Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 23 February 2016[1]

Case C-117/15

Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH
v
Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)(Request for a preliminary ruling

from the Landgericht Köln (Regional Court, Cologne, Germany))

(Reference for a preliminary ruling — Copyright and related rights in the information society — Scope of Directives 2001/29/EC and 2006/115/EC — Interpretation of the concept of 'communication to the public' — Broadcasting of television programmes on the premises of a rehabilitation centre)

1. By its questions referred for a preliminary ruling, the Landgericht Köln (Regional Court, Cologne) is seeking to ascertain whether a situation such as that at issue in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes it possible for television programmes to be viewed and heard by its patients, constitutes a '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[2] and Article 8(2) 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[3] and whether the concept of 'communication to the public' for the purposes of those two provisions must be given a uniform interpretation.

2. Those questions have been referred to the Court in a dispute between Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH ('Reha Training'), which operates a rehabilitation centre, and Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte ('GEMA'), which is responsible for the collective management of music copyright in Germany, concerning refusal to pay royalties on copyright and related rights in connection with the making available of protected works on the premises of Reha Training.

3. The Court has already been required on several occasions to interpret the concept of 'communication to the public', to which it has given a broad interpretation. To that end it has identified four assessment criteria, namely the existence of an 'act of communication' for which the role of the user is indispensable, the communication of a protected work to a 'public', the 'new' character of that public and the 'profit-making' nature of the communication.

4. The present case gives the Court an opportunity to reiterate and clarify its case-law on this subject.

1 — Original language: French.
2 — OJ 2001 L 167, p. 10.
3 — OJ 2006 L 376, p. 28.

5. In this Opinion, I will first explain why I consider that the concept of 'communication to the public' should be defined in accordance with the same criteria, whether for the purposes of Article 3(1) of Directive 2001/29 or for the purposes of Article 8(2) of Directive 2006/115.

6. I will then show why, in a situation such as that at issue in the main proceedings, Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 may both be applied.

7. Lastly, I will explain why, in my view, Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that a situation such as that at issue in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes it possible for television programmes to be viewed and heard by its patients, constitutes a 'communication to the public'.

I – **Legislative framework**

A – *EU law*

1. Directive 2001/29

8. Recitals 9, 20 and 23 of 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.

...

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular [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,[4] as amended by Council Directive 93/98/EEC of 29 October 1993[5]], and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

...

(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.'

4 — OJ 1992 L 346, p. 61.

5 — OJ 1993 L 290, p. 9, 'Directive 92/100'.

9. Article 3(1) of that directive provides:

‘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.’

10. Article 12(2) of the directive states:

‘Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.’

2. Directive 2006/115

11. According to recital 3 of Directive 2006/115:

‘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 ... be considered as being of fundamental importance for the economic and cultural development of the Community.’

12. Article 8(2) of that directive provides:

‘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.’

13. Directive 2006/115 codified and repealed Directive 92/100 on rental right and lending right. Articles 8 of those two directives are identical.

B – *German law*

14. Article 15(2) of the Law on copyright and related rights (Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtgesetz)) of 9 September 1965, [6] in its version applicable on the material date in the main proceedings, states:

‘The author shall have ... the exclusive right to communicate his work to the public in an intangible form (right of communication to the public). The right of communication to the public shall include, in particular:

1. the right of recitation, performance and presentation (Article 19);

2. the right to make available to the public (Article 19a);

3. the right to broadcast (Article 20);

6 — BGBl. 1965 I, p. 1273.

4. the right of communication by video or audio media (Article 21);

5. the right to communicate radio broadcasts and to make them available to the public (Article 22).'

15. Article 15(3) of the Law reads as follows:

'Communication shall be public where it is intended for a large number of members of the public. Any person who is not connected by a personal relationship with the person exploiting the work or with other persons to whom the work is made perceivable or accessible in an intangible form shall be deemed to be a member of the public.'

II – **The facts of the main proceedings and the questions referred for a preliminary ruling**

16. The rehabilitation centre operated by Reha Training makes it possible for accident victims to receive post-operative treatment on its premises with a view to their rehabilitation.

