Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

15 March 2012*

(Copyright and related rights in the information society — Direct applicability of the Rome Convention, the TRIPS Agreement and the WPPT in the European Union legal order — Directive 92/100/EC — Article 8(2) — Directive 2001/29/EC — Concept of 'communication to the public'– Communication to the public of phonograms broadcast by radio in a dental practice)

In Case C-135/10,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the Corte d'appello di Torino (Italy), made by decision of 10 February 2010, received at the Court on 15 March 2010, in the proceedings

Società Consortile Fonografici (SCF)

v

Marco Del Corso,

intervening party:

Procuratore generale della Repubblica,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 7 April 2011,

after considering the observations submitted on behalf of:

— Società Consortile Fonografici (SCF), by L. Ubertazzi, F. Pocar and B. Ubertazzi, avvocati,

— Marco Del Corso, by R. Longhin, A. Tigani Sava, L. Bontempi and V. Vaccaro, avvocati,

* Language of the case: Italian.

— the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

— Ireland, by D. O'Hagan, acting as Agent, assisted by E. Fitzsimons and J. Jeffers, barristers,

— the Greek Government, by G. Papadaki, acting as Agent,

— the French Government, by J. Gstalter, acting as Agent,

— the European Commission, by J. Samnadda and S. La Pergola, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2011

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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 (OJ 1992 L 346, p. 61), and of Article 3 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 (OJ 1992 L 167, p. 10).

2 The reference has been made in proceedings between Società Consortile Fonografici ('SCF') and Mr Del Corso, a dental surgeon, concerning the broadcasting in his dental practice of protected phonograms.

Legal context

International law

3 The Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement'), which constitutes Annex 1C to the Agreement establishing the World Trade Organisation (WTO) signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), contains a Part II entitled 'Standards concerning the availability, scope and use of intellectual property rights'. Part II includes Article 14(1), (2) and (6) which 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 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting

Organisations, adopted at Rome on 26 October 1961 ('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.'

4 The World Intellectual Property Organisation (WIPO) adopted, on 20 December 1996, the WIPO Performances and Phonograms Treaty ('WPPT') and the WIPO Copyright Treaty ('WCT'). The two treaties were approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

5 Article 1 of the WPPT provides:

'1. Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under 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.'

6 Under Article 2(b) of the WPPT, for the purposes of that treaty, 'phonogram' means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.

7 Article 2(d) of the WPPT provides that 'producer of a phonogram' means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds.

8 Article 2(g) of the WPPT states that '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.

9 Under the heading 'Right of making available of fixed performances', Article 10 of the WPPT provides:

'Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place at a time individually chosen by them.'

10 Article 14 of the WPPT, headed 'Right of making available of phonograms', provides:

'Producers of phonograms shall enjoy the exclusive right of authorising the making available to the public of their phonograms, 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.'

11 Article 15 of the WPPT, headed 'Right to remuneration for broadcasting and communication to the public' is worded as follows:

'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.'

12 Under Article 23(1) of theWPPT:

'Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.'

13 Article 8 of the WCT, headed 'Right of communication to the public':

'Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising 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 these works from a place and at at time individually chosen by them.'

14 The European Union is not a Contracting Party to the Rome Convention, unlike all the Member States of the European Union except Malta.

15 Under Article 12 of the Rome Convention, which concerns the secondary use of phonograms:

'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. …'

European Union law

16 The last recital of the preamble to Decision 94/800 reads as follows:

'Whereas, by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.

17 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 (OJ 2006 L 376, p. 28), which entered into force on 16 January 2007, codified and repealed Directive 92/100.

18 However, in view of the dates of the facts of the dispute in the main proceedings, Directive 92/100 still applies to it.

19 The seventh recital of the preamble to Directive 92/100 reads:

'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'.

20 The tenth recital of the preamble to that directive reads:

'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'.

21 Article 8(2) and (3) of Directive 92/100 provides:

'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 8(2) of Directive 2006/115 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'.

23 Recitals 15 and 25 of the preamble to Directive 2001/29 read as follows:

'15 The Diplomatic Conference held under the auspices of the [WIPO] in December 1996 led to the adoption of two new Treaties, the [WCT] and the [WPPT] … This Directive also serves to implement a number of the new international obligations.

