



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

15 March 2012*

(Copyright and related rights — Directive 2006/115/EC — Articles 8 and 10 — Concepts of ‘user’ and ‘communication to the public’ — Installation in hotel bedrooms of televisions and/or radios to which the hotelier distributes a broadcast signal)

In Case C-162/10,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the High Court (Commercial Division) (Ireland), made by decision of 23 March 2010, received at the Court on 7 April 2010, in the proceedings

Phonographic Performance (Ireland) Limited

v

Ireland,

Attorney General,

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:

- Phonographic Performance (Ireland) Limited, by H. Sheehy, solicitor, and J. Newman, BL,
- Ireland, by D. O’Hagan, acting as Agent, and E. Fitzsimons and J. Jeffers, BL,
- the Greek Government, by G. Papadaki, M. Germani and G. Alexaki, acting as Agents,
- the Italian Government, by P. Gentili, acting as Agent,
- the French Government, by J. Gstalter, acting as Agent,

* Language of the case: English.

— 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 relates to the interpretation of Articles 8 and 10 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 (OJ 2006 L 376, p. 28).
- 2 The reference has been made in the course of proceedings between Phonographic Performance (Ireland) Limited ('PPL') and Ireland.

Legal context

International law

- 3 The World Intellectual Property Organisation ('WIPO') adopted in Geneva, on 20 December 1996, the WIPO Performances and Phonograms Treaty ('the WPPT') and the WIPO Copyright Treaty. Those 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).
- 4 Under Article 2(b), (d) and (g) of the WPPT:

'For the purposes of this Treaty:

 - (b) "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;
 - ...
 - (d) "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.
 - ...
 - (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.'

- 5 Article 15 of the WPPT reads:

'(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.'

European Union law

6 According to recitals 5, 7 and 16 of the preamble to Directive 2006/115:

'(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.

...

(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.

...

(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.'

7 Article 7 of Directive 2006/115 provides:

'1. Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances.

2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.'

8 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.’

9 Article 10 of that directive is worded 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.’

10 Directive 2006/115 codified and repealed 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).

11 According to recital 9 of the preamble to 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 2001 L 167, p. 10):

‘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.’

12 Article 3 of that directive states:

‘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.

3. 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

13 The Copyright and Related Rights Act 2000, (‘the 2000 Act’) provides in Section 97:

‘1. Subject to subsection (2), it is not an infringement of the copyright in a sound recording, broadcast or cable programme to cause a sound recording, broadcast or cable programme to be heard or viewed where it is heard or viewed:

(a) in part of the premises where sleeping accommodation is provided for the residents or inmates, and

(b) as part of the amenities provided exclusively or mainly for residents or inmates.

2. Subsection (1) does not apply in respect of any part of premises to which subsection (1) applies where there is a discrete charge made for admission to the part of the premises where a sound recording, broadcast or cable programme is to be heard or viewed.’

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

14 PPL is a collecting society which represents the rights which phonogram producers hold over sound recordings or phonograms in Ireland.

15 The main proceedings concern an action brought by PPL against Ireland for a declaration that Ireland, in adopting and maintaining in force Section 97 of the Act of 2000, has acted in breach of Article 4 TEU and for damages for that breach.

16 PPL alleges that it was on the ground of the exemption from liability provided for by Section 97(1) of the Act of 2000 that the operators of hotels and guesthouses (collectively ‘hotels’) did not pay equitable remuneration to it for the use, in hotel bedrooms in Ireland, of phonograms included amongst those made available under licence to PPL, by means of apparatus provided by persons responsible for the operation of those hotels as part of the service they provide.

17 The exemption from liability for hoteliers broadcasting protected phonograms infringes certain European directives adopted in the area of rights related to copyright, which provide for the right of phonogram producers to equitable remuneration when their phonograms are used under certain circumstances.

18 The High Court (Commercial Division) makes clear that the main proceedings concern only sound recordings or phonograms heard by guests in hotel bedrooms in Ireland and not in other parts of those establishments. Nor do the proceedings concern the use by hotel guests of transmissions which are interactive or on-demand.

19 Moreover, according to the referring court, if a hotel in Ireland provides televisions or radios in its bedrooms and, by cable or other technology, distributes to those televisions and radios a signal received centrally, then that hotel is not required by reason of Section 97(1) of the Act of 2000 to make any payment of equitable remuneration to phonogram producers for sound recordings included in TV or radio broadcasts.

