OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 29 June 2011

Case C-162/10

Phonographic Performance (Ireland) Ltd
v
Ireland and Others

(Reference for a preliminary ruling from the High Court (Commercial Division) (Ireland))

(Copyright and related rights – Directives 92/100/EEC and 2006/115/EC – Rights of performers and phonogram producers – Article 8(2) – Communication to the public – Indirect communication to the public of phonograms in broadcasts received using radios or televisions in hotel bedrooms – Communication to the public through the provision of players and phonograms in hotel bedrooms – Users – Equitable remuneration – Article 10(1)(a) – Limitation to rights – Private use)

Table of contents

I – Introduction

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

2. The present reference for a preliminary ruling from the High Court of Ireland ('the referring court') concerns the right to equitable remuneration under Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (2) and of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), (3) which must be paid in respect of communication to the public of a phonogram already published for commercial purposes.

3. The referring court wishes to know, first of all, whether such a right also arises where a hotel operator provides televisions and/or radios in guest bedrooms to which it distributes a broadcast signal. The answer to this question depends on whether in such a case the operator uses the phonograms contained in the radio and television broadcasts for communication to the public.

4. Secondly, the referring court asks whether such an operator also uses those phonograms for communication to the public where it does not provide radios or televisions in the bedrooms, but players and the relevant phonograms.

5. Thirdly, the referring court is seeking to ascertain whether a Member State which does not provide for a right to equitable remuneration in such cases may rely on the exception under Article 10(1)(a) of Directive 92/100 and of Directive 2006/115, on the basis of which the Member States may provide for limitations to the right to equitable remuneration in respect of private use.

6. The substance of these questions is closely connected with *SGAE*. (4) In that case, the Court found, first of all, that communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (5) exists where a hotel operator distributes a signal by means of television sets provided in its bedrooms, irrespective of the technique used to transmit the signal. It also found that the private nature of hotel rooms does not preclude communication to the public. In the present case, the question arises in particular whether these principles, which concern communication to the public of copyright works under Article 3(1) of Directive 2001/29, can be applied to the notion of communication to the public within the meaning of Article 8(2) of Directive 92/100 and of Directive 2006/115, which concerns the related rights of performers and phonogram producers.

7. In addition, the present case is closely connected with Case C-135/10 *SCF*, in which I deliver my Opinion on the same date as in the present case. *SCF* relates, in particular, to whether a dentist who makes radio broadcasts audible to his patients in his practice using a radio provided in his practice must pay equitable remuneration pursuant to Article 8(2) of Directive 92/100 and of

Directive 2006/115 because he communicates the phonograms used in the radio programme indirectly to the public.

II – Applicable law

A – *International law*

1. The Rome Convention

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

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

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

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

(a) private use'.

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

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

(a) as regards Article 12:

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

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

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

(iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the

> latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection'.

11. Ireland is a Contracting Party to the Rome Convention, but has made a declaration pursuant to Article 16(1)(a)(ii).

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

2. The WPPT

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

14. Article 1 of the WPPT provides:

'Relation to Other Conventions

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

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

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

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

'For the purposes of this Treaty:

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

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

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

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

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

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

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

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

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

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

prejudice the legitimate interests of the performer or of the producer of the phonogram.'

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

B – *Union law (8)*

1. Directive 92/100

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

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

…

Whereas the creative and artistic work of authors and performers necessitates anadequate 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;

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

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

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;

…

Whereas it is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must retain the

possibility to entrust the administration of this right to collecting societies representing them;

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

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

…

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

20. Article 8 of Directive 92/100 is entitled 'Broadcasting and communication to the public'. It provides:

'1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.'

21. Article 10 of Directive 92/100 provides:

'Limitations to rights

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

(a) private use;

…

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

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

2. Directive 2006/115

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

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

…

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

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

(7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.

…

(12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must

remain able to entrust the administration of this right to collecting societies representing them.

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

…

(16) Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.'

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

'1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.'

24. Article 10 of the directive is entitled 'Limitations to rights' and reads as follows:

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

(a) private use;

…

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

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

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

25. Article 14 of the directive is entitled 'Repeal' and provides:

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

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

3. Directive 2001/29

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

'(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

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

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

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

…

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

…

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

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

…

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.'

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

‘1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

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

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

(b) for phonogram producers, of their phonograms;

…

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

C – *National law*

28. The relevant rules of national law are laid down in the Copyright and Related Rights Act, 2000 (‘the Act of 2000’).

29. Part II of the Act of 2000 is entitled ‘Copyright’.

30. The scheme of the Act of 2000 in relation to sound recordings is that section 17(2)(b) provides that copyright subsists in sound recordings. Sections 21(a) and 23(1) together provide that the producer of a sound recording is the author and, as such, the first owner of a copyright in a sound recording.

31. Chapter 4 of the Act of 2000 is entitled ‘Rights of Copyright Owner’.

32. Under section 37(1)(b) in that chapter, the owner of copyright (including the producer of a sound recording) has the exclusive right ‘to make available to the public the work’. Consequently, to a certain extent, a phonogram producer has a wider right in Irish law than he would have under Directives 92/100 or 2006/115.

33. Section 37(2) provides that copyright in a work is infringed by a person who, without the licence of the copyright owner, undertakes or authorises another to undertake any of the acts restricted by copyright.

34. However, section 38 of the Act of 2000 makes provision for licences of right to play sound recordings in public and to include them in a broadcast or a cable programme service. A person may do so as of right where he agrees to make fair payments in respect of such playing or inclusion in a broadcast or in a cable programme service, and complies with the other requirements laid down in section 38 of the Act of 2000.

35. Chapter 6 of the Act of 2000 regulates which acts are permitted in relation to works protected by copyright.

36. Section 97 in that chapter provides:

'(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.'

37. Part III of the Act of 2000 concerns performers' rights. Section 246 of the Act of 2000, which is laid down in this part, contains an exception comparable to section 97 in relation to performers' rights.

38. There is no exception similar to section 97 and section 246 in relation to an author's right to literary, artistic, dramatic or musical works in the sense of Directive 2001/29.

III – Facts

39. The applicant in the main proceedings is a licensing body. Its members are phonogram producers who hold related rights in phonograms. The applicant asserts, on behalf of its members, their rights arising from the communication of their phonograms to the public.

40. The defendant in the main proceedings is the Irish State.

41. The applicant in the main proceedings takes the view that the Irish State has not properly transposed Directives 92/100 and 2006/115. Section 97(1) of the

Act of 2000 is not compatible with Article 8(2) of Directive 92/100 and of Directive 2006/115 in so far as it provides that there can be no right to equitable remuneration for the communication of phonograms which takes place in the bedrooms of Irish hotels and guesthouses, as part of their service, on radios, televisions and sound systems.

42. The applicant in the main proceedings has brought an action against the Irish State in which it seeks a declaration, first of all, that in adopting section 97(1) of the Act of 2000, the Irish State has failed to fulfil its obligation to transpose Article 8(2) of Directive 92/100 and of Directive 2006/115 and Article 10 EC. Secondly, it seeks compensation for damage which it has suffered as a result.

IV – Procedure before the national court and questions referred for a preliminary ruling

43. The referring court raises the question whether the exception to the obligation to pay equitable remuneration, which applies under sections 97(1)(a) and 246 of the Act of 2000, is compatible with Article 8(2) of Directive 92/100 and of Directive 2006/115, in so far as that provision exempts the communication of phonograms, broadcasts or cable programmes in hotel or guesthouse bedrooms from the obligation to pay equitable remuneration. Against this background, in its order for reference, the referring court asks the Court the following questions:

(i) 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 Directive 2006/115?

(ii) If the answer to paragraph (i) is in the affirmative, does Article 8(2) of Directive 2006/115 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?

