is communicated in private premises to a paying audience of significant size. The necessary public aspect is not present here. First of all, the patients of a dental practice do not constitute an audience, as they do not have an autonomous social, economic or legal dimension. Secondly, the specific, personal and intellectual service provided by the dentist on a contractual basis is the primary service. If music is played in this context, no profit-making purpose is thus pursued. Thirdly, the dentist, who must also safeguard the personal rights of his patients, cannot provide his services simultaneously, with the result that his patients are not gathered in his practice at the same time. Fourthly, the patients have not paid an entrance fee. Fifthly, the calculations made by SCF regarding the number of patients of a dentist are not accurate. The phonograms are also not made available to the public. In addition, Marco Del Corso argues, further, that the position taken by SCF would mean that the enjoyment of music in private premises by a private individual would constitute communication to the public.

56. In the view of the Italian Government, the fourth question must be answered in the negative. The Court accepted the existence of communication to the public within the meaning of Article 3(1) of Directive 2001/29 in SGAE. However, Article 8(2) of Directive 92/100 is applicable in the present case. There is no communication to the public within the meaning of that provision in this instance. First, a dental practice is a private place in which patients are present only by appointment. However, even if this physical approach is not adopted, but a functional approach, no communication to the public can be taken to exist in a case like the present one. It is not relevant how many people are present at the same time in the practice. A successive/cumulative approach must be used. However, consideration must be given to the purposes pursued by the patients. The public who are relevant in the context of the directive are only those who are prepared to pay money with a view to the possibility of listening to the content of the phonograms, or taking that possibility into consideration. It is not justified to grant phonogram producers and performers an economic right if communication to the public does not itself have any economic importance. Economic importance must be taken to exist in relation to hotel guests, since access to radio and television programmes is part of the package offered by the hotel operator, which is taken into consideration by the hotel guests. Economic importance must be rejected, however, in the case of patients in a dental practice. The communication of phonograms may make the patients' visit more pleasant, but does not have a direct or indirect connection with the value of the service provided by the dentist. In the view of the Italian

Government, there is no need to answer the fifth question, since the fourth question is to be answered in the negative.

57. In the view of the Commission and Ireland, the concept of communication to the public within the meaning of Article 8(2) of Directive 92/100 cannot be directly equated with the concept of communication to the public in Article 3(1) of Directive 2001/29. Rather, in Article 8(2) of Directive 2006/115 that concept must be given a narrower interpretation having regard to the differences between those two provisions. In particular, it must be borne in mind that under Article 3(1) of Directive 2001/29 the author is accorded an exclusive right, whilst under Article 8(2) of Directive 92/100 phonogram producers are granted only a right to equitable remuneration. In addition, it would not be consistent with international law and Union law if authors and phonogram producers were granted the same protection.

58. In its written observations, the Commission stated, first of all, that in interpreting the concept of communication within the meaning of Article 8(2) of Directive 2006/115 regard must be had to Article 2(g) and Article 15 of the WPPT. Indirect transmissions are therefore also covered and it is sufficient that the sounds fixed in the phonograms are made audible. Communication must thus be taken to exist in a case like the present one. However, the communication is not to the public. The Court's case-law on Article 3(1) of Directive 2001/29 cannot be applied by analogy to Article 8(2) of Directive 92/100. Rather, consideration must be given to the public or private nature of the place of communication and the economic aim of the communication. Such an aim is absent in the present case, because a medical practitioner is selected not on the basis of the criterion of the attractiveness of the waiting room, but according to personal trust, and the communication has no bearing on the quality of the service provided by the medical practitioner.

59. At the hearing, on the other hand, the Commission took the view that communication cannot be taken to exist in a case like the present one. In the Commission's view, in SGAE the Court merely defined the public aspect of communication, but not the concept of communication. The concept of communication should be interpreted in the way proposed by Advocate General Kokott in her Opinion in Football Association. (12) According to recital 23 in the preamble to Directive 2001/29, the concept of communication to the public covers only persons not present at the place where the transmission originates. However, the transmission of a broadcast on a radio in a dental practice takes place before an audience present at the place where the transmission originates. The situation could be different if the signal communicated by means of such a radio was first fed into a network.

B – Admissibility of the questions

60. The fourth and fifth questions are admissible.

61. First, the plea raised by Marco Del Corso that these questions are irrelevant because the communication of the radio programme to the patients has not been proven must be rejected. It is clear from the order for reference that the referring court takes such communication to exist. On the basis of the relationship of cooperation between the national court and the Court of Justice in the context of preliminary ruling proceedings under Article 267 TFEU, the Court is required to base its ruling on the facts as stated by the referring court. (13)

62. Secondly, in so far as Marco Del Corso claims that he did not charge his patients an entrance fee in respect of the communication of the radio programmes, this likewise does not mean that the questions are irrelevant. The referring court is seeking to ascertain whether there

may also be a right to remuneration against the dentist in such a case on the basis of the rules of Union law.

C – Legal assessment

63. The fourth and fifth questions have been referred against the background of the Court's judgment in SGAE. (14) In that judgment, the Court ruled that a hotel operator which distributes a television signal using televisions installed in the hotel bedrooms communicates to the public the works used in the television broadcast for the purposes of Article 3(1) of Directive 2001/29. That provision regulates the exclusive right of authors to authorise or prohibit any communication to the public of their works. In the present case, the parties are in dispute in particular as to whether the principles developed in that ruling, which concerned copyright and hotel bedrooms, can be applied by analogy to the related rights of phonogram producers and performers, where a radio broadcast in which phonograms are used is audible in a dental practice. Against this background, I would first like to examine the interpretation of Article 3(1) of Directive 2001/29 by the Court in SGAE (1). I will then explain the provision of Union law which is relevant in the present case (2) and how that provision is to be interpreted (3).