- 20 Similarly, if a hotel places in its bedrooms other apparatus and makes available sound recordings in physical or digital form which may be played by guests thereon, that hotel is, likewise, not obliged to pay equitable remuneration to phonogram producers by reason of Section 97(1) of the Act of 2000.
- 21 Moreover, whilst the claim in the main proceedings only relates to use of sound recordings in hotel bedrooms, the referring court points out that Section 97(1) of the Act of 2000 also has the effect of removing the requirement of equitable remuneration for such use in hospitals, nursing homes, residential care facilities, prisons and all other similar institutions.
- 22 Finally, it makes clear that the sound recordings at issue in the proceedings are phonograms published for commercial purposes.
- 23 Against that background, the referring court took the view that, having regard to the differences between the rights protected by Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115, to the context in which the phrase ‘communication to the public’ is used in each, and the purpose of the respective provisions, that court should not apply to the concept ‘communication to the public’ the same meaning as the Court of Justice gave it in Case C-306/05 *SGAE* [2006] ECR I-11519).
- 24 It is in those circumstances that the High Court (Commercial Division) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- (1) Is a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal a “user” making a “communication to the public” of a phonogram which may be played in a broadcast for the purposes of Article 8(2) of Codified Directive 2006/115/EC ...?
 - (2) If the answer to paragraph (1) is in the affirmative, does Article 8(2) of Directive 2006/115/EC ... oblige Member States to provide a right to payment of equitable remuneration from the hotel operator in addition to equitable remuneration from the broadcaster for the playing of the phonogram?
 - (3) If the answer to paragraph (1) is in the affirmative, does Article 10 of Directive 2006/115/EC ... permit Member States to exempt hotel operators from the obligation to pay “single equitable remuneration” on the grounds of “private use” within the meaning of Article 10(1)(a)?
 - (4) Is a hotel operator which provides in a guest bedroom apparatus (other than a television or radio) and phonograms in physical or digital form which may be played on or heard from such apparatus a “user” making a “communication to the public” of the phonograms within the meaning of Article 8(2) of Directive 2006/115/EC ...?
 - (5) If the answer to paragraph (4) is in the affirmative, does Article 10 of Directive 2006/115/EC ... permit Member States to exempt hotel operators from the obligation to pay “a single equitable remuneration” on the grounds of “private use” within the meaning of Article 10(1)(a) of Directive 2006/115/EC?

The questions referred for a preliminary ruling

The first question

- 25 By its first question, the referring court essentially wishes to know whether a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal a ‘user’ making a ‘communication to the public’ of a broadcast phonogram for the purposes of Article 8(2) of Directive 2006/115/EC.

- 26 As a preliminary point, it must be borne in mind that, under Article 8(2) of Directive 2006/115, Member States are 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.
- 27 It follows from that provision that anyone who uses a phonogram for a broadcast or for communication to the public must be considered to be a ‘user’ for the purposes of that provision.
- 28 In those circumstances, it must be assessed whether, in a case such as that at issue in the main proceedings, there has been ‘communication to the public’.
- 29 As regards the concept of ‘communication to the public’ within the meaning of Article 8(2) of Directive 92/100, codified by Directive 2006/115, the Court held in Case C-135/10 *SCF* ECR [2012], paragraph 76, that it requires an individual assessment. The same applies as regards the identity of the user and the question of the use of the phonogram at issue (*SCF*, paragraph 78).
- 30 Moreover, the Court made clear that, for the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Consequently, they must be applied individually and in their interaction with one another, given that they may, in different situations, be present to widely varying degrees (see *SCF*, paragraph 79).
- 31 Of those criteria, the Court emphasised, first and foremost, the indispensable role played by the user. The user makes an act of communication 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. In the absence of that intervention, its customers, although physically within the area covered by the broadcast, would not, in principle, be able to enjoy the broadcast work (*SCF*, paragraph 82).
- 32 Second, the Court clarified certain aspects of the concept of ‘public’.
- 33 According to the Court, the term ‘public’ refers to an indeterminate number of potential listeners and a fairly large number of people (see, to that effect, *SCF*, paragraph 84).
- 34 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’ (*SCF*, paragraph 85).
- 35 Next, as regards, the criterion of ‘a fairly large number of people’, the Court has made clear that this is intended to indicate that, on the one hand, the concept of public encompasses a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant (*SCF*, paragraph 86). On the other hand, in order to determine that number, account must be taken of the cumulative effects of making works available to potential audiences. 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 (*SCF*, paragraphs 86 and 87).
- 36 Third, the Court has held that if it is relevant that a ‘communication’ within the meaning of Article 3(1) of Directive 2001/29 is of a profit-making nature, this must be all the more true in the case of the essentially economic right to equitable remuneration of the performers and phonogram producers under Article 8(2) of Directive 2006/115 (see, to that effect, *SCF*, paragraphs 88 and 89).
- 37 According to the Court, 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 (*SCF*, paragraph 91).