(iii) If the answer to paragraph (i) is in the affirmative, does Article 10 of Directive 2006/115 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?

(iv) 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?

(v) If the answer to paragraph (iv) is in the affirmative, does Article 10 of Directive 2006/115 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?

44. According to the referring court, the proceedings do not concern the public areas of hotels and guesthouses, but only hotel and guesthouse bedrooms. Furthermore, the proceedings do not concern any interactive or on-demand transmissions.

V – Procedure before the Court

45. The order for reference was received at the Registry of the Court on 7 April 2010.

46. In the written procedure, observations were submitted by the applicant in the main proceedings, Ireland, the Greek Government, and the Commission.

47. Representatives of the applicant in the main proceedings, SCF, Marco del Corso, Ireland, the Italian, Greek and French Governments and the Commission took part at the joint hearing in the present case and in Case C-135/10 *SCF*, which was held on 7 April 2011.

VI – Preliminary remarks

48. In the main proceedings, the applicant is making a claim for damages based on the liability of the Irish State for infringing Union law. The Court has held that such a claim exists in principle under Union law if there is a sufficiently serious breach of a rule of Union law which is intended to confer rights on individuals and there is a direct causal link with loss or damage. (9) In its questions, the referring court has deliberately focused on whether the Irish State has failed to fulfil its obligation to transpose Article 8(2) of Directive 92/100 and of 2006/115. If it answers that question in the affirmative on the basis of the following elements for the interpretation of those provisions, it will further have to examine, if it wishes to rely on the claim of State liability under Union law, whether the further relevant conditions are satisfied.

49. I would also like to point out that, for the sake of simplicity, I will consider only Directive 2006/115 hereinafter. The question of the infringement of Union law concerns both Article 8(2) of Directive 92/100 and Article 8(2) of Directive 2006/115. However, Directive 2006/115 is merely a consolidated version of Directive 92/100, with the result that Article 8(2) is identical in both directives. I will therefore consider only Article 8(2) of Directive 2006/115 hereinafter, although the statements made also apply *mutatis mutandis* to Article 8(2) of Directive 92/100. I will also refer, for the sake of simplicity, only to operators of

hotels, although those statements also apply *mutatis mutandis* to operators of guesthouses.

VII – The first and second questions

50. With its first two questions, the referring court is seeking to ascertain whether Article 8(2) of Directive 2006/115 is to be interpreted as requiring a hotel operator which provides televisions and/or radios to which it distributes a broadcast signal in hotel bedrooms to pay equitable remuneration for the indirect communication of the phonograms which are used in the broadcasts.

51. Article 8(2) of Directive 2006/115 provides that equitable remuneration is to be paid if a phonogram published for commercial purposes or a reproduction of such a phonogram is used for broadcasting by wireless means or for any communication to the public. For the sake of simplicity, I will consider hereinafter only the case of a phonogram published for commercial purposes, although the statements made also apply *mutatis mutandis* to a reproduction of such a phonogram.

52. The referring court wishes to know, first of all, whether, in a case like the present one, the hotel operator makes a 'communication to the public' within the meaning of that provision and whether it is a 'user' for its purposes. It also wishes to know whether such an obligation can also exist if the television or radio broadcaster has already paid equitable remuneration for using the phonograms in its broadcasts.

A – *Main arguments of the parties*

53. In the view of the *applicant in the main proceedings* and the *French Government*, Article 8(2) of Directive 2006/115 is to be interpreted as requiring the hotel operator to pay equitable remuneration in a case like the present one.

54. First of all, there is communication to the public within the meaning of Article 8(2) of Directive 2006/115. That notion is an autonomous Union law notion which is to be interpreted in the same way as the notion of communication to the public in Article 3(1) of Directive 2001/29. This is indicated by the fact that the same wording is used in both provisions. A consistent interpretation of the notion of communication to the public is not precluded by the differences between the level of protection for copyright and related rights. According to the objectives, equitable remuneration is to be paid not only to authors, but also to performers and phonogram producers, the latter being guaranteed equitable remuneration for the high-risk investments in the production of phonograms. The French Government points out in this connection that the aim of Directive 2001/29, of avoiding distortions as a result of differences in legislation, also suggests a uniform interpretation of the notion of communication to the public.

The distortions resulting from the fact that Member States already have the possibility of providing for exceptions and limitations would be increased if the interpretation of the notion of communication to the public was at the discretion of the Member States. A uniform interpretation of the notion of communication to the public is also necessary because it is important for the term of protection of copyright and related rights under Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights. (10) The applicant in the main proceedings points out that indirect transmissions are also covered. In *SGAE* the Court ruled, in a similar case, that there was communication to the public within the meaning of Article 3(1) of Directive 2001/29. It was sufficient that the radio or television programme was made available because radios or televisions were provided to which a signal was fed. It was not relevant whether the hotel customers had actually used the equipment. Because it allowed access to the radio and television programme, hotel operators provided an additional service and therefore pursued an economic interest.

55. Secondly, in the view of the applicant in the main proceedings and the French Government, an obligation to pay equitable remuneration is not precluded by the fact that under Article 8(2) of Directive 2006/115 only a single remuneration is to be paid. This does not mean that a hotel operator is not required to pay remuneration for communication to the public if the radio or television broadcaster has already paid remuneration. Rather, equitable remuneration must be paid for any relevant use under Article 8(2) of the directive, irrespective of whether the use is direct or indirect. In so far as that provision refers to a single equitable remuneration, this merely means that hotel operators are only required to pay one remuneration which must then be shared between the producers and the performers. Such an interpretation is also not precluded by the Court's judgment in *SENA*, (11) since in that judgment the Court only dealt with the rules of Union law on the scope of the remuneration.

56. *Ireland* and the *Greek Government* take the view that Article 8(2) of Directive 2006/115 cannot be interpreted as requiring the hotel operator to pay equitable remuneration in a case like the present one.

57. First of all, in the view of Ireland, the question whether there is communication to the public must be answered having regard to national law.

58. Secondly, in the view of Ireland and the Greek Government, there is no communication to the public within the meaning of Article 8(2) of Directive 2006/115. Only playbacks in a discotheque, at a concert or in a bar are covered. Ireland points out in this connection that the notion of communication to the public in Article 8(2) of Directive 2006/115 cannot be interpreted in the same way as the Court interpreted the notion of communication to the public within the meaning of Article 3(1) of Directive 2001/29 in *SGAE*. First of all, Article 3(1) of

Directive 2001/29 establishes an absolute right for authors. For the producers of phonograms, on the other hand, provision is made for an absolute right only in respect of making available to the public under Article 3(2) of Directive 2001/29, whilst for communication to the public under Article 8(2) of Directive 2006/115 provision is made only for an economic right. Furthermore, those rights have a different international law context. In particular, the notion of communication to the public as defined in Article 2(g) of the WPPT is narrower than the notion employed in Article 8 of the WCT. In this connection, Ireland points out that under Article 2(g) of the WPPT the phonograms must be made audible to the public, which is only the case if the radio or television is actually switched on. Furthermore, the Court has based its interpretation of the notion of communication to the public in Article 3(1) of Directive 2001/29 on the fact that that notion also covers the right to make available to the public. On the other hand, Article 8(2) of Directive 2006/115 does not provide for a right to equitable remuneration for making a phonogram available to the public. Furthermore, the recitals in the preamble to Directive 2001/29 and in the preamble to Directive 2006/115 militate against a consistent interpretation of the notion of communication to the public. Moreover, when Directive 92/100 was codified in Directive 2006/115, there was neither a reference to Article 3(1) of Directive 2001/29, nor was it clarified that indirect communication was also covered. In addition, account must be taken of the possibilities for exceptions under the Rome Convention and the WPPT. Lastly, the fact that the Member States may provide for more extensive rights militates against a consistent interpretation. The Greek Government adds that an excessively broad interpretation of the notion of communication to the public would lead to unwanted results, as setting up a central antenna in a residential building and renting radios or televisions could then be regarded as communication to the public. The present case concerns only the reception of a broadcast which is protected as a fundamental right. The interests of the tourism sector must also be taken into consideration.