1. The interpretation of Article 3(1) of Directive 2001/29 by the Court

64. The Court stated the following grounds for its ruling that the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive:

65. First of all, it referred to the recitals in the preamble to Directive 2001/29. It began by referring to recital 23, according to which the concept of communication to the public should be understood in a broad sense. (15) It also stated that only in this way is it possible to achieve the objective mentioned in recitals 9 and 10, of establishing a high level of protection of authors and giving them an appropriate reward for the use of their work. (16)

66. Secondly, the Court cited its case-law on other provisions of Union law. (17)

67. Thirdly, it considered the cumulative effects of the fact that, usually, guests in hotel rooms follow each other in quick succession and that making the works available could therefore become very significant. (18)

68. Fourthly, the Court found that under Article 11bis(1)(ii) of the revised Berne Convention, an independent communication to the public exists where a broadcast made by an original broadcasting organisation is retransmitted by another broadcasting organisation. Thus, the work is communicated indirectly to a new public through the communication of the radio and television broadcast. (19)

69. Fifthly, the Court defined the public aspect of indirect communication, with reference to the WIPO Guide, on the basis of the authorisation already granted to the author. It explained that the author's authorisation to broadcast his work covers only direct users, that is, the owners of reception equipment who, personally within their own private or family circles, receive the programme. However, if transmission is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work. The communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. (20)

70. Sixthly, it found that the clientele of a hotel constitutes a new public. The hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. (21)

71. Seventhly, the Court pointed out that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. (22)

72. Eighthly, the Court considered that giving access to the broadcast works constitutes an additional service performed with the aim of obtaining some benefit. In a hotel it is even of a profit-making nature, since that service has an influence on the hotel's standing and, therefore, on the price of rooms. (23)

73. Ninthly, however, the Court qualified its findings, indicating that the mere provision of reception equipment does not as such amount to communication within the meaning of Article 3(1) of Directive 2001/29. On the other hand, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of that provision. (24)

2. The relevant provision in the present case

74. In its fourth question, the national court makes reference to Article 3(2)(b) of Directive 2001/29. That provision is not relevant in the present case. Article 3(2)(a) and (b) of Directive 2001/29 is not applicable because that provision regulates only the case of making available to the public, where members of the public may access the phonograms or the representations or performances from a place and at a time individually chosen by them. That is not the case with the transmission of a radio programme. For the sake of completeness, I would point out that Article 3(1) of Directive 2001/29 is also irrelevant, since the present case does not concern copyright works, but the related rights of phonogram producers and of performers.

75. Instead, Article 8(2) of Directive 92/100 and Article 8(2) of Directive 2006/115 is relevant. Under those provisions, Member States must 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 ensure that this remuneration is shared between the relevant performers and phonogram producers.

76. Since the Court has the power to provide the referring court with all the guidance that is relevant for assessing the case in the main proceedings, (25) I will examine below the interpretation of those relevant provisions. Furthermore, because Directive 92/100 has been consolidated in Directive 2006/115 and Article 8(2) is identical in both directives, I will consider only Article 8(2) of Directive 2006/115 hereinafter, although the statements made also apply mutatis mutandis to Article 8(2) of Directive 92/100. In addition, for the sake of simplicity, I will consider hereinafter only the case of a phonogram published for commercial purposes, although the statements made also apply mutatis mutandis to a reproduction of such a phonogram.

3. The interpretation of Article 8(2) of Directive 2006/115

77. I would first like to explain that the requirements under Article 8(2) of Directive 2006/115 are autonomous Union law concepts (a), which must be interpreted having regard to the

international law context (b). I will then consider the concept of communication to the public (c) and the other requirements under Article 8(2) of Directive 2006/115 (d).

(a) Autonomous Union law concepts

78. It must be noted that, in the absence of a reference to the law of the Member States, the concepts used in Article 8(2) of the directive are autonomous Union law concepts. In the interest of a uniform application of Union law in all Member States and having regard to the principle of equality throughout the European Union, they must be given a uniform interpretation. (26) Only then is it also possible to achieve the objective, mentioned in recital 6 in the preamble to Directive 2006/115, of facilitating creative, artistic and entrepreneurial activities through a harmonised legal framework in the Community.

79. However, in certain cases, only very limited harmonisation can be undertaken, despite the existence of an autonomous Union law concept, with the result that the regulatory intensity of the concept is very low. In such cases, only a broad regulatory framework is laid down in Union law, which must be filled out by the Member States. (27) The Court proceeded from this basis with regard to the equitableness of remuneration within the meaning of Article 8(2) of Directive 2006/115. (28) However, as the regulatory intensity of a concept must be assessed individually for each concept mentioned in a provision, it is not possible to draw any inferences as to the other concepts used in Article 8(2) of Directive 2006/115.

(b) International law and Union law context

80. It must also be borne in mind that the provision governing the right to equitable remuneration under Article 8(2) of Directive 2006/115 must be interpreted having regard to its international law context.

81. The right to equitable remuneration is laid down in international law in Article 12 of the Rome Convention and in Article 15 of the WPPT. Article 8(2) of Directive 2006/115 must thus be interpreted having regard to those provisions of international law.

82. As far as the WPPT is concerned, this is because the European Union itself is a Contracting Party. It is settled case-law that European Union legislation must be interpreted in a manner that is consistent with international law, in particular where the European Union is a Contracting Party and that European Union legislation is intended to give effect to that international law. (29)

83. As far as the Rome Convention is concerned, it must be pointed out that the European Union itself is not a Contracting Party to that convention. However, it is clear from recital 7 in the preamble to Directive 2006/115, in accordance with which harmonisation should be carried out in such a way as not to conflict with the Rome Convention, that the provisions of the Rome Convention must be taken into account.