- 38 It is in the light, *inter alia*, of those criteria and in accordance with the need for an individual assessment established in paragraph 29 of this judgment that it must be assessed whether, in a case such as that at issue in the main proceedings, a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is making a communication to the public within the meaning of Article 8(2) of Directive 2006/115.
- 39 Although 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.
- 40 It must be observed, first, that in the situation contemplated by the referring court, in which a hotel operator provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal, just as in the case leading to the judgment in *SGAE* (paragraph 42), although the guests of a hotel 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 operator. Its role is thus indispensable, within the meaning of paragraph 31 of the present judgment.
- 41 As regards, next, the guests of a hotel such as those at issue in the main proceedings, it must be observed that they constitute an indeterminate number of potential listeners, insofar as the access of those guests to the services of that establishment is the result of their own choice and is limited only by the capacity of the establishment in question. In such a situation they are thus ‘persons in general’ in the sense of paragraph 34 of this judgment.
- 42 As regards, further, the number of potential listeners referred to in paragraph 33 of the present judgment, it must be observed that the Court has held that the guests of a hotel constitute a fairly large number of persons, such that they must be considered to be a public (*SGAE*, paragraph 38).
- 43 Finally, as regards the profit-making nature of the broadcast referred to in paragraphs 36 and 37 of this judgment, it must be held that the guests of a hotel may be described as ‘targeted’ and ‘receptive’.
- 44 Indeed, the action of the hotel by which it gives access to the broadcast work to its customers constitutes an additional service which has an influence on the hotel’s standing and, therefore, on the price of rooms (see, to that effect, *SGAE*, paragraph 44). Moreover, it is likely to attract additional guests who are interested in that additional service (see, by analogy, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 205).
- 45 It follows that, in the present case, the broadcasting of phonograms by a hotel operator is of a profit-making nature.
- 46 It follows from the foregoing considerations that, in a case such as that in the main proceedings, a hotel operator is making a ‘communication to the public’ within the meaning of Article 8(2) of Directive 2006/115.
- 47 Having regard to the foregoing, the answer to the first question is that a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is a ‘user’ making a ‘communication to the public’ of a phonogram which may be played in a broadcast for the purposes of Article 8(2) of Directive 2006/115.

The second question

- 48 By its second question the referring court asks, essentially, whether a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is obliged to pay equitable remuneration under Article 8(2) of Directive 2006/115 in addition to that paid by the broadcaster.
- 49 It should be recalled, at the outset, that the Court has already made clear, as regards the concept of ‘communication to the public’ for the purposes of Article 3(1) of Directive 2001/29, that a hotel operator which carries out an act of communication to the public transmits a protected work to a new public, that is to say, to a public which was not taken into account by the authors of the protected work when they authorised its use by communication to the original public (see, to that effect, *SGAE* paragraphs 40 and 42).
- 50 It must be pointed out that the notion of ‘new public’ derived from the case-law cited in the previous paragraph must also be taken into account in the context of the application of Article 8(2) of Directive 2006/115.
- 51 When a hotel operator communicates a broadcast phonogram in its guest bedrooms, it is using that phonogram in an autonomous way and transmitting it to a public which is distinct from and additional to the one targeted by the original act of communication. Moreover, as observed in paragraph 45 of the present judgment, the hotel operator derives economic benefits from that transmission which are independent of those obtained by the broadcaster or the producer of the phonograms.
- 52 Consequently, in such a situation, a hotel operator is required, under Article 8(2) of Directive 2006/115, to pay equitable remuneration for the communication to the public of that phonogram in addition to that paid by the broadcaster.
- 53 In that respect, Ireland’s argument that it follows from the words ‘or’ and ‘single’ in Article 8(2) of Directive 2006/115 that a hotel operator is not required to pay any remuneration for the indirect communication of phonograms to the public if a radio or television broadcaster has already paid equitable remuneration for the use of the phonograms in its broadcasts cannot succeed.
- 54 By using the word ‘single’ in that provision, the European Union legislature merely wished to make clear that it is not necessary for the Member States to make provision for the user to pay separate remuneration several times for the same act of communication to the public, as that single remuneration will, as is clear from the second sentence of that provision, be shared amongst the different beneficiaries of the equitable remuneration, that is to say, the performers and the phonogram producers. The conjunction ‘or’ in the expression ‘by wireless means or for any communication to the public’ must be interpreted as meaning that remuneration is due both in the case of a broadcast and in the case of communication to the public.
- 55 Having regard to the foregoing observations, the answer to the second question is that a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is obliged to pay equitable remuneration under Article 8(2) of Directive 2006/115 for the broadcast of a phonogram, in addition to that paid by the broadcaster.