59. Thirdly, in the view of the Greek Government and Ireland, in a case like the present one a hotel operator is not a user within the meaning of Article 8(2) of Directive 2006/115. Ireland points out, first of all, that the hotel operator merely provides equipment and technical support for the reception of the relevant signals. If the hotel operator does not switch on that equipment, it is not a user. It must also be borne in mind that Article 8(2) of Directive 2006/115, in contrast with Article 3(1) of Directive 2001/29, does not refer to the user. In the view of the Greek Government, only the radio or television broadcaster is a user, whilst the hotel operator only enables the reception of the broadcasts. Such reception is protected as a fundamental right and is not therefore relevant for the purposes of copyright.

60. Fourthly, in the view of the Greek Government and Ireland, a right to equitable remuneration must also be rejected because a hotel operator is not required to pay any further remuneration under Article 8(2) of Directive 2006/115

if the radio or television broadcaster has already paid equitable remuneration in respect of use. In the view of Ireland, this is clear from the use of the words 'or' and 'single', and from the schematic context of the individual paragraphs of Article 8 of the directive. Such a payment is also not equitable because the broadcaster has already had to pay remuneration. In the view of the Greek Government, the remuneration paid by the radio or television broadcaster also covers the reception of broadcasts on radios or televisions in hotel bedrooms. It must also be borne in mind that in certain Member States such as Greece a fee must be paid in order to be able to receive radio and television programmes. That fee is also paid by hotels and thus, indirectly, by customers in the charge for the room.

61. The *Commission*, too, takes the view that Article 8(2) of Directive 2006/115 cannot be interpreted as requiring a hotel operator to pay equitable remuneration in a case like the present one.

62. The Court's case-law on Article 3(1) of Directive 2001/29 cannot be readily applied to Article 8(2) of Directive 2006/115. Instead, account must be taken of the differences between those two provisions. Whilst an author is accorded the highest level of protection, and therefore an exclusive right, a phonogram producer is granted only a weaker right to equitable remuneration. The two provisions also have a different international law context.

63. Despite these differences, in the view of the Commission, communication to the public within the meaning of Article 8(2) of Directive 2006/115 must be taken to exist in a case like the present one. First of all, that provision also covers indirect transmissions. It also follows from Article 2(g) of the WPPT that it is sufficient for communication within the meaning of Article 15 of the WPPT that the phonogram is made audible. Furthermore, the communication is to the public. The question whether communication is to the public depends on whether the place where the phonogram is played is private or public, whether the communication has an economic value and how large the audience is. On the basis of those criteria, communication to the public must be taken to exist in the present case in accordance with the judgment in *SGAE*.

64. However, the Commission takes the view that the payment of additional remuneration by the hotel operator is not equitable in the present case. First of all, the Member States have a margin of discretion in connection with Article 8(2) of Directive 2006/115. This follows from the possibilities accorded to the Member States, under international law, to provide for limitations and exceptions. It allows them not only to decide when remuneration is equitable, but also whether remuneration is actually equitable. Secondly, it is incompatible with the different level of protection under Article 3(1) of Directive 2001/29, on the one hand, and under Article 8(2) of Directive 2006/115, on the other, if further remuneration would also have to be paid by the hotel operator in a case like the present one,

where the broadcaster has already paid equitable remuneration. It is irrelevant, however, whether or not the public have an interest in communication.

B – *Legal assessment*

65. These questions have been referred against the background of the Court's judgment in *SGAE*. (12) In that judgment, the Court ruled that a hotel operator which distributes a television signal using televisions installed in the hotel bedrooms communicates to the public the works used in the television broadcast for the purposes of Article 3(1) of Directive 2001/29. That provision regulates the exclusive right of authors to authorise or prohibit any communication to the public of their works. In the present case, the parties are in dispute in particular as to whether this interpretation of the notion of communication to the public, which is given having regard Article 3(1) of Directive 2001/29, can be applied to the same notion in Article 8(2) of Directive 2006/115. In the light of this, I would first like to consider the judgment in *SGAE* (1), before I consider the interpretation of Article 8(2) of Directive 2006/115 (2).

1. The interpretation of the notion of communication to the public in Article 3(1) of Directive 2001/29

66. In *SGAE* the Court found that the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive. It stated the following grounds.

67. First of all, it referred to the recitals in the preamble to Directive 2001/29. It began by referring to recital 23, according to which the notion of communication to the public should be understood in a broad sense. (13) It also stated that only in this way is it possible to achieve the objective mentioned in recitals 9 and 10, of establishing a high level of protection of authors and giving them an appropriate reward for the use of their work. (14)

68. Secondly, the Court cited its case-law on other provisions of Union law. (15)

69. Thirdly, it considered the cumulative effects of the fact that, usually, hotel customers quickly succeed each other and that making the works available could therefore become very significant. (16)

70. Fourthly, the Court found that under Article 11*bis*(1)(ii) of the revised Berne Convention, an independent communication to the public exists where a broadcast made by an original broadcasting organisation is retransmitted by another broadcasting organisation. Thus, the work is communicated indirectly to a new public through the communication of the radio and television broadcast. (17)

71. Fifthly, the Court defined the public aspect of indirect communication, with reference to the Guide to the Berne Convention, an interpretation document drawn up by WIPO, on the basis of the authorisation already granted to the author. It explained that the author's authorisation to broadcast his work covers only direct users, that is, the owners of reception equipment who, personally within their own private or family circles, receive the programme. However, if transmission is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work. The communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. (18)

72. Sixthly, it found that the clientele of a hotel constitutes a new public. The hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. (19)

73. Seventhly, the Court pointed out that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. (20)

74. Eighthly, the Court considered that giving access to the broadcast works constitutes an additional service performed with the aim of obtaining some benefit. In a hotel it is even of a profit-making nature, since that service has an influence on the hotel's standing and, therefore, on the price of rooms. (21)

75. Ninthly, however, the Court qualified its findings, indicating that the mere provision of reception equipment does not as such amount to communication within the meaning of Article 3(1) of Directive 2001/29. On the other hand, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of that provision. (22)

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

76. Before I examine the interpretation of the notions of communication to the public (c) and user (d) employed in Article 8(2) of Directive 2006/115, and the obligation to pay equitable remuneration (e), I would first like to explain that those notions are autonomous Union law notions (a), which must be interpreted having regard to the international law context (b).

(a) Autonomous Union law notions

77. Some of the parties point out that a uniform interpretation of certain notions contained in Article 8(2) of Directive 2006/115, such as the notion of communication to the public, is not required by Union law. It is therefore for the Member States to define those notions.

78. It must be noted that, in the absence of a reference to the law of the Member States, the notions used in Article 8(2) of the directive are autonomous Union law notions. In the interest of a uniform application of Union law in all Member States and having regard to the principle of equality throughout the European Union, they must be given a uniform interpretation. (23) Only then is it possible to achieve the objective, mentioned in recital 6 in the preamble to Directive 2006/115, of facilitating creative, artistic and entrepreneurial activities through a harmonised legal framework in the Community.

79. However, in certain cases, only very limited harmonisation can be undertaken, despite the existence of an autonomous Union law notion, with the result that the regulatory intensity of the notion is very low. In such cases, only a broad regulatory framework is laid down in Union law, which must be filled out by the Member States. (24) The Court proceeded from this basis with regard to the equitableness of remuneration within the meaning of Article 8(2) of Directive 2006/115. (25) However, as the regulatory intensity of a notion must be assessed individually for each notion mentioned in a provision, it is not possible to draw any inferences as to the other notions used in Article 8(2) of Directive 2006/115.