17. Those premises include two waiting rooms and a training room in which, from June 2012 to June 2013, Reha Training broadcast television programmes on television sets installed there. Those programmes could therefore be viewed by those who were at the rehabilitation centre for treatment.

18. Reha Training never requested permission from GEMA to broadcast. According to GEMA, such broadcasting constitutes an act of communication to the public of works belonging to the repertoire it manages. It therefore claimed, for the period from June 2012 to June 2013, payment of damages calculated on the basis of the rates in force.

19. The Amtsgericht Köln (Local Court, Cologne) granted that application. Reha Training lodged an appeal with the Landgericht Köln against the judgment given at first instance.

20. The referring court takes the view, in accordance with the criteria identified in the Court's case-law in connection with Directive 2001/29, that a communication to the public exists in the main proceedings. That court also assumes that the same criteria apply to the assessment of the question whether there is 'communication to the public' within the meaning of Article 8(2) of Directive 2006/115. However, the court feels that the judgment in *SCF* (C-135/10, EU:C:2012:140) prevents it giving a decision.

21. In that judgment the Court of Justice held that patients of a dental practice are not 'persons in general'. In the present case, since persons other than the patients of Reha Training do not, as a rule, have access to the treatment provided by Reha Training, those patients do not constitute 'persons in general', but a 'private group'.

22. In that judgment the Court also held that the number of patients of a dental practice is not large, indeed it is insignificant, given that the group of persons present in that practice at the same time is, in general, very small. The group formed by the patients of Reha Training would also seem to be limited.

23. Moreover, in its judgment in *SCF* (C-135/10, EU:C:2012:140), the Court ruled that normal patients of a dental practice do not wish to listen to music in that practice, given that they would enjoy it by chance and without any active choice on their part. In the case at hand, the patients of Reha Training in the waiting rooms and the training room also view and hear the television programmes without any active wish or choice on their part.

24. Under these circumstances, the Landgericht Köln decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is the question as to whether there is a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29 and/or within the meaning of Article 8(2) of Directive 2006/115 always to be determined in accordance with the same criteria, namely that:

— a user acts, in full knowledge of the consequences of its action, to provide access to the protected work to third parties which the latter would not have without that user’s intervention;

— the term “public” refers to an indeterminate number of potential recipients of the service and, in addition, must consist of a fairly large number of persons, in which connection the indeterminate nature is established when “persons in general” — and therefore not persons belonging to a private group — are concerned, and “a fairly large number of persons” means that a certain *de minimis* threshold must be exceeded and that groups of persons concerned which are too small or insignificant therefore do not satisfy the criterion; in this connection not only is it relevant to know how many persons have access to the same work at the same time but it is also relevant to know how many of them have access to it in succession;

— the public to which the work is communicated is a new public, that is to say, a public which the author of the work did not contemplate when he authorised its use by communication to the public, unless the subsequent communication uses a specific technical means which differs from that of the original communication; and

— it is not irrelevant that the act of exploitation in question serves a profit-making purpose and also that the public is receptive to that communication and is not merely “reached” by chance, although this is not an essential condition for the existence of communication to the public?

(2) In cases such as that in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes it possible for television programmes to be viewed and heard, is the question whether there is communication to the public to be assessed according to the concept of “communication to the public” under Article 3(1) of Directive 2001/29 or under Article 8(2) of Directive 2006/115 if the copyright and related rights of a wide range of persons concerned — in particular composers, songwriters and music publishers, but also performing artists, phonogram producers and authors of literary works as well as their publishing houses — are affected by the television programmes which have been made accessible?

(3) In cases such as that in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes television programmes accessible to its patients, is there a “communication to the public” pursuant to Article 3(1) of Directive 2001/29 or pursuant to Article 8(2) of Directive 2006/115?

(4) If the existence of communication to the public within this meaning is confirmed for cases such as that in the main proceedings, does the Court of Justice uphold its case-law according to which no communication to the public takes place in the event of the radio broadcasting of protected phonograms to patients in a dental practice (see the judgment of 15 March 2012 in *SCF*, C-135/10, EU:C:2012:140) or similar establishments?’

