Court of Justice EU, 31 May 2016, Reha Training v Gema

COPYRIGHT LAW

Uniform interpretation of "Communication to the public" in article 3(1) Directive 2001/29/EC and article 8 Directive 2006/115/EC:

- **It follows from the foregoing that, in a case such as that in the main proceedings, concerning the broadcast of television programmes which allegedly affects not only copyright but also, inter alia, the rights of performers or phonogram producers, both Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be applied, whilst giving the concept of 'communication to the public' in both those provisions the same meaning.**

Act of communication to the public in case of intentionally transmitting copyright protected works by an operator of a rehabilitation centre to patients via television sets that are placed in several areas in this centre:

- **Therefore, it must be held that such an operator carries out an act of communication.**
- **In the second place, as regards the body of patients of a rehabilitation centre, such as that at issue in the main proceedings, it must be observed, first of all, that it is apparent from the documents submitted to the Court that they are persons in general.**
- **Next, the circle of persons constituted by those patients is not 'too small or insignificant', it being understood, in particular, that those patients may enjoy works broadcast at the same time in several places in the establishment.**
- **In those circumstances, it must be held that the body of patients of a rehabilitation centre, such as that at issue in the main proceedings, constitute a 'public', within the meaning of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115.**
- **Finally, the patients of such a rehabilitation centre cannot, in principle, enjoy works broadcast without the targeted intervention of the operator of that centre. Furthermore, since the origin of the dispute in the main proceedings concerns the payment of royalties for copyright and related rights for the making available of protected works in that centre, it must be observed that those patients were clearly not taken into account when the original authorisation for the work to be made available was given.**

The presence of a profit-making nature is relevant for determining the amount of remuneration.

- **In the third place, as regards the profit-making nature of such a communication, it must be stated, as the Advocate General observed in point 71 of his Opinion, that, in the present case, the broadcasting of television programmes on television sets, in so far as it is intended to create a diversion for the patients of a rehabilitation centre, such as that at issue in the main proceedings, during their treatment or in the waiting time, constitutes the supply of additional services which, while not having any medical benefit, does have an impact on the establishment's standing and attractiveness, thereby giving it a competitive advantage.**
- **It follows that, in a situation such as that at issue in the main proceedings, the broadcasting of television programmes by the operator of a rehabilitation centre, such as Reha Training, has a profit-making nature, capable of being taken into account in order to determine the amount of remuneration due, where appropriate, for such a broadcast.**

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Court of Justice EU, 31 May 2016

(K. Lenaerts, L. Bay Larsen, T. von Danwitz, J.L. da Cruz Vilaca, D. Svaby, C. Lycourgos, A. Rosas, E. Juhasz, A. Borg Barthet, J. Malenovský (Rapporteur), M. Berger, A. Prechal and M. Vilaras)

JUDGMENT OF THE COURT (Grand Chamber)

31 May 2016 (*)

(Reference for a preliminary ruling — Intellectual property — Copyright and related rights — Directive 2001/29/EC — Article 3(1) — Directive 2006/115/EC — Article 8(2) — Concept of 'communication to the public' — Installation of television sets by the operator of a rehabilitation centre making it possible for patients to watch television programmes)

In Case C‑117/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Köln (Regional Court, Cologne, Germany), made by decision of 20 February 2015, received at the Court on 9 March 2015, in the proceedings

Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH

v

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA),

intervening parties:

Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, T. von Danwitz, J.L. da Cruz Vilaça, D. Šváby, C. Lycourgos, Presidents of Chambers, A. Rosas, E. Juhász, A. Borg Barthet, J. Malenovský (Rapporteur), M. Berger, A. Prechal and M. Vilaras, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,
having regard to the written procedure and further to the hearing on 19 January 2016,
after considering the observations submitted on behalf of:
– Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH, by S. Dreismann and D. Herfs, Rechtsanwälte,
– Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA), by C. von Köckritz, I. Brinker, N. Lutzhöft and T. Holzmüller, Rechtsanwälte,
– Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), by U. Karpenstein and M. Kottmann, Rechtsanwälte,
– the German Government, by T. Henze and J. Kemper, acting as Agents,
– the French Government, by G. de Bergues, D. Colas and D. Segoin, acting as Agents,
– the Hungarian Government, by G. Szima, Z. Fehér and M. Bóra, acting as Agents,
– the European Commission, by J. Samnadda and T. Scharf, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 23 February 2016,
gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation 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 (OJ 2001 L 167, p. 10), and Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

2. This request has been made in proceedings between Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH ('Reha Training'), which operates a rehabilitation centre, and Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA), the company entrusted with the collective management of copyright in the musical sector in Germany, concerning the refusal of Reha Training to pay royalties on copyright and related rights in connection with making available protected works at that company's premises.