…

25 The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them'.

24 Article 3 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;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(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.

The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article’.

National law

25 Article 72 of Italian Law No 633 of 22 April 1941 on the protection of copyright and other rights relating to its exercise (legge n° 633 recante protezione del diritto d’autore e di altri diritti connessi al suo esercizio), as replaced by Article 11 of Legislative Decree No 68 implementing 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 (decreto legislativo n° 68, attuazione della direttiva 2001/29/CE sull’armonizzazione di taluni aspetti del diritto d’autore e dei diritti connessi nella società dell’informazione), of 9 April 2003 (Ordinary Supplement to GURI No 87, of 14 April 2003), in the version applicable to the dispute in the main proceedings (‘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.’

26 Article 73(1) of the Law on copyright, as replaced by Article 12 of Legislative Decree No 68 provides:

‘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.’

27 Article 73a of the Law on copyright as introduced by Article 9 of Legislative Decree No 685 (decreto legislativo n° 685, attuazione della direttiva 92/100/CEE concernente il diritto di noleggio, il diritto di prestito e taluni diritti connessi al diritto d’autore in materia di proprieta intellettuale), of 16 November 1994 (GURI No 293 of 16 December 1994), provides:

‘1. 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.

2. In the absence of agreement to the contrary between the parties, such remuneration is determined, paid out and distributed according to the provisions of the [implementing rules for the amended Law on copyright].’

The dispute in the main proceedings and the questions referred for a preliminary ruling

28 SCF acts as a collecting agency, both within and outside Italy, and manages, collects and distributes the royalties of its associated phonogram producers.

29 In the exercise of its activity as agent, 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 any ‘communication to the public’ of phonograms, including such communication in private professional practices.

30 As those negotiations were unsuccessful, on 16 June 2006 SCF brought an action before the Turin district court against Mr Marco Del Corso, seeking a declaration that he was broadcasting, by way of background music, in his private dental practice in Turin phonograms protected by property rights, and that, since it constituted ‘communication to the public’ within the meaning of the Law on copyright, international law and European Union law, such activity gave rise to the payment of equitable remuneration.

31 In his defence, Mr Del Corso argued, among other things, that, in his practice, the music was being broadcast by radio and that SCF could claim copyright only if the medium on which the phonogram had been fixed was used, whereas remuneration for listening to the broadcast was payable not by the listener, but by the radio or television broadcaster. The Law on copyright expressly made a distinction between remuneration due for a disk and that due for use of broadcasting equipment.

32 In any event, Mr Del Corso argued that Articles 73 and 73a of the amended Law on copyright were not applicable to the present case, as they referred to communication to the public in public places and on the occasion of any other public use of phonograms. A private dental practice could not be classified as a public place, unlike public health facilities.

33 By judgment of 20 March 2008, amended by order of 16 May 2008, the Turin district court dismissed the application by SCF, finding that in this case there was no communication for profit, the type of music played in the practice did not influence the patients' choice of dentist, and the situation did not fall within those provided for in Article 73a of the Law on copyright, since the dental practice was private and, as such, could not be equated with a public place or place open to the public, given that the patients were not a random public but were individually identified and could normally attend the practice only if they had an appointment and, in any event, with the dentist's consent

34 SCF appealed against that judgment to the Corte d'appello di Torino.

35 As it considered that there was some doubt over the question whether the broadcasting of phonograms in private professional practices such as dental practices, was included in the definition of 'communication to the public' for the purposes of international law and European Union law, the Corte d'appello decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are the [Rome Convention], the [TRIPs Agreement] and the [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?'

The questions referred for a preliminary ruling

The first to third questions

36 By its first to third questions, which should be examined together, the referring court asks, essentially, first, whether the Rome Convention, the TRIPS Agreement and the WPPT are directly applicable in the legal order of the European Union and whether individuals may rely on them directly. Next, it wishes to know whether the definition of 'communication to the public' in those international conventions is the same as that in Directives 92/100 and 2001/29 and, finally, in the event that the last question is answered in the negative, which source of law should prevail.

37 First, as regards the question whether the Rome Convention, the TRIPS Agreement and the WPPT are directly applicable in the legal order of the European Union, it must be recalled at the outset that, under Article 216(2) of the TFEU, '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States'.