III – **My analysis**

A – *Are the assessment criteria for the concept of 'communication to the public' for the purposes of Article 3(1) of Directive 2001/29 and for the purposes of Article 8(2) of Directive 2006/115 identical?*

25. By the first part of its first question, the referring court asks the Court in essence whether the concept of 'communication to the public' for the purposes of Article 3(1) of Directive 2001/29 and for the purposes of Article 8(2) of Directive 2006/115 must be interpreted in accordance with the same assessment criteria.

26. As regards the uniform interpretation of the concept of 'communication to the public', the Court has ruled that, so far as concerns Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115, that concept is used there in contexts which are not the same and pursues objectives which, while similar, are none the less different to some extent.[7] Those two provisions confer different kinds of rights on their respective addressees.

27. Thus, Article 3(1) of Directive 2001/29 grants authors a right which is preventive in nature and allows them to intervene between users of their work and the communication to the public which such users might contemplate making, in order to prohibit such use. Article 8(2) of Directive 2006/115 grants performers and producers of phonograms a right which is compensatory in nature, which is not liable to be exercised before a phonogram published for commercial purposes, or a reproduction of such a phonogram, has been used for communication to the public by a user.[8]

28. According to the Court, Article 8(2) of Directive 2006/115 requires an individual interpretation of the concept of 'communication to the public'.[9] Furthermore, that right is clearly a right which is essentially financial in nature.[10]

29. In order to determine whether a user is making a communication to the public, the national court must make an overall assessment of the situation, taking account of several complementary criteria, which are not autonomous and are interdependent. Those criteria, which may be met to varying degrees according to different specific situations, must be applied individually and in the light of their interaction with one another.[11]

30. However, the fact that the concept of 'communication to the public' is used in different contexts and pursues different objectives depending on whether it is for the purposes of Article 3(1) of Directive 2001/29 or for the purposes of Article 8(2) of Directive 2006/115 does not, in my view, constitute a sufficient reason to justify recourse to different assessment criteria.

31. As the Court has stated, Directive 2001/29 is based on principles and rules already laid down in the directives in force in the area of intellectual property, such as Directive 92/100 which has been codified by Directive 2006/115.[12]

32. In order that the requirements of unity and coherence of the European Union legal order are respected, it is important that the concepts used by that body of directives have the same meaning, unless the EU legislature has, in a specific legislative context, expressed a different intention.[13]

7 — Judgment in *SCF* (C-135/10, EU:C:2012:140, paragraph 74).

8 — Judgment in *SCF* (C-135/10, EU:C:2012:140, paragraph 75).

9 — Judgment in *SCF* (C-135/10, EU:C:2012:140, paragraph 76).

10 — Judgment in *SCF* (C-135/10, EU:C:2012:140, paragraph 77).

11 — Judgment in *SCF* (C-135/10, EU:C:2012:140, paragraph 79).

12 — See, inter alia, judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 187 the case-law cited).

13 — See, inter alia, judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 188).

33. The Court has also applied the criteria which it had identified in its case-law concerning the interpretation of Article 3(1) of Directive 2001/29 in interpreting Article 8(2) of Directive 2006/115. [14]

34. Lastly, as GEMA rightly states, the different nature of the rights protected under Directives 2001/29 and 2006/115 cannot hide the fact that those rights have the same trigger, namely the communication to the public of protected works. [15]

35. In my view, the concept of 'communication to the public' for the purposes of Article 3(1) of Directive 2001/29 and for the purposes of Article 8(2) of Directive 2006/115 must therefore be interpreted in accordance with the same assessment criteria.

B – *The combined application of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115*

36. By its second question, the referring court asks the Court whether in the present case the concept of 'communication to the public' must be assessed in the light of Article 3(1) of Directive 2001/29 or in the light of Article 8(2) of Directive 2006/115.

37. As I stated above, the protection regimes established by Directives 2001/29 and 2006/115 respectively do differ in their objectives and in their addressees.