(c) The concept of communication to the public

84. On the basis of its wording, the concept of communication to the public can be divided into two elements. First of all, there must be communication. Secondly, that communication must be to the public.

(i) The concept of communication

85. Communication within the meaning of Article 8(2) of Directive 2006/115 is not expressly defined in that directive. However, it is possible to infer indications as to the interpretation of that concept from the wording and the context of that provision.

86. As has been explained above, (30) in interpreting the concept of communication in that provision regard must be had to the provisions of Article 12 of the Rome Convention and of Article 15 of the WPPT. Article 15(1) in conjunction with Article 2(g) of the WPPT is particularly relevant to the concept of communication. Article 15(1) provides that performers and producers of phonograms enjoy the right to a single equitable remuneration for direct or indirect use for broadcasting or for any communication to the public. In Article 2(g) of the WPPT, the concept of communication to the public of a phonogram is defined as communication to the public by any medium, otherwise than by broadcasting, of the sounds or the representations of sounds fixed in a phonogram. It is further provided that it is sufficient for the purposes of communication to the public within the meaning of Article 15 of the WPPT if the sounds fixed in a phonogram are made audible or represented.

87. It is possible to infer the following conclusions as regards the concept of communication within the meaning of Article 8(2) of Directive 2006/115:

88. First of all, Article 8(2) of Directive 2006/115 covers both direct and indirect communications. This is shown, first, by that provision's open wording and drafting history. It is clear from the drafting history of Directive 92/100 that it was not considered necessary to clarify further the concept of communication by adding the words 'direct or indirect', since through the use of the concept of communication it was evident that indirect communications would also be covered. (31) That interpretation is also now suggested, since it has entered into force, by Article 15 of the WPPT, under which a right must also exist for indirect transmissions. (32)

89. Secondly, it is sufficient for the purposes of communication if the sounds fixed in the phonogram are made audible. It is irrelevant whether a customer has actually heard the sounds. This is suggested, first, by Article 2(g) of the WPPT, which refers to audibility. Furthermore, according to the spirit and purpose of Directive 2006/115, it would appear to be sufficient if the customer has the legal and practical possibility of enjoying the phonograms. (33) Such an interpretation also has the benefit of corresponding to the interpretation of the concept of communication to the public within the meaning of Article 3(1) of Directive 2001/29.

90. If these rules are taken into consideration, there is much to suggest that the concept of communication in Article 8(2) of Directive 2006/115 is to be interpreted as meaning that, where a dentist in a case like the present one makes radio broadcasts audible to his patients in his practice by means of a radio, he indirectly communicates the phonograms used in the radio broadcasts.

91. The Commission argues in this connection that the concept of communication to the public within the meaning of Article 8(2) of Directive 2006/115 may not, in principle, be interpreted more broadly than the concept of communication to the public in Article 3(1) of Directive 2001/29. It must be borne in mind that the European Union legislature intended to provide a higher level of protection for copyright than for the related rights of phonogram producers and performers, and it is therefore contrary to the system to grant phonogram producers and performers more extensive rights under Article 8(2) of Directive 2006/115 than authors under Article 3(1) of Directive 2001/29.

92. The questions therefore arise whether regard must be had to recitals 23 and 27 in the preamble to Directive 2001/29 in interpreting the concept of communication to the public within

the meaning of Article 8(2) of Directive 2006/115 and whether this means that there is no communication within the meaning of Article 8(2) of Directive 2006/115 in a case like the present one.

– Consideration of recital 27 in the preamble to Directive 2001/29

93. The question arises, first of all, whether, having regard to recital 27 in the preamble to Directive 2001/29, no communication can be taken to exist in a case like the present one.

94. According to that recital, the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication. That recital must be seen in conjunction with the Agreed Statement of the Contracting Parties concerning Article 8 of the WCT. According to that Statement, the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the WCT or the Berne Convention.

95. In my view, this cannot be understood to mean that no communication within the meaning of Article 3(1) of Directive 2001/29 or Article 8(2) of Directive 2006/115 can be taken to exist in a case like the present one. (34) I consider that it should be construed as meaning that persons who provide players, but do not at the same time control access to copyright works, do not make any communication to the public. This is the case, for example, where televisions or radios are sold or rented or where an internet service provider merely provides access to the internet. In a case like the present one, however, the dentist does not simply provide the players. Instead, he makes the radio broadcasts audible to his patients himself, and thus indirectly the phonograms used in the radio broadcasts.

96. Recital 27 in the preamble to Directive 2001/29 does not therefore preclude the existence of communication within the meaning of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 in a case like the present one.

– Consideration of recital 23 in the preamble to Directive 2001/29

97. According to recital 23 in the preamble to Directive 2001/29, the right of communication to the public should be understood as covering all communication to the public not present at the place where the communication originates.

98. At the hearing (departing from its previous written submissions), the Commission argued that, having regard to that recital, there were doubts as to the existence of communication. It made reference in this connection to the Opinion of Advocate General Kokott in Football Association Premier League and Others, (35) in which she took the view, with reference to that recital, that reception of a broadcast signal by an automatic reception television does not constitute communication within the meaning of Article 3(1) of Directive 2001/29. Communication exists only where autonomous retransmission of the original broadcast is made, for example where the original signal of a broadcast is received and transmitted by a distributor to different devices. (36) Against this background, the Commission now takes the view that in SGAE the Court considered only the element of the public nature of communication, but not the element of communication itself.