38 The TRIPS Agreement and the WPPT were signed by the European Union and approved by Decisions 94/800 and 2000/278 respectively. Consequently, that agreement and treaty bind the institutions of the European Union and the Member States.

39 Moreover, according to the settled case-law of the Court, the provisions of agreements concluded by the Union form an integral part of the Union legal order (Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5; Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7, and Case C-301/08 *Bogiatzi* [2009] ECR I-10185, paragraph 23) and are therefore applicable in the Union.

40 The TRIPS Agreement and the WPPT are such agreements.

41 As regards the Rome Convention, it must be pointed out, first, that the European Union is not a contracting party to that convention and, second, that it cannot be regarded as having taken the place of its Member States as regards its application, if only because not all of those States are parties to that convention (see, by analogy, Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 85).

42 Consequently, the provisions of the Rome Convention do not form part of the legal order of the European Union.

43 As regards, second, the question whether individuals are entitled to rely directly on the provisions of the TRIPS Agreement and the WPPT, it must be observed that, according to the case-law of the Court of Justice, it is not sufficient that they are part of the legal order of the Union. Those provisions must also appear, as regards their content, to be unconditional and sufficiently precise and their nature and broad logic must not preclude their being so relied on (see, to that effect, *Demirel*, paragraph 14; Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 31, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 39).

44 The first condition is met where the provisions relied on contain clear and precise obligations which are not subject, in their implementation or effects, to the adoption of any subsequent measure (see, to that effect, Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-7357, paragraph 39 and the case-law cited, and Case C-240/09 *Lesoochranárske zoskupenie* [2011] ECR I-1255, paragraph 44 and the case-law cited).

45 As regards the TRIPS Agreement, it must be recalled that, according to the last recital in the preamble to Decision 94/800, the Agreement establishing the World Trade Organisation, including its Annexes is not susceptible to being directly invoked in European Union or Member State courts.

46 Moreover, the Court has already held that, having regard to their nature and structure, the provisions of the TRIPs Agreement do not have direct effect. Those provisions are not, in principle, among the rules in the light of which the Court is to review the legality of measures of the Community institutions under the first paragraph of Article 230 EC and are not such as to create rights upon which individuals may rely directly before the courts by virtue of European Union law (see, to that effect, Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraphs 42 to 48; Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 44, and Case C-245/02 *Anheuser-Busch* [2004] ECR I-10989, paragraph 54).

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

48 It follows that the application of the provisions of the WPPT, in their implementation or effects, is subject to the adoption of subsequent measures. Therefore, such provisions have no direct effect in the law of the European Union and are not such as to create rights for individuals which they may rely on before the courts by virtue of that law.

49 As regards the Rome Convention, it must be recalled that, under Article 1(1) of the WPPT, nothing in that treaty is to derogate from existing obligations that Contracting Parties have to each other under the Rome Convention.

50 Accordingly, although the European Union is not a contracting party to the Rome Convention, it is none the less required, under Article 1(1) of the WPPT, not to stand in the way of the obligations of the Member States under that convention. Accordingly, that convention has indirect effects within the European Union.

51 Third, as regards the question of the relationship between the concept of 'communication to the public' in the TRIPS Agreement, the WPPT and the Rome Convention and that in Directives 92/100 and 2001/29, it must be recalled that, according to settled case-law, European Union legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union (see, inter alia, Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20, and Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 35).

52 In that regard, it is common ground that, as recital 15 in the preamble to Directive 2001/29 makes clear, that directive is intended to implement a number of the Union's new obligations under the WCT and the WPPT, which are considered, according to the same recital, to update the international protection for copyright and related rights significantly. In those circumstances, the concepts contained in that directive must be interpreted, as far as is possible, in the light of those two Treaties (see, to that effect, Case C-456/06 *Peek & Cloppenburg* [2008] ECR I-2731, paragraph 31).

53 Moreover, it follows from recital 10 of Directive 92/100 that the legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which many Member States' laws on copyright and related rights are based.

54 As that directive is intended to harmonise certain aspects of the law on copyright and related rights in the field of intellectual property in compliance with the relevant international agreements such as, inter alia, the Rome Convention, the TRIPS Agreement and the WPPT, it is supposed to establish a set of rules compatible with those contained in those agreements.