38. That being said, it is clear from the decision referring the case that the present case involves not only the rights of authors as guaranteed by Article 3(1) of Directive 2001/29 but also the rights of performers and phonogram producers as guaranteed by Article 8(2) of Directive 2006/115.

39. The Court has ruled, moreover, that the provisions of Directive 2001/29 should be without prejudice to the provisions of Directive 92/100 (codified by Directive 2006/115), unless otherwise provided in Directive 2001/29. [16]

40. In the light of the foregoing considerations, I take the view that both Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 may be applied in a situation such as that at issue in the main proceedings.

C – *Identification of assessment criteria for the concept of 'communication to the public' and their examination in the present case*

41. By the second part of its first question and by its third and fourth questions, which should, in my view, be dealt with together, the referring court asks the Court in essence whether Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that a situation such as that at issue in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes it possible for television programmes to be viewed and heard by its patients, constitutes a 'communication to the public'.

42. The question of the interpretation of the concept of 'communication to the public' has given rise to significant case-law.

14 — See judgments in *SCF* (C-135/10, EU:C:2012:140, paragraphs 81 to 92) and *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, paragraphs 31 to 38).

15 — See paragraph 19 of GEMA's observations.

16 — See, inter alia, judgment in *Luksan* (C-277/10, EU:C:2012:65, paragraph 43 and the case-law cited).

43. In order that the need for uniform interpretation of EU law and the principle of equality are respected, where provisions of EU law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, they must be given an autonomous and uniform interpretation throughout the European Union. [17]

44. In its abundant and consistent case-law, the Court has thus favoured a broad interpretation of the concept of 'communication to the public'. For the purpose of establishing the existence of a communication to the public, it has identified four assessment criteria, namely the existence of an 'act of communication' for which the role of the user is indispensable, the communication of a protected work to a 'public', the 'new' character of that public and the 'profit-making' nature of the communication.

45. First, the concept of 'communication to the public' includes two cumulative criteria, namely an 'act of communication' of a work and the communication of that work to a 'public'. [18] Given the cumulative nature of these two criteria, communication to the public cannot be established where one of them is not met.

46. With regard to the 'act of communication', emphasis must be placed on the indispensable role of the user, who must act intentionally. An act of communication is made where the user intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its clients. [19] In this regard, the Court has pointed out that it is necessary that the intervention by the user is not just a technical means to ensure or improve reception of the original broadcast in the catchment area, but an act without which those customers are unable to enjoy the broadcast works, although physically within that area. [20]

47. Furthermore, the concept of 'communication' must be construed broadly as covering any transmission of a protected work, irrespective of the technical means or process used. [21]

48. In addition, the Court has already ruled that the operators of a public house, a hotel or a spa establishment perform an act of communication when they deliberately transmit protected works to their clientele, by intentionally distributing a signal through television or radio sets which they have installed in their establishment. [22]

49. As the Landgericht Köln mentioned in its decision referring the case, Reha Training installed television sets in two waiting rooms and in the training room of the rehabilitation centre operated by it, to which it intentionally transmitted a broadcast signal and thus made it possible for its patients to access television programmes.

50. Consequently, in accordance with the Court's abovementioned case-law, there is no doubt, in my view, that Reha Training has, in full knowledge of the consequences of its action, made protected works accessible to the public formed by its patients and thus performed an 'act of communication'.

51. With regard to the criterion relating to communication to a 'public', 'public' refers to an indeterminate number of potential recipients, which implies a fairly large number of persons. [23]

17 — See, inter alia, judgment in *SGAE* (C-306/05, EU:C:2006:764, paragraph 31 and the case-law cited).

18 — See, inter alia, judgment in *SBS Belgium* (C-325/14, EU:C:2015:764, paragraph 15 and the case-law cited).

19 — See, inter alia, judgment in *OSA* (C-351/12, EU:C:2014:110, paragraph 32 and the case-law cited).

20 — See, inter alia, judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 194 and 195 and the case-law cited). See also judgments in *SCF* (C-135/10, EU:C:2012:140, paragraph 82) and *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, paragraph 31).