99. That argument cannot be accepted.

100. It cannot be inferred from recital 23 in the preamble to Directive 2001/29 that no communication within the meaning of Article 3(1) of Directive 2001/29 can be taken to exist in a case like the present one.

101. Contrary to the claims made by the Commission, in SGAE the Court did not merely interpret the element of the public nature of the communication. Rather, in that judgment it ruled that it is sufficient, for the purposes of the existence of communication within the meaning of Article 3(1) of Directive 2001/29, if access to a work is provided through the distribution of a signal by means of a television. The Court expressly made clear that communication to the public exists irrespective of the technique used to transmit the signal. (37) In my view, this clarification can only be construed as meaning that it is irrelevant to the existence of communication whether the televisions receive the broadcast themselves or whether there has first been a new transmission of the signal to the television, which can be distinguished from the original broadcast.

102. There are thus two mutually incompatible approaches to the interpretation of the concept of communication. The approach adopted by the Court emphasises the aim of adequate protection of authors, irrespective of the technical details, and will therefore be referred to hereinafter as the functional approach. The approach advocated by the Commission, on the other hand, focuses on whether there has been a retransmission of the signal or whether automatic reception equipment is used. Because this approach takes account of technical details, it will be referred to hereinafter as the technical approach.

103. In my view, there are more convincing grounds in support of the functional approach employed by the Court.

104. First of all, the functional approach is suggested by the aim of adequate protection of copyright and related rights, as expressed in recitals 9 and 10 of Directive 2001/29 and recitals 5, 12 and 13 of Directive 2006/115. If that aim is taken into consideration, it would seem more convincing to focus on the recipients covered by the authorisation or by the equitable remuneration.

105. Secondly, the functional approach is not precluded by the fact that it is not stipulated in international law. It is true that there has been no consensus in international law regarding the binding nature of this criterion. (38) However, this does not preclude the application of the criterion in Union law. The relevant rules of international law provide for a minimum degree of protection for copyright and related rights, which the Contracting Parties may exceed. It should also be pointed out in this connection that the Contracting Parties are not required in international treaty law to employ a functional approach, but it is suggested that the Contracting Parties employ it in non-binding interpretation documents such as the WIPO Guide. (39)

106. Thirdly, contrary to the view taken by the Commission, I cannot infer with sufficient clarity from recital 23 in the preamble to Directive 2001/29 and its drafting history that the Union legislature intended to exclude communication to the public of a broadcast by means of automatic reception equipment from the concept of communication within the meaning of Article 3 of the directive.

107. In the legislative procedure, the European Parliament had suggested clarifying in the relevant recital that the right of communication to the public does not cover ‘direct representation or performance’. This had been accepted by the Commission in its amended proposal. Although the Council supported the underlying objective of this amendment, it decided not to refer to the concept of direct representation, as this could give rise to legal uncertainty in

the absence of a Community-wide definition. Instead, the Council preferred to clarify the actual scope of the concept of communication to the public within the meaning of Article 3 of the directive. (40)

108. The aim of recital 23 is thus to exclude direct representation and performance from the concept of communication to the public, without using that concept. As is clear from the wording of that recital, the Union legislature attempted to achieve that aim by excluding some people from the concept of relevant public, namely those present at the place where the communication originates. (41) The distance of the audience from the place where the communication originates is thus relevant, but technical aspects are not.

109. Consequently, it can be inferred from the aim pursued by the Union legislature with recital 23, and from the wording of that recital, that the Union legislature merely wished to restrict the group of persons to be considered as the public, but not the concept of communication.

110. It must be stated, in summary, that there are not sufficiently certain grounds, either in recital 23 or in the drafting history of Directive 2001/29, to restrict the concept of communication in Article 3(1) of that directive, from a technical perspective, to cases where a transmission of the signal, which can be distinguished from the original broadcast, is made to a television or radio, and to exclude automatic reception by televisions or radios from that concept.

– Interim conclusion

111. It must be stated, as an interim conclusion, that where a dentist makes a radio broadcast audible in his practice by means of a radio, he indirectly communicates the phonograms which are used in the radio broadcast for the purposes of Article 8(2) of Directive 2006/115.

(ii) The concept of public

112. It is likewise not defined in Directive 2006/115 what is meant by communication ‘to the public’.

113. Unlike in the case of the definition of the concept of communication, the legal definition of communication to the public in Article 2(g) of the WPPT does not offer any assistance in this connection. In that provision there is no further clarification of the ‘public’ element of communication to be defined. It is merely stated that the sounds must be made audible to the public, with the result that the legal definition appears to be meaningless in this regard.

114. Nevertheless, reference can be made in this connection to the Court’s abovementioned case-law on the interpretation of the concept of communication to the public within the meaning of Article 3(1) of Directive 2001/29. (42) As I explained in my Opinion delivered today in Phonographic Performance, the concept of public in Article 3(1) of Directive 2001/29 and in Article 8(2) of Directive 2006/115 should, in principle, be given a consistent interpretation. I therefore refer to the relevant statements contained in points 96 to 111 of that Opinion.

115. If the criteria developed by the Court in SGAE are applied, there is much to suggest that communication to the public can also be taken to exist in a case like the present one. The phonograms are also communicated indirectly to a new public in a case like the present one, by the radio broadcast being made audible. In the waiting room of a dental practice the patients will not be present for as long, but their visits will be in quicker succession than in hotel bedrooms, with the result that a successive-cumulative effect can also be assumed here, which leads to very extensive availability of the phonograms.