55 It follows from all those considerations that the concepts appearing in Directives 92/100 and 2001/29, such as 'communication to the public' must be interpreted in the light of the equivalent concepts contained in those international agreements and in such a way that they are compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property.

56 Having regard to the foregoing considerations, the answer to the first to third questions is:

— the provisions of the TRIPS Agreement and the WPPT are applicable in the legal order of the European Union,

— as the Rome Convention does not form part of the legal order of the European Union it is not applicable there; however, it has indirect effects within the European Union

— individuals may not rely directly either on that convention or on the TRIPS Agreement or the WPPT;

— the concept of 'communication to the public' must be interpreted in the light of the equivalent concepts contained in the Rome Convention, the TRIPS Agreement and the WPPT and in such a way that it is compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property.

The fourth and fifth questions

Preliminary observations

57 By its fourth and fifth questions, the referring court asks whether 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, constitutes '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 and whether such an act of transmission entitles the phonogram producers to the payment of remuneration?

58 In that regard, it must be observed at the outset that the referring court refers, in the wording of those questions, to Article 3(2)(b) of Directive 2001/29 concerning the exclusive right of phonogram producers to authorise or prohibit the making available to the public of their phonograms, 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.

59 As is clear from the explanatory memorandum to the Proposal for Directive 2001/29 (COM(97) 628), confirmed by recital 25 of that directive, making available to the public, for the purposes of that provision, is intended to refer to 'interactive on-demand transmissions' characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

60 According to the decision for reference, the issue in the main proceedings is the broadcasting of music in a dental practice for the benefit of the patients present and not interactive on-demand transmission.

61 However, according to case-law, in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it, it is for the Court of Justice, if necessary, to reformulate the questions referred to it (Case C-286/05 *Haug* [2006] ECR I-4121, paragraph 17, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 46).

62 Moreover, in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it, the Court may find it necessary to consider provisions of European Union law which the national court has not referred to in its questions (C-329/06 and C-343/06 *Wiedemann and Funk* [2008] ECR I-4635, paragraph 45, and Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paragraph 36).

63 In that connection, it must be observed that Article 8(2) of Directive 92/100 is intended to ensure that a single equitable remuneration is paid by the user to performers and phonogram producers, 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.

64 In those circumstances, the fourth and fifth questions of the referring court must be interpreted as asking, in essence, whether the concept of 'communication to the public' for the purposes of Article 8(2) of Directive 92/100 must be interpreted as meaning that it covers 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, and whether such an act of transmission entitles the phonogram producers to the payment of remuneration

Admissibility

65 Mr Del Corso considers that the fourth and fifth questions are inadmissible since he has never acknowledged that he was broadcasting protected phonograms to his patients by means of his radio-broadcast receiver in his private dental practice, particularly as such broadcasts were not made in exchange for the payment of an entrance fee by those patients.

66 In that regard, it must be recalled that it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute before it and to establish the consequences which they have for the judgment which it is required to deliver (Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 32, and Case C-232/09 *Danosa* [2010] ECR I-11405, paragraph 33).

67 As regards the division of jurisdiction between the European Union judicature and national courts, it is in principle for the national court to determine whether the factual conditions triggering the application of a European Union rule are fulfilled in the case pending before it, while the Court, when giving a preliminary ruling, may, where appropriate, provide clarification to guide the national court in its interpretation (see, to that effect, Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 58, and Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraph 23).

68 In the present case, as is clear from the decision for reference, the fourth and fifth questions are based on the factual premiss that Mr Del Corso broadcast protected phonograms to his patients.

69 Accordingly, those questions must be considered to be admissible and must be examined in the factual framework defined by the referring court.

Merits

70 As regards the concept of 'communication to the public', it must be observed at the outset that it appears not only in Article 8(2) of Directive 92/100, a provision which is relevant to the main proceedings, but also in Article 3(1) of Directive 2001/29 and, inter alia, in Article 12 of the Rome Convention, Article 15 of the WPPT and Article 14(1) of the TRIPS agreement.

71 As is clear from paragraph 55 of the present judgment, the concept of 'communication to the public' must be interpreted in the light of the equivalent concepts contained in the Rome Convention, the TRIPS agreement and the WPPT and in such a way that it is compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the provisions of those agreements.