21 — See, inter alia, judgment in *OSA* (C-351/12, EU:C:2014:110, paragraph 25 and the case-law cited).

22 — See, respectively, the judgments in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 196); *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, paragraph 40), and *OSA* (C-351/12, EU:C:2014:110, paragraph 26).

23 — See, inter alia, judgment in *OSA* (C-351/12, EU:C:2014:110, paragraph 27 and the case-law cited).

52. The Court explained that the cumulative effect of making the works available to potential recipients should be taken into account. Regard must therefore be had not only to the number of persons who have access to the same work at the same time, but also to the number of persons who have access to it successively. [24]

53. In addition, the communication must be to a public not present at the place where the communication originates, thereby excluding acts of direct representation or performance of a protected work. [25]

54. The referring court has expressed doubts whether the patients of a rehabilitation centre like that operated by Reha Training may be classified as 'public'. Those doubts stem from the judgment in *SCF* (C-135/10, EU:C:2012:140), in which the Court ruled that the patients of a dentist, who generally form a largely consistent group of persons, constitute a determinate circle of potential recipients and the number of them with access to the same work at the same time is not large. [26]

55. The strict approach thus adopted by the Court in that judgment would seem to depart from its settled case-law. That is why I consider that the scope of the judgment in *SCF* (C-135/10, EU:C:2012:140) should not be extended, but limited to the specific factual circumstances which gave rise to that judgment. To apply the Court's reasoning in that judgment to a situation such as that at issue in the main proceedings would, in my view, be too restrictive vis-à-vis copyright and related rights and contrary to the high level of protection desired by the Union legislature and applied by the Court itself in its settled case-law.

56. According to that case-law, the term 'public' should be interpreted in contrast with specific individuals belonging to a 'private group' of persons. Unlike in the ruling made by the Court in *SCF* (C-135/10, EU:C:2012:140), the patients of the rehabilitation centre operated by Reha Training, who form a constantly changing group with each visit, do, in my view, constitute an indeterminate group of persons, which is, moreover, potentially large.

57. In this regard, in contrast with that judgment, in order to assess the existence of a public, account should be taken not only of the persons who have access to the same work at the same time, but also of the persons who have access to it successively. [27]

58. The patients of a rehabilitation centre like that operated by Reha Training, whose consultations last between 30 and 60 minutes on average, [28] follow in quicker succession than the clients of a hotel, those of a public house or those of a spa establishment. [29] The rehabilitation centre operated by Reha Training is thus likely to receive, at the same time and successively, an indeterminate, large number of patients who have access to protected works, whether in the waiting rooms or in the training room, with the result that those patients must be considered to be a 'public'.

59. In addition to these two cumulative criteria, there is also the criterion of a 'new public'.

24 — See, inter alia, judgment in *OSA* (C-351/12, EU:C:2014:110, paragraph 28 and the case-law cited).

25 — See, inter alia, judgments in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 200) and *Circul Globus București* (C-283/10, EU:C:2011:772, paragraphs 36, 37 and 40).

26 — Judgment in *SCF* (C-135/10, EU:C:2012:140, paragraphs 95 and 96).

27 — See point 52 of this Opinion.

28 — See paragraph 5 of Reha Training's observations.

29 — The Court ruled in its judgments in *SGAE* (C-306/05, EU:C:2006:764); *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631), and *OSA* (C-351/12, EU:C:2014:110), that the clientele of a hotel, a public house and a spa establishment do constitute a 'public' (see, respectively, paragraphs 42, 199 and 32).

60. The criterion of a 'new public' was established by the Court in its judgment in *SGAE* (C-306/05, EU:C:2006:764) and subsequently confirmed by several decisions, in particular the judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631), sitting as the Grand Chamber.

61. In so far as that criterion of a 'new public' must be examined in a situation such as that at issue in the main proceedings, there is, in my view, no doubt that that criterion is met.