(b) International law and Union law context

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

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

82. As far as the WPPT is concerned, this is because the European Union itself is a Contracting Party. It is settled case-law that European Union legislation must be interpreted in a manner that is consistent with international law, in particular where the European Union is a Contracting Party and that European Union legislation is intended to give effect to that international law. (26)

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

(c) The notion of communication to the public

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

(i) The notion of communication

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

86. As has been explained above, (27) in interpreting the notion of communication in that provision regard must be had to the provisions of Article 12 of the Rome Convention and of Article 15 of the WPPT. Article 15(1) in conjunction with Article 2(g) of the WPPT is particularly relevant to the notion of communication. Article 15(1) provides that performers and producers of phonograms enjoy the right to a single equitable remuneration for direct or indirect use for broadcasting or for any communication to the public. In Article 2(g) of the WPPT, the notion of communication to the public of a phonogram is defined as communication to the public by any medium, otherwise than by broadcasting, of the sounds or the representations of sounds fixed in a phonogram. It is further provided that it is sufficient for the purposes of communication to the public within the meaning of Article 15 of the WPPT if the sounds fixed in a phonogram are made audible or represented.

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

88. First of all, Article 8(2) of Directive 2006/115 covers both direct and indirect communications. This is shown, first, by that provision's open wording and drafting history. It is clear from the drafting history of Directive 92/100 that it was not considered necessary to clarify further the notion of communication by adding the words 'direct or indirect', since through the use of the notion of communication it was evident that indirect communications would also be covered. (28) That interpretation is also now suggested, since it has entered into force, by Article 15 of the WPPT, under which a right must also exist for indirect transmissions. (29)

89. Secondly, it is sufficient for the purposes of communication if the sounds fixed in the phonogram are made audible. It is irrelevant whether a customer has actually heard the sounds. This is suggested, first, by Article 2(g) of the WPPT, which refers to audibility. Furthermore, according to the spirit and purpose of Directive 2006/115, it would appear to be sufficient if the customer has the legal and practical possibility of enjoying the phonograms. (30) Such an interpretation also has the benefit of corresponding to the interpretation of the notion of

communication to the public within the meaning of Article 3(1) of Directive 2001/29.

90. Applying those provisions, it must be held that the notion of communication within the meaning of Article 8(2) of Directive 2006/115 is to be interpreted as existing where a hotel operator provides televisions and/or radios in guest bedrooms to which it distributes a broadcast signal. In that case there is indirect communication, irrespective of whether the customers have actually received the television or radio programme.

91. The Commission argues in this connection that the notion of communication to the public within the meaning of Article 8(2) of Directive 2006/115 may not, in principle, be interpreted more broadly than the notion of communication to the public in Article 3(1) of Directive 2001/29. It must be borne in mind that the European Union legislature intended to provide a higher level of protection for copyright than for the related rights of phonogram producers and performers, and it is therefore contrary to the system to grant phonogram producers and performers more extensive rights under Article 8(2) of Directive 2006/115 than authors under Article 3(1) of Directive 2001/29. For that reason, regard must be had to recitals 23 and 27 in the preamble to Directive 2001/29.

92. Recital 27 in the preamble to Directive 2001/29 does not preclude the existence of communication in a case like the present one, however. It must be construed as meaning that persons providing players, without at the same time controlling access to copyright works, do not make any communication to the public. This is the case, for example, where televisions or radios are sold or rented or where an internet service provider merely provides access to the internet. In a case like the present one, however, the hotel operator does not simply provide the players. Instead, it provides hotel customers with access to the phonograms, only indirectly, but deliberately. (31)

93. In so far as the Commission takes the view, with reference to recital 23 in the preamble to Directive 2001/29, that the mere reception of a broadcast signal by automatic reception equipment cannot constitute communication within the meaning of Article 8(2) of Directive 2006/115, this does not need to be examined for the purposes of the present question. The referring court has made clear that in the present case the hotel operator did not simply receive the broadcast signal, but retransmitted that signal itself. (32)

(ii) The notion of public

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

95. Unlike in the case of the definition of the notion of communication, the legal definition of communication to the public in Article 2(g) of the WPPT does

not offer any assistance in this connection. In that provision there is no further clarification of the 'public' aspect of communication in the definitions. It is merely stated that the sounds must be made audible to the public, with the result that the legal definition appears to be meaningless in this regard.

96. However, the question arises whether recourse may be had in this connection to the Court's abovementioned case-law (33) on the interpretation of the notion of communication to the public within the meaning of Article 3(1) of Directive 2001/29, according to which communication in a hotel bedroom may be to the public where the quick succession of hotel customers in the bedrooms leads to a very extensive use of the protected work.

97. In my opinion, this question should be answered in the affirmative. (34)

98. First of all, this is suggested by the fact that the same expression is used in Article 3(1) of Directive 2001/29 and in Article 8(2) of Directive 2006/115. Ireland objects that following the judgment in *SGAE* there has been no clarification, in connection with the consolidation of Directive 92/100 in Directive 2006/115, to the effect that the notion of communication to the public in Article 8(2) thereof must be construed consistently with the notion of communication to the public within the meaning of Article 3(1) of Directive 2001/29. However, I am not convinced by that objection. Rather, the fact that following the judgment in *SGAE* the notion of communication to the public in Article 8(2) of Directive 2006/115 was retained without further indications would appear to suggest a consistent interpretation of that notion in both provisions.

99. Secondly, the close substantive and legal connection between copyright and the related rights of performers and phonogram producers would seem to suggest that both notions should be given a consistent interpretation.

100. It must be borne in mind that Directive 2006/115 and Directive 2001/29 are connected in so far as the rights of performing artists and phonogram producers are regulated not only in Directive 2006/115, but also in Article 3(2) of Directive 2001/29. The latter provision establishes an exclusive right for performers and phonogram producers, in the specific case of making available to the public from a place and at a time freely chosen, whilst the former provision merely establishes a right to equitable remuneration in respect of communication to the public. Against this background, it does not seem reasonable, in my view, to give a different interpretation to the same notions in these directives.

101. Furthermore, account must be taken of the substantive connection between copyright, on the one hand, and the related rights of performers and phonogram producers, on the other. In many cases, copyright musical works are made available to the public at large only by means of interpretation by a performance by a performer fixed in a phonogram. If it is taken into account that that

contribution by performers and phonogram producers is intended to be rewarded by the right to equitable remuneration under Article 8(2) of the directive, there is much to suggest that the notion of communication to the public in Article 3(1) of Directive 2001/29 and in Article 8(2) of Directive 2006/115 should be given a consistent interpretation.

102. Thirdly, this is also suggested by recital 5 in the preamble to Directive 2006/115, under which performers are to be granted an adequate income and phonograph producers must be able sufficiently to recoup the investments made. If account is taken of the abovementioned close connection between copyright and related rights, it difficult to understand why in a case of communication of a phonogram to the public the author should have an exclusive right under Article 3(1) of Directive 2001/29, whilst performers and phonogram producers do not receive equitable remuneration under Article 8(2) of Directive 2006/115, but, rather, are granted nothing.

103. On the other hand, the objections which are raised against such a consistent interpretation are not convincing.

104. First of all, it is not clear to me why the fact that Article 3(1) of Directive 2001/29 provides for an exclusive right for authors, whilst Article 8(2) of Directive 2006/115 only grants an economic right to equitable remuneration for performers and phonogram producers, should justify a different interpretation of the notion of public.