72 It must be recalled that, under Article 3(1) of Directive 2001/29, Member States are to 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. That provision is inspired by Article 8 of the WCT, the wording of which it reproduces almost verbatim.

73 Article 8(2) of Directive 92/100 requires Member States to 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. That provision is inspired by Article 12 of the Rome Convention the wording of which it likewise reproduces almost verbatim (Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 35).

74 It is clear from a comparison of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 92/100 that the concept of communication to the public appearing in those provisions is used in contexts which are not the same and pursue objectives which, while similar, are none the less different to some extent.

75 Under Article 3(1) of Directive 2001/29, authors have a right which is preventive in nature and allows them to intervene, between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such use. On the other hand, under

Article 8(2) of Directive 92/100, performers and producers of phonograms have 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.

76 It follows that Article 8(2) of Directive 92/100, on the one hand, requires an individual interpretation of the concept of communication to the public. The same applies as regards the identity of the user and the question of the use of the phonogram at issue.

77 On the other hand, as the right under Article 8(2) of Directive 92/100 is exercised in the event of the use of a work, that right is clearly a right which is essentially financial in nature.

78 Thus, in order to assess whether a user is making a communication to the public within the meaning of Article 8(2) of Directive 92/100, in accordance with the need for an individual approach noted in paragraph 76 of the present judgment, the situation of a specific user and of all the persons to whom he communicates the protected phonograms must be assessed.

79 For the purposes of such an assessment, account must be taken of several complementary criteria, which are not autonomous and are interdependent. Consequently, they must be applied individually and in the light of their interaction with one another, given that in different specific situations, they may be met to varying degrees.

80 Thus, it is for the national court to make an overall assessment of a given situation.

81 In that connection, it should be pointed out that the Court has already identified certain criteria in the rather different context of Article 3(1) of Directive 2001/29.

82 First, the Court has already stressed the indispensable role of the user. Thus, the Court has held that the operator of a hotel or public house makes a communication to the public within the meaning of Article 3(1) of Directive 2001/29 when it intervenes, in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers. Without its intervention the customers cannot enjoy the works broadcast, even though they are physically within the broadcast's catchment area (see, to that effect, *SGAE*, paragraph 42, and Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 195).

83 Second, the Court has already identified certain aspects of the concept of public.

84 In that regard, the Court has held that the term 'public' within the meaning of Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential listeners, and, in addition, implies a fairly large number of persons (see, to that effect, Case C-89/04 *Mediakabel* [2005] ECR I-4891, paragraph 30; Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, paragraph 31, and *SGAE*, paragraphs 37 and 38).

85 As regards, to begin with, the 'indeterminate' nature of the public, the Court has observed that, according to the definition of the concept of 'communication to the public' given by the WIPO glossary, which, while not legally binding, none the less sheds light on the interpretation of the concept of public, it means 'making a work … perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group'.

86 Next, as regards, the criterion of 'a fairly large number of people', this is intended to indicate that the concept of public encompasses a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant.

87 In order to determine that number, the Court took account of the cumulative effects of making works available to potential audiences (*SGAE*, paragraph 39). In that 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 necessary to know how many of them have access to it in succession.

88 Third, in paragraph 204 of the judgment in *Football Association Premier League and Others*, the Court held that it is not irrelevant that a 'communication' within the meaning of Article 3(1) of Directive 2001/29 is of a profit-making nature.

89 It follows that this must be all the more true in the case of the right to equitable remuneration provided for in Article 8(2) of directive 92/100 given its essentially financial nature.

90 More specifically, the Court has held that the action by a hotel operator by which it gives access to a broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit, since the provision of that service has an influence on the hotel's standing and, therefore, on the price of rooms. Similarly, the Court has held that the transmission of broadcast works by the operator of a public house is made with the intention that it should, and is likely to, have an effect upon the number of people going to that establishment and, ultimately, on its financial results (see, to that effect, *SGAE*, paragraph 44, and *Football Association Premier League and Others*, paragraph 205).

91 It is thus understood 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.

92 It is in the light of those criteria in particular that it must be determined whether, in a case such as that at issue in the main proceedings, a dentist who broadcasts phonograms to his patients, by way of background music, is making a communication to the public within the meaning of Article 8(2) of Directive 92/100.