62. The criterion of a 'new public' requires the existence of a public different from the public at which the original act of communication of the work is directed. [30] When the author authorises a broadcast of his work, he considers, in principle, only the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts. [31]

63. In this regard the Court has ruled that intentional transmission of a broadcast work in a place accessible to the public, for an additional public which is permitted by the owner of the television set to hear or see the work constitutes an act of communication of a protected work to a new public. [32]

64. By intentionally transmitting broadcast signals to television sets which it installed on its premises, Reha Training made it possible, outside its own private circle, for protected works to be viewed and heard by its patients, who constitute an additional and indirect public which had not been contemplated by the authors when they authorised the broadcasting of their works and, without the intervention of Reha Training, would have been unable to enjoy those works.

65. Lastly, in assessing the existence of a communication to the public, the 'profit-making nature' of the communication may prove to be relevant. [33] However, this is not an essential condition for the existence of a communication to the public. [34]

66. The Court has made clear that, for the communication to pursue a profit-making objective, it is necessary that the public which is the subject of the communication is both targeted by the user and receptive, in one way or another, to that communication, and not merely 'caught' by chance. [35]

67. Like the German Government, however, I take the view that the receptivity of the public should not be regarded as a determining factor in establishing the profit-making nature of the broadcasting of a work. The subjective dimension of that criterion of the receptivity of the public makes it difficult to apply in practice. [36] Furthermore, as the Court has ruled, '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'. [37] Actual, intentional access by the public to a work is not therefore necessary in order to establish the existence of a communication to the public.

30 — See, inter alia, judgment in *SGAE* (C-306/05, EU:C:2006:764, paragraph 40).

31 — See, inter alia, judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 198 and the case-law cited).

32 — See, inter alia, judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 198 and the case-law cited).

33 — See, inter alia, judgment in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 204 and the case-law cited).

34 — See, inter alia, judgment in *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraph 42 and the case-law cited).

35 — See, inter alia, judgments in *SCF* (C-135/10, EU:C:2012:140, paragraph 91) and *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141, paragraph 37).

36 — See, in particular, paragraphs 50 to 56 of the German Government's observations.

37 — See judgment in *SGAE* (C-306/05, EU:C:2006:764, paragraph 43). My italics. See also, to that effect, judgment in *Padawan* (C-467/08, EU:C:2010:620, paragraph 58).

68. Consequently, in my view, the judgment in *SCF* (C-135/10, EU:C:2012:140), in which the Court rejected the existence of the profit-making nature of the broadcasting of phonograms in a dental practice on the ground that they have access to those phonograms 'by chance and without any active choice on their part', should not be applied to the present case. [38]

69. On the other hand, in order to examine whether or not the criterion of the profit-making nature of the broadcasting of a work is met, in my view, it is crucial to consider whether or not the user is likely to derive a benefit from such broadcasting.

70. In this regard, there is no doubt that, by installing television sets in waiting rooms and in a training room, areas mainly used by its patients, Reha Training intentionally targeted those patients in order to permit them to enjoy television programmes either while waiting for a consultation or during their rehabilitation session.

71. In my view, the criterion of the profit-making nature is met in this case. The broadcasting of television programmes on television sets installed in waiting rooms or in a training room is intended to create a diversion for the centre's patients and, in particular, to make the waiting time or the time of the rehabilitation sessions seem shorter. These are additional services which, while not having any medical benefit, do have an impact on the establishment's standing and attractiveness, thereby giving it a competitive advantage.

72. In the light of the foregoing considerations, I therefore consider that a situation such as that at issue in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes it possible for television programmes to be viewed and heard by its patients, constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115.

IV – **Conclusion**

73. In the light of the above considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Landgericht Köln as follows:

(1) The concept of 'communication to the public' must be defined in accordance with the same criteria, whether for the purposes 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 or for the purposes of Article 8(2) 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.

(2) In a situation such as that at issue in the main proceedings, Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 may both be applied.

(3) Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that a situation such as that at issue in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes it possible for television programmes to be viewed and heard by its patients, constitutes a 'communication to the public'.

38 — Judgment in *SCF* (C-135/10, EU:C:2012:140, paragraph 98).