105. A particular feature of the grant of an exclusive right under Article 3(1) of Directive 2001/29 is that it permits the author to prohibit the use of his music by unauthorised persons. The European Union legislature did not wish to go that far in the case of phonograms already published for commercial purposes in respect of the related rights of phonogram producers and performers embodied therein. However, it granted them a right to equitable remuneration by way of compensation. Article 8(2) of Directive 2006/115 can thus be regarded as a kind of compulsory licence. (35) If these ideas of compensation and the compulsory licence are taken into account, it seems reasonable, in the case of communication of a phonogram to the public, to grant phonogram producers and performers a right to equitable remuneration in all cases where an author has an exclusive right.

106. Secondly, it cannot necessarily be inferred from the fact that, according to recital 9 in the preamble to Directive 2001/29, authors are intended to have a high level of protection, whilst performers and phonogram producers are to enjoy only an adequate level of protection under recital 5 in the preamble to Directive 2006/115, that the public aspect of communication should be given a narrower interpretation for related rights. It seems much more reasonable, in my view, to construe this as an indication that Article 3(1) of Directive 2001/29 establishes an exclusive right for authors, whilst Article 8(2) of Directive 2006/115 does not

establish an exclusive right for performers and phonogram producers, but merely a right to equitable remuneration.

107. Thirdly, it is argued that the Court based the interpretation of the notion of communication to the public within the meaning of Article 3(1) of Directive 2001/29 on recital 23 in the preamble to Directive 2001/29, under which the right of communication to the public should be understood in a broad sense. Because Directive 2006/115 does not have a comparable recital, the notion of communication to the public in that directive must be given a narrow interpretation.

108. This objection must also ultimately be rejected.

109. It must be acknowledged that in *SGAE* the Court in fact based its interpretation of the notion of communication to the public on that recital and that there is no identical recital in the preamble to Directive 2006/115.

110. However, this does not justify a stricter interpretation of the public aspect of communication in Article 8(2) of Directive 2006/115. The abovementioned recitals and the objectives mentioned in recitals 3, 4 and 5 in the preamble to Directive 2006/115 relating to equitable remuneration for rightholders are based on the approach whereby the notion of the public in Article 3(1) of Directive 2001/29 and in Article 8(2) of Directive 2006/115 is to be given a consistent interpretation. It must also be pointed out that the Court has attributed the need for a broad interpretation to the fact that according to recital 10 in the preamble to Directive 2001/29 authors are to be guaranteed an appropriate reward. In recital 5 in the preamble to Directive 2006/115, however, there is a corresponding recital, under which the holders of related rights are also to be guaranteed an adequate income and sufficient recouping of investments.

111. It must be stated, as an interim conclusion, that the public aspect of communication in Article 8(2) of Directive 2006/115 must in principle (36) be interpreted in same way as the public aspect of communication within the meaning of Article 3(1) of Directive 2001/29. In a case like the present one, the public aspect of communication can therefore be attributed to the fact that in hotel bedrooms the quick succession of hotel customers in the bedrooms may lead to a very extensive use of the protected work.

(iii) Conclusion

112. On the above grounds, the notion of communication to the public in Article 8(2) of Directive 2006/115 is to be interpreted as meaning that a hotel operator which provides televisions and/or radios in hotel bedrooms to which it distributes a broadcast signal indirectly communicates to the public the phonograms used in radio and television broadcasts.

113. In this connection, I must mention that the question whether communication to the public may also exist where the communication is not of a profit-making nature was fiercely debated at the hearing. Since, however, the present case concerns a situation in which making the phonograms audible constitutes an additional service which has an influence on the hotel's standing and on the price of rooms, there is a profit-making purpose, with the result that there is no need to consider this point any further for the purposes of the present case. (37)

(d) The notion of user

114. The referring court is also seeking to ascertain whether the hotel operator constitutes a 'user' within the meaning of Article 8(2) of Directive 2006/115. Article 8(2) of the directive provides that the person liable in respect of the right to equitable remuneration which arises where a phonogram is used for communication to the public is the user.

115. 'User' for the purposes of Article 8(2) of the directive means any person who broadcasts the phonograms by wireless means or communicates them to the public.

116. Contrary to the view taken by Ireland, it cannot be inferred from the fact that the notion of user appears in Article 8(2) of Directive 2006/115, but not in Article 3(1) of Directive 2001/29, that Article 8(2) of Directive 2006/115 must be given a strict interpretation. The reason for that difference in the wording of the two provisions is as follows: Article 3(1) of Directive 2001/29 grants an exclusive right which may be invoked by an author against anyone. For that reason, the person who may be held liable does not have to be mentioned in that provision. On the other hand, Article 8(2) of Directive 2006/115 does not grant an exclusive right, but only a right to equitable remuneration. The person who may be held liable must therefore also be defined in that provision.

117. It must be stated, as an interim conclusion, that a hotel operator which communicates phonograms indirectly to the public is a user within the meaning of Article 8(2) of Directive 2006/115 and thus the person liable in respect of the right to equitable remuneration under that provision.

(e) The obligation to pay a single equitable remuneration

118. The referring court is also seeking to ascertain whether Article 8(2) of Directive 2006/115 is to be interpreted as meaning that where a radio or television broadcaster has already paid equitable remuneration for the use of the phonograms in the broadcast, a hotel operator which provides its customers with access to radio and television broadcasts in the hotel bedrooms and thus communicates the phonograms used in the broadcasts indirectly to the public must also pay equitable remuneration for the use of the phonograms.

119. Article 8(2) of Directive 2006/115 provides that the user must pay a single equitable remuneration 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 this remuneration must be shared between the relevant performers and phonogram producers. In the absence of agreement between the performers and phonogram producers, the Member States may lay down the conditions as to the sharing of this remuneration between them.

120. It is clear from the wording and the scheme of the provision that in such a case the hotel operator must also pay equitable remuneration.

121. Contrary to the view taken by Ireland, it cannot be inferred from the words 'or' and 'single' that a hotel operator is not required to pay any remuneration in such a case (i). Furthermore, neither the view taken by Ireland and the Commission, according to which the payment of a further remuneration would not be equitable (ii) nor the Commission's reference to the discretion enjoyed by the Member States (iii) is convincing. Lastly, the Greek Government's reference to the fact that licence fees have to be paid in certain Member States cannot in itself justify a derogation from the obligation to pay equitable remuneration (iv).

(i) The importance of the words 'or' and 'single'

122. In the view of Ireland, 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.

123. This argument is unconvincing.

124. By using the word 'single' in the first sentence of Article 8(2) of Directive 2006/115, the European Union legislature merely wished to make clear that it is not necessary to pay one remuneration to the performers and another remuneration to the phonogram producers, but just a single remuneration, which is then to be shared between the performers and the phonogram producers.

125. This view is supported, first of all, by the wording and the scheme of the provision, in particular the connection with the second sentence of Article 8(2) of Directive 2006/115, which governs the manner in which the single equitable remuneration is to be shared in the internal relationship between the phonogram producers and the performers.

126. Secondly, only this interpretation would seem to be compatible with the abovementioned understanding of the right to equitable remuneration under the first sentence of Article 8(2) of Directive 2006/115 as a kind of compulsory licence. If this understanding is adopted, whenever a phonogram is used for the

purposes of that provision, that is in the case of both broadcast and subsequent communication to the public, the infringement of the related rights is compensated, with the result that a right to equitable remuneration arises each time.

127. Thirdly, contrary to the view taken by Ireland, this position would seem to be supported by the rule of international law laid down in Article 15 of the WPPT, from which it is clear that Article 8(2) of Directive 2006/115 must also cover indirect communications. In the case of indirect communication, there will, as a rule, be a right to equitable remuneration vis-à-vis the persons who have broadcast or directly communicated the phonograms. If, in this case, an obligation on the part of the person who indirectly communicates the phonograms is rejected because equitable remuneration has already been paid for the broadcast or the direct communication, no right to remuneration would arise, as a rule, in the case of indirect communication to the public. This does not appear to be compatible with the rule of international law laid down in Article 15 of the WPPT.