The fourth question

- 56 By its fourth question, which should be examined third, the referring court asks, essentially, whether a hotel operator which provides in guest bedrooms, not televisions and/or radios, but other apparatus and phonograms in physical or digital format capable of being broadcast or heard by means of that apparatus, is a ‘user’ making a ‘communication to the public’ of a phonogram, for the purposes of Article 8(2) of Directive 2006/115.

- 57 In those circumstances, the Court is required to verify that the considerations underlying its reply to the first question are still relevant even in a situation where a hotel operator provides apparatus for his clients other than a television or radio, and phonograms in a physical or digital format capable of being broadcast or heard by means of that apparatus.
- 58 In that regard, it must be pointed out that the concept of ‘communication to the public’ in Article 8(2) of Directive 2006/115 must be interpreted with due regard for the equivalent concepts used, *inter alia*, by the WPPT, and in a manner compatible with those concepts, and taking account of the context in which they are used and the objective pursued by the relevant provisions of conventions (*SCF*, paragraph 55).
- 59 Article 2(g) of the WPPT, concerning communication to the public and referring to Article 15 of the WPPT stipulates that such communication includes making the sounds or representations of sounds fixed in a phonogram audible to the public.
- 60 In those circumstances, the concept of ‘communication to the public’ in Article 8(2) of Directive 2006/115 must be interpreted as meaning that it also includes making the sounds or representations of sounds fixed in a phonogram audible to the public.
- 61 Moreover, that finding is borne out by the wording itself of Article 8(2) of Directive 2006/115 which states that it concerns ‘any’ communication to the public, and thus all forms of communication which can be envisaged and carried out.
- 62 So, a hotel operator which provides in guest bedrooms apparatus other than a television or radio, and phonograms in a physical or digital format capable of being broadcast or heard by means of that apparatus, is providing the two elements making it possible to make the sounds or representations of sounds fixed in a phonogram audible to the public, that is to say, phonograms.
- 63 Consequently, that form of communication falls within the scope of Article 8(2) of Directive 2006/115 interpreted in the light of Articles 2(g) and 15 of the WPPT read together.
- 64 Since, as is clear from paragraph 57 of this judgment, the fourth question differs from the first only as regards the form of transmission of the phonograms, it may be inferred that the operator and his customers are the same for the purposes of those two questions.
- 65 It may thus be presumed, first, that the operator of that hotel must be considered to be the ‘user’ for the purposes of Article 8(2) of Directive 2006/115 and, second, that the customers of that establishment must be considered to be a ‘public’ for the purposes of that provision, unless there is specific evidence which is such as to lead the Court to a different conclusion.
- 66 In that regard it must be assessed whether the particular form of transmission, by apparatus and by phonograms in physical or digital form which can be broadcast or heard by means of that apparatus, is such as to lead to a different conclusion from that reached in paragraph 40 of this judgment.
- 67 That is not the case. Since a hotel operator which installs such apparatus and such phonograms in the bedrooms of its hotel thereby provides its customers with the two elements necessary to enjoy the works in question, it follows that, without its intervention, the customers would not have access to those works. The role of that hotel operator is thus indispensable.
- 68 In the absence of any other specific evidence requiring examination, it must be concluded that, in a situation like that at issue in the main proceedings, there has been an act of ‘communication to the public’ of a phonogram, for the purposes of Article 8(2) of Directive 2006/115.