116. However, the question also arises whether on the abovementioned grounds the concept of communication to the public within the meaning of Article 8(2) of Directive 2006/115 is to be interpreted, having regard to recital 23 in the preamble to Directive 2001/29, as meaning that no communication to the public can be taken to exist in a case like the present one. As stated above, in recital 23 in the preamble to Directive 2001/29 the Union legislature wished to exclude from the group of persons to be regarded as a public within the meaning of Article 3(1) of the directive the persons present at the place where the communication originates. The aim was that direct representation and performance should not be covered by the concept of communication to the public. (43)

117. The Commission argues, with reference to the Opinion of Advocate General Kokott in Football Association Premier League and Others, that it is thus intended to exclude the persons who are present at the place where there is an automatic reception television. In the case of an automatic reception television, the place where the communication originates is the place where the television is located. (44)

118. That argument cannot be accepted.

119. First of all, that view is not compatible with the approach taken by the Court in SGAE. It can be seen from that judgment that, in the case of an automatic reception television, the place where the communication originates is not the place where the television is located. (45)

120. There are also more convincing arguments for the approach taken by the Court. The reference in recital 23 in the preamble to Directive 2001/29 to the place where the communication originates cannot be construed as meaning that in the case of automatic reception televisions this is the place where the television is located.

121. First, the natural meaning of the word ‘originate’ suggests that it does not mean the place where the communication ultimately takes place.

122. Such a reading is also suggested by the abovementioned drafting history of the directive. The Union legislature’s aim with the clarification in recital 23 was that representation or performance to the public should not be covered by the concept of communication to the public. (46) That aim is achieved if the audience, which has no physical distance from the original representation or performance of the work, is excluded from the concept of communication to the public. (47) Listeners to a radio programme have such a physical distance, however.

123. Furthermore, the connection between recital 23 and recital 24 in the preamble to Directive 2001/29 militate against an approach whereby the place where the communication originates in the case of automatic reception equipment is deemed to be the place where the equipment is located. Under recital 24, the right to make available to the public under Article 3(2) of Directive 2001/29 should be understood as covering all acts of making available to members of the public not present at the place where the act of making available originates. If the place where the act of making available originates also meant the place where the equipment on which the phonograms are ultimately played is located, Article 3(2) of the directive would largely be deprived of its practical effectiveness. In many cases this will be equipment in a private household. It would therefore be more compelling for me to construe recital 23, and also recital 24, as meaning that only the audience of the direct performance or representation, as the audience present at the place where the communication originates, is excluded from the concept of communication under Article 3(1) of Directive 2001/29.

124. Furthermore, an argument against an approach whereby the place where the communication originates in the case of an automatic reception radio is the place where the radio is located is the fact that this would produce inconsistent results. According to that approach, in a case where a number of automatic reception radios were provided in a bar there would be no communication within the meaning of Article 3(1) of Directive 2001/29. On the other hand, if only two radios were provided in that bar and a signal was distributed to them by means of equipment in the cellar of the building, there would be communication within the meaning of Article 3(1) of Directive 2001/29. It seems unlikely that the Union legislature wished to accept such an inconsistent result.

125. In a case like the present one, the place where the communication originates within the meaning of Article 3(1) of Directive 2001/29 is therefore the place where the original performance or representation was recorded on the phonograms.

126. The Commission's plea must therefore be rejected because, on the abovementioned grounds, it cannot be inferred from recital 23 that the audience in front of an automatic reception television cannot be taken into consideration for the purposes of Article 3(1) of Directive 2001/29.

127. If the Court were to interpret the concept of communication to the public under Article 3(1) of Directive 2001/29, departing from its previous case-law, as not covering communication to an audience in front of automatic reception equipment, the Commission's plea would have to be rejected, secondly, because such an approach cannot be applied to the concept of communication within the meaning of Article 8(2) of Directive 2006/115. The concept of communication within the meaning of Article 8(2) of Directive 2006/115 must be interpreted having regard to Article 15 in conjunction with Article 2(g) of the WPPT. Under that provision, communication of phonograms exists where the sounds fixed in a phonogram are made audible to the public. Thus, the concept of communication within the meaning of Article 8(2) of Directive 2006/115 at least covers the audience which is present at the place of communication. (48)

128. Recital 23 in the preamble to Directive 2001/29 does not therefore require an interpretation of the public aspect of communication within the meaning of Article 8(2) of Directive 2006/115, under which, in the case of automatic reception radios, the audience present at the place where the radio is located is not taken into consideration.

(iii) The other pleas

129. The other pleas raised by the parties cannot be accepted.

– The need for an entrance fee

130. First of all, the existence of communication to the public within the meaning of Article 8(2) of Directive 2006/115 does not depend on an entrance fee being paid. First of all, there is nothing in the wording of Article 8(2) of Directive 2006/115 to indicate such a requirement. Secondly, this view is countered by the schematic connection with Article 8(3) of the directive. That provision establishes an exclusive right for broadcasting organisations to authorise or prohibit 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. It can be inferred a contrario from the fact that that provision cumulatively requires the existence of communication to the public and communication in places accessible to the public against payment of an entrance fee that the existence of communication to the public requires neither the public nature of the place nor the payment of an entrance fee.

– Profit-making purpose

131. Furthermore, I am not convinced by the pleas that no communication to the public can be taken to exist because, in the present case, the service provided by the dentist is the primary service, and not the communication of the phonograms, and because the dentist acted without a profit-making purpose.

132. First of all, the existence of communication to the public does not depend on whether the user pursues a profit-making purpose.