128. The words 'or' and 'single' in Article 8(2) of Directive 2006/115 do not therefore preclude the obligation on a hotel operator to pay equitable remuneration in a case like the present one.

(ii) The equitableness of a further payment

129. Ireland and the Commission claim that it is not equitable within the meaning of Article 8(2) of Directive 2006/115 to provide for additional remuneration paid by the hotel operator in a case like the present one. After all, the phonogram producers and the performers already have a claim vis-à-vis the broadcasting organisation.

130. This view is unconvincing.

131. First of all, it is not compatible with the idea underlying Article 8(2) of Directive 2006/115 that remuneration is to be paid whenever a new section of the receiving public hears the phonogram. The equitable remuneration paid for the use of the phonogram in a radio or television broadcast covers only the reception of the broadcast within private or family circles. The creation of a new group of listeners, such as the hotel customers, goes beyond such use and therefore constitutes further use in the form of indirect communication to the public. On the basis of the understanding of Article 8(2) of Directive 2006/115 as a kind of compensatory compulsory licence, further equitable remuneration is to be paid in respect of that further use.

132. Secondly, I consider that such a view is not compatible with the rules of international law laid down in Article 15 of the WPPT. As has already been explained, (38) under that provision equitable remuneration must also be paid in the case of indirect communication of a phonogram to the public. An approach

whereby the payment of equitable remuneration for indirect communication is not equitable because equitable remuneration is already payable in respect of the direct communication would seem to circumvent that rule of international law.

133. Thirdly, the approach taken by Ireland and by the Commission could give rise to conflicting assessments. An operator of a bar, a restaurant or a discotheque which plays phonograms itself would thus be required to pay equitable remuneration in respect of that use. However, the same operator would not have to pay any remuneration for communicating a radio station which simply plays phonograms.

(iii) The discretion enjoyed by the Member States

134. The Commission also takes the view that the Member States have discretion as to whether, in addition to the right to equitable remuneration vis-à-vis the broadcasting organisation, they also provide for a right vis-à-vis the hotel operator in a case like the present one.

135. That argument must be rejected.

136. It must be stated, first of all, that it is not reasonable to assume such discretion on the basis of the wording of Article 8(2) of Directive 2006/115. Because of the low regulatory intensity of the notion of equitableness, (39) the Member States do enjoy a broad margin of discretion in assessing what remuneration they consider to be equitable. However, the provision does not allow then any discretion as to *whether* they must provide for remuneration. Rather, Article 8(2) of Directive 2006/115 provides that the Member States must provide for equitable remuneration both if a phonogram is used for broadcasting or for any communication to the public.

137. Secondly, an interpretation whereby the Member States must provide for remuneration, but may limit it nominally to zero, stretches the wording of Article 8(2). Such an interpretation would also appear to run counter to the objective of Article 8(2) of Directive 2006/115, of guaranteeing phonogram producers and performers equitable compensation for the fact that there is a further infringement of their rights by virtue of the indirect communication of the phonograms.

138. Thirdly, the Commission's argument that, when determining the extent of the Member State's discretion under Union law, account must also be taken of the margin of discretion enjoyed by them under international law is not convincing.

139. It must be pointed out, first of all, that a Member State may not rely on a margin of discretion existing under international law if it is subject to stricter requirements under Union law. The Commission's approach therefore seems to be fundamentally wrong.

140. It must also be borne in mind that the European Union itself is a Contracting Party to the WPPT and is thus subject to the international law obligations stemming from that Treaty. In accordance with the principle of good faith, a Member State must refrain from taking any measures which could result in the European Union failing to comply with its obligations under international law.

141. The European Union is bound by Article 15 of the WPPT, which establishes a right to equitable remuneration for indirect communications too. It cannot rely on an exception or limitation in respect of that provision. Article 15(3) of the WPPT is not relevant. That provision stipulates that any Contracting Party may, in a notification deposited with the Director-General of WIPO, declare that it will apply the provisions relating to the right to equitable remuneration in Article 15(1) of the WPPT 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. The European Union has not deposited any such notification, however. Reference cannot be made to Article 16 of the WPPT in this connection either. The first part of that provision merely permits the Contracting Parties to provide for the same kinds of limitations or exceptions with regard to related rights as they provide for copyright. That provision does not therefore allow an autonomous limitation or exception just for related rights. Nor can the second part of that provision in itself constitute a basis for a limitation or exception. It does not provide for any possibility of a limitation or exception itself, but restricts the discretion enjoyed by the Contracting Parties with regard to exceptions and limitations provided for under the WPPT.

142. It must be stated, as an interim conclusion, that the Commission's argument based on the discretion enjoyed by the Member States must also be rejected.

(iv) The effects of a licence fee

143. Lastly, in so far as the Greek Government argues that a licence fee must be paid in certain Member States, including by hotels, this argument is not persuasive in itself. In so far as such a fee does not provide equitable remuneration for performers and phonogram producers, but serves other purposes, such as financing public radio and television, the effects of invoking such a fee cannot be to the detriment of performers and phonogram producers.

(v) Conclusion

144. Article 8(2) of Directive 2006/115 is therefore to be interpreted as meaning that where a radio or television broadcaster has already paid equitable remuneration for the use of the phonograms in the broadcast, a hotel operator which provides its customers with access to radio and television broadcasts in the hotel bedrooms and thus communicates the phonograms used in the broadcasts indirectly to the public must also pay equitable remuneration for the use of the phonograms.

3. Conclusion

145. In summary, it must be held that Article 8(2) of Directive 2006/115 is to be interpreted as requiring a hotel operator which provides televisions and/or radios in the hotel bedrooms to which it distributes a broadcast signal to pay equitable remuneration in respect of the fact that it communicates the phonograms used in the broadcasts indirectly to the public, even if the radio and television broadcasters have already paid equitable remuneration for using those phonograms in their broadcasts.

VIII – The third question

146. By its third question, the referring court is seeking to ascertain whether Article 10(1)(a) of Directive 2006/115 permits Member States to exempt hotel operators from the obligation to pay 'a single equitable remuneration'. This would require the indirect communication to the public of phonograms by means of radios or televisions to constitute 'private use' within the meaning of that provision.

A – *Main arguments of the parties*

147. In the view of the *applicant in the main proceedings*, Article 10(1)(a) of Directive 2006/115 is not applicable in a case like the present one. According to the Court's ruling in *SGAE*, there is no private use within the meaning of that provision in such a case. The hotel makes commercial use of the phonograms in that, in its own economic interest, it communicates them to the public. The private nature of the use by the hotel customer and the place of use are immaterial. In any case, Article 10 of Directive 2006/115, which as an exception must be given a narrow interpretation, permits only limitations to the right to equitable remuneration and is not, therefore, as extensive an exception as the Irish legislation. Furthermore, that provision does not satisfy the conditions of the three-stage test contained in Article 10(3) of the directive.

148. In the view of *Ireland*, the *Greek Government* and the *Commission*, Article 10(1)(a) of Directive 2006/115 permits a Member State to provide for an exception like the Irish legislation. Ireland and the Greek Government point out, first of all, that the use of radios or televisions by the hotel customer in the hotel bedroom is private, since a hotel bedroom belongs to the private sphere, which is protected under fundamental rights. In the view of Ireland, regard must be had to the individual listener or viewer in the individual bedrooms. The judgment in *SGAE* is not applicable to the present case. In any event, in that judgment the Court did not consider it to be incompatible that the hotel bedrooms are private in nature, but communication to the public takes place. The Commission claims in this connection that Directive 2006/115 does not provide a definition of the notion of private use and, for that reason, a Member State is free to define certain places

as private places for the purposes of Article 10(1) of Directive 2006/115. Furthermore, in the view of Ireland and the Commission, the three-stage test under Article 10(3) of Directive 2006/115 does not preclude the application of Article 10(1)(a) either.