69 Having regard to the foregoing, the answer to the fourth question is that a hotel operator which provides in guest bedrooms, not televisions and/or radios to which it distributes a broadcast signal, but other apparatus and phonograms in physical or digital form which may be played on or heard from such apparatus, is a ‘user’ making a ‘communication to the public’ of a phonogram within the meaning of Article 8(2) of Directive 2006/115/EC. It is therefore obliged to pay ‘equitable remuneration’ under that provision for the transmission of those phonograms.

The third and fifth questions

70 By its third and fifth questions, which should be examined together, the referring court asks, essentially, whether Article 10(1)(a) of Directive 2006/115, which provides for a limitation of the right to equitable remuneration in the case of ‘private use’, allows the Member States to exempt a hotel operator who makes a ‘communication to the public’ of a phonogram, within the meaning of Article 8(2) of that directive, from the obligation to pay such remuneration.

71 As a preliminary point, it must be made clear that, as the Advocate General observed in point 153 of her Opinion, it is not the private nature or otherwise of the use of the work by guests of a hotel which is relevant in order to determine whether a hotel operator may rely on the limitation based on ‘private use’ within the meaning of Article 10(1)(a) of Directive 2006/115, but whether the use made of the work by the operator himself is private or not.

72 However, the ‘private use’ of a protected work communicated to the public by its user constitutes a contradiction in terms, since ‘public’ is, by definition, ‘not private’.

73 Accordingly, in the case of a communication to the public within the meaning of Article 8(2) of Directive 2006/115, the limitation based on ‘private use’ within the meaning of Article 10(1)(a) of that directive, cannot apply.

74 However, that interpretation is not such as to deprive that provision of all practical effect. Rather, that provision retains a wider scope by covering uses other than communication to the public, such as ‘fixation’ within the meaning of Article 7 of that directive.

75 Moreover, to allow the user to benefit from the limitation referred to in Article 10(1)(e) of Directive 2006/115, when he makes a communication such as that at issue in the case in the main proceedings, would run counter to the provisions of Article 10(3) of that directive under which that limitation is applicable only in certain special cases which do not prejudice the normal exploitation of the work or other protected object or cause unjustified harm to the legitimate interests of the rightholder.

76 Such an interpretation would allow the user to evade the obligation to pay equitable remuneration for forms of use of the work which amount to commercial exploitation of it, which would cause unjustified harm to the legitimate interests of protected artists or performers precisely as a result of the right to equitable remuneration.

77 Having regard to the foregoing, the answer to the third and fifth questions is that Article 10(1)(a) of Directive 2006/115, which provides for a limitation to the right to equitable remuneration provided for by Article 8(2) of that directive in the case of ‘private use’, does not allow Member States to exempt a hotel operator which makes a ‘communication to the public’ of a phonogram, within the meaning of Article 8(2) of that directive, from the obligation to pay such remuneration.

Costs

⁷⁸ 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. **A hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is a ‘user’ making a ‘communication to the public’ of a phonogram which may be played in a broadcast 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. **A hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is obliged to pay equitable remuneration under Article 8(2) of Directive 2006/115 for the broadcast of a phonogram, in addition to that paid by the broadcaster.**
3. **A hotel operator which provides in guest bedrooms, not televisions and/or radios to which it distributes a broadcast signal, but other apparatus and phonograms in physical or digital form which may be played on or heard from such apparatus, is a ‘user’ making a ‘communication to the public’ of a phonogram within the meaning of Article 8(2) of Directive 2006/115/EC. It is therefore obliged to pay ‘equitable remuneration’ under that provision for the transmission of those phonograms.**
4. **Article 10(1)(a) of Directive 2006/115, which provides for a limitation to the right to equitable remuneration provided for by Article 8(2) of that directive in the case of ‘private use’, does not allow Member States to exempt a hotel operator which makes a ‘communication to the public’ of a phonogram, within the meaning of Article 8(2) of that directive, from the obligation to pay such remuneration.**

[Signatures]