93 Although, as was pointed out in paragraph 80 of the present judgment, it is, in principle, for the national courts to determine whether that is the situation in a particular case and to make all definitive findings of fact in that regard, it must none the less be held that the Court has all the evidence necessary in relation to the case in the main proceedings to assess whether there is such an act of communication to the public.

94 It must be observed, first, that, as in the cases leading to the judgments in *SGAE* and *Football Association Premier League and Others*, although the patients of a dentist are in the area covered by the signal conveying the phonograms, they are able to listen to those phonograms only as a result of the deliberate intervention of that dentist. Therefore such a dentist must be considered to be intervening deliberately in the broadcasting of those phonograms.

95 Next, as regards the patients of a dentist such as the one in the case in the main proceedings, it must be observed that they generally form a very consistent group of persons and thus constitute a determinate circle of potential recipients, as other people do not, as a rule, have access to treatment by that dentist. Consequently, they are not 'persons in general' as defined in paragraph 85 of the present judgment.

96 As regards, further, having regard to paragraph 84 of the present judgment, the number of persons to whom the same broadcast phonogram is made audible by the dentist, it must be held that, in the case of the patients of a dentist, the number of persons is not large, indeed it is insignificant, given that the number of persons present in his practice at the same time is, in general, very limited. Moreover, although there are a number of patients in succession, the fact remains that, as those patients attend one at a time, they do not generally hear the same phonograms, or the broadcast phonograms, in particular.

97 Finally, it cannot be disputed that, in a situation such as that in the main proceedings, a dentist who broadcasts phonograms, by way of background music, in the presence of his patients cannot reasonably either expect a rise in the number of patients because of that broadcast alone or increase the price of the treatment he provides. Therefore, such a broadcast is not liable, in itself, to have an impact on the income of that dentist.

98 The patients of a dentist visit a dental practice with the sole objective of receiving treatment, as the broadcasting of phonograms is in no way a part of dental treatment. They have access to certain phonograms by chance and without any active choice on their part, according to the time of their arrival at the practice and the length of time they wait and the nature of the treatment they undergo. Accordingly, it cannot be presumed that the usual customers of a dentist are receptive as regards the broadcast in question.

99 Consequently such a broadcast is not of a profit-making nature, and thus does not fulfil the criterion set out in paragraph 90 of the present judgment.

100 It follows from all the foregoing considerations that a dentist such as the one in question in the case in the main proceedings who broadcasts phonograms free of charge in his dental practice, for the benefit of his clients and enjoyed by them without any active choice on their part, is not making a 'communication to the public' for the purposes of the application of Article 8(2) of Directive 92/100.

101 It follows that the requirement set out in Article 8(2) of Directive 92/100 for the payment of equitable remuneration by the user, namely that the user makes a 'communication to the public' within the meaning of that provision, is not met in a situation such as that in the main proceedings.

102 Accordingly, the answer to the fourth and fifth questions is that the concept of 'communication to the public' for the purposes of Article 8(2) of Directive 92/100 must be interpreted as meaning that it does not cover the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, such as the one at issue in the main proceedings, for the benefit of patients of those practices and enjoyed by them without any active choice on their part. Therefore such an act of transmission does not entitle the phonogram producers to the payment of remuneration.

Costs

103 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **The provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which constitutes Annex 1C to the Agreement establishing the World Trade Organisation (WTO) signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) and of the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty of 20 December 1996 are applicable in the legal order of the European Union.**

As the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted at Rome on 26 October 1961, does not form part of the legal order of the European Union it is not applicable there; however, it has indirect effects within the European Union.

Individuals may not rely directly either on that convention or on the agreement or the treaty mentioned above.

The concept of 'communication to the public' which appears in 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 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 must be interpreted in the light of the equivalent concepts contained in the convention, the agreement and the treaty mentioned above and in such a way that it is compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property.

2. **The concept of 'communication to the public' for the purposes of Article 8(2) of Directive 92/100 must be interpreted as meaning that it does not cover the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, such as the one at issue in the main proceedings, for the benefit of patients of those practices and enjoyed by them without any active choice on their part. Therefore such an act of transmission does not entitle the phonogram producers to the payment of remuneration.**

[Signatures]