B – *Legal assessment*

149. Article 10(1)(a) of Directive 2006/115 provides that Member States may limit the rights contained in Chapter II of the directive, which include the right to equitable remuneration under Article 8(2) of Directive 2006/115, in the case of private use.

150. That provision must be interpreted as meaning that, under it, the obligation on a hotel operator under Article 8(2) of Directive 2006/115 to pay equitable remuneration for the communication of phonograms to the public may not be limited in a case like the present one.

151. In the context of Article 10(1)(a) of Directive 2006/115, the relevant factor is the assessment of the actual use. In addition, the public or private nature of the use is crucial, but not the public or private nature of the place where such use occurs. (40)

152. The use of the phonograms which gave rise to the right to equitable remuneration under Article 8(2) of Directive 2006/115 in the present case is the use by the hotel operator in the form of communication to the public. In my view, such use cannot come within the exception under Article 10(1)(a) of Directive 2006/115 because use by the hotel operator in the form of communication to the public cannot really be regarded, at the same time, as private use by the hotel operator. The terms ‘private’ and ‘public’ are clearly antonyms. (41)

153. It is irrelevant for the purposes of the present case, on the other hand, whether the conduct of a hotel customer in his hotel bedroom can be regarded as private use. The present case does not concern the application of Article 10(1)(a) of Directive 2006/115 to use by a hotel customer, but to use by the hotel operator. In a case like the present one, the use of phonograms by the hotel operator may constitute communication to the public, whilst it may be private use for the hotel customer. This would also appear to be consistent with the Court’s findings in *SGAE*, in which it accepted the existence of communication to the public despite pointing out the private nature of hotel bedrooms. (42)

154. It cannot be argued, to counter such an interpretation of Article 10(1)(a) of Directive 2006/115, that that provision is thus deprived of all practical effectiveness. Rather, that provision retains an autonomous scope, in particular with regard to uses which do not constitute communication to the public, but other use, such as fixation within the meaning of Article 7 of Directive 2006/115.

155. Lastly, the approach taken by the Commission, according to which, in the absence of a legal definition of the notion of private use in Article 10(1)(a) of Directive 2006/115, the Member States are free in principle to define certain places as private places for the purposes of that provision, must be rejected. First of all, the notion of private use within the meaning of Article 10(1)(a) of Directive 2006/115 is an autonomous Union law notion which must be given a uniform interpretation throughout the European Union. (43) The absence of a legal definition in the directive does not therefore automatically mean that the Member States have discretion as to the interpretation of the notion of private use. As explained above, in the present case the regulatory intensity of the provision is also not so low that the Member States enjoy a broad margin of discretion in filling out the Union law framework. Rather, the notion of private use is as sharply delimited as the public aspect of communication, since the notions of private and public are mutually exclusive.

156. It must be stated, in conclusion, that Article 10(1)(a) of Directive 2006/115 is to be interpreted to the effect that where a hotel operator communicates phonograms to the public, its obligation to pay equitable remuneration cannot be ruled out under that provision, because in such a case there is no private use by the hotel operator.

IX – The fourth question

157. By its fourth question, the referring court is seeking to ascertain whether 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 is a 'user' making a 'communication to the public' of the phonograms within the meaning of Article 8(2) of Directive 2006/115.

A – *Main arguments of the parties*

158. In the view of the *applicant in the main proceedings*, this question should be answered in the affirmative. According to the Court's case-law, in such a case a hotel operator makes a communication to the public in respect of the hotel customers, who would otherwise not have access to those phonograms. It is not a case of mere provision of physical facilities for enabling a communication, which does not amount to communication in accordance with recital 27 in the preamble to Directive 2001/29.

159. In the view of *Ireland*, the *Greek Government* and the *Commission*, this question should be answered in the negative. The Greek Government refers to its arguments with regard to the first question. Ireland and the Commission take the view that it does not constitute communication to the public where the hotel operator provides the hotel customer with players and phonograms and,

consequently, the hotel operator is not a user which is required to pay remuneration under Article 8(2) of Directive 2006/115.

B – *Legal assessment*

160. By its fourth question, the referring court is seeking to ascertain whether a hotel operator which provides in its hotel bedrooms players for phonograms and the relevant phonograms in physical or digital form must pay equitable remuneration under Article 8(2) of Directive 2006/115. In its order for reference, it made clear that the proceedings do not concern interactive transmissions or on-demand transmissions. In this connection too, it is relevant whether the hotel operator uses phonograms for communication to the public. I will first examine below the notion of communication (1), before dealing with the public aspect of communication (2).

1. The notion of communication

161. As I have explained above, (44) there is communication within the meaning of Article 8(2) of Directive 2006/115 if there is direct or indirect transmission by any medium, otherwise than by broadcasting, of the sounds or the representations of sounds fixed in a phonogram, including making the sounds or representations of sounds fixed in a phonogram audible. It is not therefore relevant that the sounds fixed in the phonogram are made audible. (45)

162. These conditions for communication within the meaning of Article 8(2) of Directive 2006/115 would thus appear to be satisfied in a case like the present one, where the hotel operator provides the hotel customers with both players and the related phonograms.

163. The Commission argues in this connection that the notion of communication to the public within the meaning of Article 8(2) of Directive 2006/115 may not, in principle, be interpreted more broadly than the notion of communication to the public in Article 3(1) of Directive 2001/29. It must be borne in mind that the European Union legislature intended to provide a higher level of protection for copyright than for the related rights of phonogram producers and performers, and it is therefore contrary to the system to grant phonogram producers and performers more extensive rights under Article 8(2) of Directive 2006/115 than authors under Article 3(1) of Directive 2001/29. For that reason, regard must be had to recitals 23 and 27 in the preamble to Directive 2001/29.

164. Recital 27 in the preamble to Directive 2001/29 does not preclude the existence of communication in a case like the present one, however. It must be construed as meaning that persons providing players, without at the same time controlling access to copyright works, do not make any communication to the public. This is the case, for example, where televisions or radios are sold or rented

or where an internet service provider merely provides access to the internet. In a case like the present one, however, the hotel operator does not simply provide the players. Instead, it also deliberately provides hotel customers with phonograms, and thus provides hotel customers with direct access to the sounds fixed in the phonograms.

165. It can be stated, in conclusion, that a hotel operator which provides its customers with not only players, but also the relevant phonograms, makes the copyright works embodied in phonograms accessible and makes the phonograms audible, with the result that there is communication to the public both within the meaning of Article 3(1) of Directive 2001/29 and within the meaning of Article 8(2) of Directive 2006/115.

2. The notion of public

166. As has been explained above, (46) the notion of public in Article 3(1) of Directive 2001/29 and in Article 8(2) of Directive 2006/115 is, in principle, to be interpreted consistently, with the result that the criteria developed by the Court in *SGAE* may be applied.

167. Even if players and phonograms are provided in physical or digital form, the phonograms are communicated to a new public which, where there is a quick succession of hotel customers, leads to a cumulative effect and thus to very extensive availability.

168. The facts are also comparable in other respects to the facts on which that judgment is based, because a hotel operator which, in full knowledge of the consequences of its action, gives its customers access to the protected works pursues the purpose of entertaining a wider audience. Furthermore, the provision of access to the works in the present case also constitutes an additional service performed with the aim of obtaining some benefit and thus having an influence on the price of rooms.