133. The concept of communication to the public does not imply that it is dependent on a profit-making purpose.

134. Furthermore, not only does the connection with the abovementioned Article 8(3) of Directive 2006/115 militate against such a requirement, but also the connection with Article 5 of Directive 2001/29, to which Article 10(2) of Directive 2006/115 refers. Thus, Article 5(3)(a), (b) and (j) of Directive 2001/29 provides that Member States may provide for exceptions or limitations to the right of communication to the public provided they are in respect of certain privileged uses and no commercial purpose, or no commercial purpose going beyond the privileged activity, is pursued. It follows, conversely, that communication to the public can also exist where no commercial purpose or no profit-making purpose is pursued.

135. It is also not evident from SGAE that a profit-making purpose is a relevant factor. The Court did stress the profit-making purpose of the hotel operators. However, this does not mean that it regarded this as a mandatory requirement for communication to the public. (49)

136. Furthermore, focusing on the profit-making purpose would appear to lead to difficult problems of delimitation. It would then be necessary to decide for each service whether the communication of a phonogram is sufficiently insignificant to be of secondary importance to the principal service.

137. Lastly, against the background of these arguments, the argument put forward by the Italian Government that a financial right like Article 8(2) of Directive 2006/115 may not be granted where the user does not pursue a profit‑making purpose with the communication to the public must also be rejected. It is not clear to me why, in the example given of a political event, the author should have an exclusive right, but the phonogram producers and the performers should have no right at all. Furthermore, the absence of a profit-making purpose on the part of the user can be taken into consideration under Article 8(2) of Directive 2006/115 in assessing what remuneration is adequate for such use.

138. Secondly, I would like to point out, in the alternative, that a profit-making purpose can certainly be taken to exist in a case like the present one. Even though radio broadcasts to which patients in a dental practice listen are certainly not an essential part of the service provided by the dentist, it cannot be denied that they may have a practical benefit. It will, as a rule, be more pleasant for patients in a waiting room to listen to radio broadcasts than the noise of the drill from the treatment room. In addition, such broadcasts provide entertainment during the waiting times which generally occur in dental practices. The fact that the price of treatment is not dependent on whether or not phonograms are audible is, in my view, not capable of ruling out a profit-making purpose. In order to assume such a purpose, it is sufficient that there is an element of the service which is liable to improve the overall picture of the service from the patient’s perspective. This seems to be the case on the basis of the above arguments.

– The will of the patients

139. Furthermore, the fact that communication takes place irrespective of the will of the patients and is even regarded by them as a constant annoyance is irrelevant in assessing the public aspect of the communication.

– The other pleas

140. The other pleas also cannot be accepted.

141. First of all, the public aspect of communication for the purposes of Article 8(2) of Directive 2006/115 does not require the public to have an autonomous social, economic or legal dimension. Such a dimension is also absent in other cases in which there is undoubtedly a public, such as in railway or underground stations. In addition, in the field of copyright and related rights, the dimension or the homogeneity of the group of persons which may constitute the public is not relevant. (50)

142. Secondly, the plea that a dentist's patients are not all gathered in his practice at the same time must be rejected on the ground that a cumulative effect, which can also be achieved through a succession of visits to the waiting room, is sufficient.

(iv) Conclusion

143. Article 8(2) of Directive 2006/115 is therefore to be interpreted as meaning that communication to the public exists for the purposes of that provision where a dentist provides a radio in his waiting room, by which he broadcasts a radio programme.

(d) The other requirements

144. With regard to the further requirement of a 'user' within the meaning of Article 8(2) of Directive 2006/115, it can be stated that any person who communicates the phonograms to the public uses them for the purposes of that provision.

145. With regard to the obligation to pay equitable remuneration, I refer to points 118 to 144 of my Opinion delivered today in Case C‑162/10 Phonographic Performance.

4. Conclusion

146. Article 8(2) of Directive 2006/115 is thus to be interpreted as meaning that a dentist who provides a radio in his practice, by which he makes radio broadcasts audible for his patients, is required to pay equitable remuneration for the indirect communication of the phonograms which are used in the radio broadcasts.

VII – The first to third questions

147. By its first and second questions, the referring court is seeking to ascertain whether the relevant rules of international law contained in the Rome Convention, the WPPT and TRIPs are directly applicable within the Union legal order and whether they may also be relied on directly by private individuals. By its third question, it wishes to know whether the concept of communication to the public within the meaning of the provisions of international law cited by it

mirrors the concept contained in Directives 92/100 and 2001/29 and, if not, which source should take precedence.

A – Main arguments of the parties

148. In the view of SCF, these questions must be answered in the affirmative. The relevant provisions of international law all form an integral part of the Union legal order and are directly applicable in private-law relationships. Furthermore, Union law must be interpreted as far as possible in conformity with international law, but may go beyond the stipulations of international law. Union law can achieve a higher level of protection than the relevant stipulations of international law, since the rules on copyright and related rights are constantly evolving.

149. In the view of Marco del Corso, the Rome Convention is directly applicable in the Union legal order because it has been integrated into the TRIPs agreement, to which the European Union has acceded. The European Union has also acceded to the WPPT. The question of precedence does not arise because the relevant provisions of international law and of Union law are identical.

150. In the view of the Italian Government, there is no need to answer the first three questions. The European Union adopted the directives to implement the WPPT. Only the interpretation of those directives is therefore relevant.

151. In the view of the Commission, the first two questions must be answered in the negative. As far as the Rome Convention is concerned, this is because it is not part of the Union legal order. As far as TRIPs and the WPPT are concerned, the Commission points out that the referring court did not refer to any specific provisions. In so far as provisions mentioned by the referring court in its order for reference are at issue, these questions must be answered in the negative. The Court has consistently held that a provision of an international treaty is directly applicable only if it contains a clear, precise and unconditional obligation which is not dependent on any other implementing measure. As far as GATT is concerned, the Court has always denied that that international treaty has direct effect. This case-law also applies to TRIPs and the WPPT. Like TRIPs, the WPPT also provides that the Contracting Parties must implement the provisions of that agreement. This is confirmed by Article 14 of the WCT and Article 23(1) of the WPPT, which expressly provide that the Contracting Parties must adopt the measures necessary to ensure the application of those treaties. The Union adopted those measures in Directive 2001/29.