169. Reference also cannot be made to recital 23 in the preamble to Directive 2001/29 as an argument against the existence of communication to the public within the meaning of Article 8(2) of Directive 2006/115.

170. First of all, that recital is merely intended to make clear that direct representations or performances of the work are not intended to be covered by the notion of communication to the public within the meaning of Article 3(1) of Directive 2001/29. (47) A direct representation or performance of a work does not exist in this case.

171. Secondly, this idea cannot in any case be applied to the communication of a phonogram within the meaning of Article 8(2) of Directive 2006/115. The notion

of communication within the meaning of Article 8(2) of Directive 2006/115 must be interpreted having regard to the specific context of that provision and thus having regard to Article 15 in conjunction with Article 2(g) of the WPPT. Under that provision, communication of phonograms exists where the sounds fixed in a phonogram are made audible to the public. Through this definition, the Contracting Parties to the WPPT wished to make clear that communication to the public within the meaning of Article 15 of the WPPT also exists where the phonogram is communicated to an audience which is present at the place of communication of the phonogram. (48)

172. For a fuller discussion of the importance of recital 23 in the preamble to Directive 2001/29 for the notion of communication to the public within the meaning of Article 8(2) of Directive 2006/115, I refer to points 90 to 109 and points 114 to 125 of my Opinion in Case C-135/10 *SCF*.

173. In a case like the present one, the communication is therefore also to the public.

3. The notion of user

174. As has been explained above, (49) any person who communicates phonograms to the public within the meaning of Article 8(2) of Directive 2006/115 must be regarded as a user within the meaning of that provision.

4. Conclusion

175. It must, therefore, be stated, in conclusion, that a hotel operator which provides in its hotel bedrooms players for phonograms and the relevant phonograms in physical or digital form uses those phonograms for communication to the public within the meaning of Article 8(2) of Directive 2006/115 and must therefore pay equitable remuneration for them under Article 8(2) of Directive 2006/115.

X – The fifth question

176. By its fifth question, the referring court is seeking to ascertain whether, in the event that the fourth question is to be answered in the affirmative, Article 10 of Directive 2006/115 permits 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.

A – *Main arguments of the parties*

177. The *applicant in the main proceedings* takes the view that this question should be answered in the negative on the same grounds as those set out in

relation to the third question. In the view of *Ireland* and the *Greek Government*, this question must be answered in the affirmative. Ireland argues that a case like the present one constitutes private use. The Greek Government refers to the arguments set out in connection with the third question. In the view of the *Commission*, because of the answer to the fourth question, there is no need to examine the final question.

B – *Legal assessment*

178. The fifth question must be answered in the negative. As is clear from the statements made on the third question, where use takes the form of communication to the public, the limitation in respect of private use under Article 10(1)(a) of Directive 2006/115 is not applicable.

XI – Conclusion

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

(1) 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 (codified version) and 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 is to be interpreted to the effect that a hotel or guesthouse operator which provides televisions and/or radios in bedrooms to which it distributes a broadcast signal uses the phonograms played in the broadcasts for indirect communication to the public.

(2) In such a case, the Member States are required, in transposing Directives 2006/115 and 92/100, to provide for a right to equitable remuneration vis-à-vis the hotel or guesthouse operator even if the radio and television broadcasters have already paid equitable remuneration for the use of the phonograms in their broadcasts.

(3) Article 8(2) of Directive 2006/115 and of Directive 92/100 is to be interpreted as meaning that a hotel operator which provides its customers, in their bedrooms, with players for phonograms other than a television or radio and the related phonograms in physical or digital form which may be played on or heard from such apparatus uses those phonograms for communication to the public.

(4) Article 10(1)(a) of Directive 2006/115 and of Directive 92/100 is to be interpreted to the effect that a hotel or a guesthouse operator which uses a phonogram for communication to the public does not make private use of it

and an exception to the right to equitable remuneration under Article 8(2) of Directive 2006/115 is not possible even if the use by the customer in his bedroom has private character.

---

1 – Original language: German. Language of the case: English.

---

2 – OJ 1992 L 346, p. 61.

---

3 – OJ 2006 L 376, p. 28.

---

4 – Case C-306/05 [2006] ECR I-11519.

---

5 – OJ 2001 L 167, p. 10.

---

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

---

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

---

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

---

9 – Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; and Case C-568/08 *Combinatie Spijker Infrabouw* v *De Jonge Konstruktie and Others* [2010] ECR I-0000, paragraph 87.

---

10 – OJ 2006 L 372, p. 12.

---

11 – Case C-245/00 [2003] ECR I-1251.

---

12 – Cited in footnote 4.

13 – Ibid. paragraph 36.

14 – Ibid., paragraph 36.

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

16 – Ibid., paragraphs 38 and 39.

17 – Ibid., paragraph 40.

18 – Ibid., paragraph 41.

19 – Ibid., paragraph 42.

20 – Ibid., paragraph 43.

21 – Ibid., paragraph 44.

22 – Ibid., paragraphs 45 and 46.

23 – Ibid., paragraph 31.

24 – *SENA*, cited in footnote 11, paragraph 34.

25 – Ibid., paragraphs 34 to 38.

26 – Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52, and *SGAE,* cited in footnote 4, paragraph 35. See, in this connection, Rosenkranz, F., 'Die völkerrechtliche Auslegung des EG-Sekundärrechts dargestellt am Beispiel der Urheberrechts', *Europäische Zeitschrift für Wirtschaftsrecht*, 2007, p. 238 et seq., 239 et seq.

27 – See point 81 of this Opinion.

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

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

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

31 – *SGAE*, cited in footnote 4, paragraphs 45 and 46.

32 – I refer to points 90 to 109, and points 114 to 125 of my Opinion in Case C-135/10 *SCF*, in which I address this point of law.

33 – See points 66 to 75 of this Opinion.

34 – See also Walter, M. and Von Lewinski, S., *European Copyright Law*, Oxford University Press, 2010, p. 989.

35 – WIPO, *WIPO Intellectual Property Handbook*, 2004, p. 318.

36 – For a discussion of the questions of how the notion of public within the meaning of Article 3(1) of Directive 2001/29 is to be interpreted in the case of auto-reception equipment and whether that interpretation can be applied to the notion of public within the meaning of Article 8(2) of Directive 2006/115, see points 114 to 125 of my Opinion in Case C-135/10 *SCF*.

37 – For further discussion, I refer to points 128 to 135 of my Opinion in Case C-135/10 *SCF*, in which there is a discussion of this point of law.

38 – See point 127 of this Opinion.

39 – See point 78 of this Opinion.

40 – See Mahr, F.E., 'Die öffentliche Wiedergabe von Rundfunksendung im Hotelzimmer', *Medien and Recht*, 2006, p. 372 et seq., p. 376, who points out that the place of communication is not important, but the act of exploitation. The private character of the place depends on technical variables in the individual case.

41 – This is also argued with regard to the relevant pairs of terms under international law; see Ricketson, S. and Ginsburg, J., *International Copyright and Neighbouring Rights*, Volume I, Oxford, 2nd edition, 2006, paragraph 12.02, though with regard to the Berne Convention.

42 – Cited in footnote 4, paragraphs 50 to 54.

43 – See point 78 et seq. of this Opinion.

44 – See points 85 to 89 of this Opinion.

45 – See point 89 of this Opinion.

46 – See points 94 to 110 of this Opinion.

47 – See the communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a directive of the European Parliament and of the Council on the

harmonisation of certain aspects of copyright and related rights in the information society (SEC(2000) 1734 final).

---

48 – Von Lewinski, S., *International Copyright and Policy*, Oxford University Press, 2008, p. 481.

---

49 – See points 114 to 117 of this Opinion.