B – Admissibility of the questions

152. I have serious doubts as to whether, in the light of the answers given to the fourth and fifth questions, the referring court will have a practical need for the answers to the first to third questions. In the fourth and fifth questions Article 8(2) of Directive 2006/115 has been interpreted having regard to the rules of international law. In so far as the referring court can take this provision of the directive, which is consistent with international law, into consideration in the main proceedings, the autonomous application of the rules of international law will no longer be important.

153. Nevertheless, the questions cannot be rejected as not being relevant to the decision. The question of the direct application of the provisions of international law could be relevant if the referring court cannot take Article 8(2) of Directive 2006/115 into consideration in the main proceedings. It does seem possible to interpret the relevant national rules in conformity with the directives (and thus also with international law). However, it is ultimately a matter of national law, for which the referring court alone has jurisdiction, whether such an interpretation is

possible. In the (in my view unlikely) case that an interpretation in conformity with the directives is not possible, Article 8(2) of the directive cannot apply directly, however, because the dispute is between private individuals.

154. The relevance of the first three questions to the decision cannot therefore be denied.

C – Legal assessment

155. Since, on the above grounds, the answers to the first three questions will probably have only a limited practical benefit for the purposes of the main proceedings, I would like to be brief in answering those questions.

156. A requirement for the direct applicability of a rule of international law is that it is part of an international agreement concluded by the Union and, regard being had to its wording and the purpose and nature of the agreement itself, it contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. It must thus be sufficiently precise and unconditional. (51)

157. Article 12 of the Rome Convention cannot therefore be a directly applicable rule of Union law because the Union is not a Contracting Party to that Convention.

158. In so far as the referring court relies on TRIPs, it should be pointed out that the TRIPs agreement does not contain a provision corresponding to Article 8(2) of Directive 2006/115. Article 14 of the TRIPs agreement, which governs the related rights of performers and of phonogram producers, does not contain any such right to equitable remuneration for performers or phonogram producers. (52)

159. In any case, the very strict position taken by the Court with regard to the direct applicability of the WTO agreements in general would suggest that a provision of the TRIPs agreement is not directly applicable. According to settled case-law, which will not be assessed in detail at this juncture, for the reasons mentioned above, the WTO agreements, including TRIPs, are not capable of direct application on account of their nature and structure. (53)

160. In so far as the direct application of Article 15 of the WPPT is concerned, the question arises, first, whether that agreement is intended to confer rights directly on private individuals. Regard should be had in this connection in particular to Article 23(1) of the WPPT, under which Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty. That provision could be construed as requiring the Member States to adopt further measures, which might militate against the direct applicability of the provisions of the WPPT. In support of this view, it could be mentioned that many provisions of the WPPT allow the Contracting Parties a broad margin of discretion. However, the question arises whether Article 23(1) of the WPPT precludes the direct application of certain provisions of the WPPT, where they are sufficiently precise and unconditional.

161. There is no need to answer this question for the purposes of the present case. Article 2(g) and Article 15 of the WPPT do not contain sufficiently precise rules to indicate whether the right to equitable remuneration also applies in cases like the present one, where the concept of communication is understood functionally and the public nature of the communication is established with reference to the idea of a successive-cumulative public. It is agreed that no firm requirements can be inferred from the WPPT in such cases. Because of the lack of indications on the definition of the concepts of public and private communication in the WPPT, the Contracting

Parties enjoy a considerable margin of discretion in deciding when to assume the existence of communication to the public. (54)

162. To counter this view, it cannot be argued that in SGAE the Court based the interpretation of the concept of communication to the public in Article 3(1) of Directive 2001/29 on the relevant rules of international law. With regard to the crucial question whether the criterion of a new audience may be used as a criterion for the existence of a new communication to the public, the Court did not rely on the provisions of the Berne Convention. That criterion had been deliberately rejected by the Contracting Parties to the Berne Convention. (55) Instead, the Court based its interpretation on the WIPO Guide to the Berne Convention, a document which was not legally binding. A legally binding clarification of the concept of public has thus not been laid down in the relevant provisions of international law, but only in Union law, under Article 3(1) of Directive 2001/29.

163. Article 2(g) and Article 15 of the WPPT are also therefore not provisions on which the parties to the main proceedings may rely directly.

VIII – Conclusion

164. On the abovementioned grounds, I propose that the Court answer the questions referred as follows:

(1) Article 8(2) 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 and 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 (codified version) is to be interpreted as meaning that a dentist who provides a radio in his waiting room, by which he makes a radio broadcast audible for his patients, is required to pay equitable remuneration for the indirect communication to the public of the phonograms which are used in the radio broadcast.

(2) In accordance with Union law, neither Article 12 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961, nor Article 15 of the WIPO Performances and Phonograms Treaty (WPPT) of 20 September 1996, nor Article 14 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) are rules of international law on which a party may rely directly in a dispute between private individuals.

1 – Original language: German.

Language of the case: Italian.

2 – OJ 1992 L 346, p. 61.

3 – OJ 2006 L 376, p. 28.

4 – Case C‑306/05 [2006] ECR I‑11519.

5 – OJ 2001 L 167, p. 10.

6 – Reproduced in the German Bundesgesetzblatt 1965 II, p. 1245.

7 – See Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (OJ 2000 L 89, p. 6).

8 – Annex 1C to the WTO Agreement, OJ 1994 L 336, p. 214.

9 – In accordance with the terms used in the TEU and in the TFEU, the expression 'Union law' will be used as an umbrella expression for Community law and European Union law. Where individual provisions of primary law are relevant hereinafter, the rules which are applicable ratione temporis will be cited.

10 – Case C‑245/00 SENA [2003] ECR I‑1251.

11 – OJ 2006 L 372, p. 12.

12 – Opinion of Advocate General Kokott in Joined Cases C‑403/08 and C‑429/08 Football Association Premier League and Others [2011] ECR I‑9083.

13 – See Joined Cases 28/62 to 30/62 Da Costa and Others [1963] ECR 65, 81; Case 62/72 Bollmann [1973] ECR 269, paragraph 4; Case C‑261/95 Palmisani [1997] ECR I‑4025, paragraph 31; and Case C‑2/06 Kempter [2008] ECR I‑411, paragraph 41 et seq.

14 – Cited in footnote 4.

15 – Ibid. paragraph 36.

16 – Ibid., paragraph 36.

17 – Ibid., paragraph 37. In this connection, it first cited the judgment in Case C‑89/04 Mediakabel [2005] ECR I‑4891, paragraph 30, in which it interpreted the concept of reception of a television programme by the public, in connection with Article 1(a) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as depending on an indeterminate number of potential television viewers. It also invoked the judgment in Case C‑192/04 Lagardère Active Broadcast [2005] ECR I‑7199, paragraph 31, in which it interpreted the concept of communication to the public by satellite, in connection with Article 1(2)(a) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), as depending on an indeterminate number of potential listeners.

18 – Ibid., paragraphs 38 and 39.

19 – Ibid., paragraph 40.

20 – Ibid., paragraph 41.

21 – Ibid., paragraph 42.

22 – Ibid., paragraph 43.

23 – Ibid., paragraph 44.

24 – Ibid., paragraphs 45 and 46.

25 – Case C‑150/99 Stockholm Lindöpark [2001] ECR I‑493, paragraph 38, and Case C‑566/07 Stadeco [2009] ECR I‑5295, paragraph 43.

26 – SGAE, cited in footnote 4, paragraph 31.

27 – SENA, cited in footnote 10, paragraph 34.

28 – Ibid., paragraphs 34 to 38.

29 – Case C‑61/94 Commission v Germany [1996] ECR I‑3989, paragraph 52, and SGAE, cited in footnote 4, paragraph 35. See, in that connection, Rosenkranz, F., 'Die völkerrechtliche Auslegung des EG-Sekundärrechts dargestellt am Beispiel des Urheberrechts', Europäische Zeitschrift für Wirtschaftsrecht, 2007, p. 238 et seq.

30 – See point 80 of this Opinion.

31 – Reinbothe, J. and Von Lewinski, S., The EC Directive on Rental and Lending Rights and on Piracy, Sweet & Maxwell, 1993, p. 97.

32 – Article 12 of the Rome Convention provides for such a right only in respect of direct transmissions. The Contracting Parties to the WPPT deliberately went further than the Rome Convention in this respect.

33 – See, in this connection, point 67 of the Opinion of Advocate General Sharpston in Case C‑306/05 SGAE, cited in footnote 4, and point 22 of the Opinion of Advocate General La Pergola in Case C‑293/98 Egeda [2000] ECR I‑629.

34 – See also Ullrich, J.N., 'Die "öffentliche Wiedergabe" von Rundfunksendungen in Hotels nach dem Urteil "SGAE" des EuGH (Rs. C-306/05)', Zeitschrift für Urheber- und Medienrecht 2008, p. 112 et seq., 117 et seq.

35 – Cited in footnote 12.

36 – Ibid., points 127 to 147.

37 – See the description of the judgment in points 65 to 73 of this Opinion.

38 – See point 50 of the Opinion of Advocate General Sharpston in Case C‑306/05 SGAE (cited in footnote 4).

39 – Case C‑306/05 SGAE, cited in footnote 4, paragraph 41.

40 – See Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, SEC(2000) 1734 final.

41 – Walter, M., Lewinsky, S., European Copyright Law, Oxford University Press 2010, p. 981.

42 – See points 65 to 73 of this Opinion.

43 – See points 106 to 109 of this Opinion.

44 – See points 144 and 146 of the Opinion of Advocate General Kokott in Football Association Premier League and Others (cited in footnote 12).

45 – Otherwise, in the case of an automatic reception television, there could be no communication to the public, which the Court appears to have accepted in that case.

46 – See point 104 et seq. of this Opinion.

47 – Reinbothe, J., 'Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft', Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil 2001, p. 733 et seq., 736.

48 – Lewinsky, S., International Copyright and Policy, Oxford University Press 2008, p. 481.

49 – See Walter, M., Lewinsky, P. (cited in footnote 41), p. 990.

50 – See Walter, M., Lewinsky, P. (cited in footnote 41), p. 990.

51 – Case 12/86 Demirel [1987] ECR 3719, paragraph 14, and Case C‑162/96 Racke [1998] ECR I‑3655, paragraph 31.

52 – See Correa, C., Trade related aspects of intellectual property rights, Oxford University Press 2007, pp. 156 and 162, and Busche, J., Stoll, P.-T., TRIPs – Internationales und europäisches Recht des geistigen Eigentums, Carl Heymanns Verlag 2007, pp. 268 and 272.

53 – Case C‑149/96 Portugal v Council [1999] ECR I‑8395, paragraph 47.

54 – See Lewinski, S., Walter, M. (cited in footnote 41), p. 988.

55 – See point 50 of the Opinion of Advocate General Sharpston in SGAE (cited in footnote 4).