Legal context

EU law

Directive 2001/29

3. Recitals 9, 10, 20 and 23 of Directive 2001/29 are worded 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.

...

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular [Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61), as amended by Council Directive 93/83/EEC of 29 October 1993 (OJ 1993 L 290, p. 9)]. It develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

...

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

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

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

5. Article 12(2) of that directive states:

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

Directive 2006/115

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

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

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

'Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the

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

8. Directive 2006/115 codified and repealed Directive 92/100, as amended by Directive 93/98. However, Article 8 of Directive 2006/115 is drafted in identical terms to Article 8 of the repealed directive.

German law

9. Paragraph 15(2) of the Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights) of 9 September 1965 (BGBl. 1965 I, p. 1273), in the version applicable at the material time, provides:

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

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

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

3. the right to broadcast (Article 20);

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

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

10. Under Paragraph 15(3) of the Law on copyright and related rights:

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

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

11. The rehabilitation centre operated by Reha Training provides for accident victims to receive post-operative treatment on its premises with a view to permitting their rehabilitation.

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

13. Reha Training never requested permission from GEMA to broadcast those programmes. According to the latter, such broadcasting constitutes an act of communication to the public of works belonging to the repertoire it manages. Therefore, it billed that company, for the period from June 2012 to June 2013, for sums it considered to be due for royalties on the basis of the rates in force, and on failing to receive payment it brought an action before the Amtsgericht Köln (Local Court, Cologne) seeking an order for Reha Training to pay damages and interest in respect of those amounts.

14. Since the Amtsgericht Köln (Local Court, Cologne) granted that application, Reha Training lodged an appeal with the Landgericht Köln (Regional Court, Cologne) against that judgment.

15. The referring court takes the view, in accordance with the criteria set out in the Court's case-law relating to the interpretation of Directive 2001/29, that the making available of television programmes by Reha Training constitutes a communication to the public. That court also considers that the same criteria should apply to determine whether there is 'communication to the public' within the meaning of Article 8(2) of Directive 2006/115, but that **the judgment of 15 March 2012 in SCF (C-135/10, EU:C:2012:140)**, prevents it giving a decision.

16. In that judgment the Court of Justice held that patients of a dental practice are not 'persons in general'. In the present case, since, as a rule, only the patients of Reha Training have access to the treatment provided by it, those patients cannot be categorised as 'persons in general', but constitute a 'private group'.

17. In **its judgment of 15 March 2012 in SCF (C-135/10, EU:C:2012:140)** the Court also held that the number of patients of a dental practice is not large, indeed it is insignificant, given that the group of persons present in that practice at the same time is, in general, very small. The category of persons formed by the patients of Reha Training would also seem to be limited.

18. Moreover, in that judgment, the Court ruled that the usual patients of a dental practice do not willingly listen to music there, since they enjoy it by chance, but do not choose to do so. In the present case, the patients of Reha Training in the waiting rooms and the training room also view and hear the television programmes without any active wish or choice on their part.

19. Under those circumstances, the Landgericht Köln (Regional Court, Cologne) decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

– the term "public" refers to an indeterminate number of potential recipients of the service and, in addition, must consist of a fairly large number of persons, in which connection the indeterminate nature is established when "persons in general" — and therefore not persons belonging to a private group — are concerned, and "a fairly large number of persons"

means that a certain de minimis threshold must be exceeded and that groups of persons concerned which are too small or insignificant therefore do not satisfy the criterion; in this connection not only is it relevant to know how many persons have access to the same work at the same time but it is also relevant to know how many of them have access to it in succession;

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

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

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

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

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

20. By letter sent to the Court on 17 April 2015, the referring court indicated that Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) had been granted leave to take part in the main proceedings.

21. Pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, the French Government requested the Court to sit as a Grand Chamber.

Consideration of the questions referred for a preliminary ruling

22. By its first three questions, which it is appropriate to examine together, the referring court asks essentially, first, if, in a case such as that in the main proceedings, in which it is alleged that the broadcast of television programmes by means of television sets that the operator of a rehabilitation centre has installed in its premises affects copyright and related rights of a large number of interested parties, in particular, composers, songwriters and music publishers, but also performers, phonogram producers and authors of literary works and their publishers, the question whether such a situation constitutes a 'communication to the public' must be determined with regard to both Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 or only one of those provisions and, second, whether the existence of such communication must be determined with regard to the same criteria. It also asks whether such a broadcast constitutes an 'act of communication to the public' within the meaning of one and/or the other of those provisions.

23. In that connection, it must be recalled that, under Article 3(1) of Directive 2001/29, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

24. Furthermore, pursuant to Article 8(2) of Directive 2006/115, the legislation of the Member States must ensure, first, 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, second, that that remuneration is shared between the relevant performers and phonogram producers concerned.

25. In that connection, it must be observed that recital 20 of Directive 2001/29 provides, inter alia, that the provisions of that directive must apply, in principle, without prejudice to Directive 92/100, as amended by Directive 93/98, which was codified and repealed by Directive 2006/115, unless Directive 2001/29 provides otherwise (see, to that effect, **judgment of 9 February 2012 in Luksan, C‑277/10, EU:C:2012:65, paragraph 43 and the case-law cited**).

26. No provision of Directive 2001/29 authorises a derogation from the principles laid down in Article 8(2) of Directive 2006/115.

27. It follows that Article 3(1) of Directive 2001/29 must be applied without prejudice to the application of Article 8(2) of Directive 2006/115.

28. Moreover, given the requirements of unity and coherence of the European Union legal order, the concepts used by Directives 2001/29 and 2006/115 must have the same meaning, unless the EU legislature has, in a specific legislative context, expressed a

different intention (see, to that effect, judgment of 4 October 2011 in **Football Association Premier League and Others, C‑403/08 and C‑429/08, EU:C:2011:631, paragraph 188**).

29. It is true, as is clear from a comparison of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115, that the concept of 'communication to the public' appearing in those provisions is used in contexts which are not the same and pursue objectives which, while similar, are however in part divergent (see, to that effect, **judgment of 15 March 2012 in SCF, C‑135/10, EU:C:2012:140, paragraph 74**).

30. Under Article 3(1) of Directive 2001/29, authors have a right which is preventive in nature and allows them to intervene, between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such use. However, under Article 8(2) of Directive 2006/115, performers and producers of phonograms have a right which is compensatory in nature, which is not liable to be exercised before a phonogram published for commercial purposes, or a reproduction of such a phonogram, has been used for communication to the public by a user (see, to that effect, **judgment of 15 March 2012 in SCF, C‑135/10, EU:C:2012:140, paragraph 75**).

31. That being the case, there is no evidence that the EU legislature wished to confer on the concept of 'communication to the public' a different meaning in the respective contexts of Directives 2001/29 and 2006/115.

32. As the Advocate General noted, in point 34 of his Opinion, the different nature of the rights protected under those directives cannot hide the fact that, according to the wording of those directives, those rights have the same trigger, namely the communication to the public of protected works.

33. It follows from the foregoing that, in a case such as that in the main proceedings, concerning the broadcast of television programmes which allegedly affects not only copyright but also, inter alia, the rights of performers or phonogram producers, both Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be applied, whilst giving the concept of 'communication to the public' in both those provisions the same meaning.

34. Therefore, that concept must be assessed in accordance with the same criteria in order to avoid, inter alia, contradictory and incompatible interpretations depending on the applicable provision.

35. In that connection, the Court has already held that, in order to determine whether there has been a communication to the public, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another (see, to that effect, **judgment of 15 March 2012 in Phonographic Performance (Ireland), C‑162/10, EU:C:2012:141, paragraph 30 and the case-law cited**).

36. Furthermore, it must be recalled that the concept of 'communication to the public' must be interpreted broadly, as recital 23 of Directive 2001/29 indeed expressly states (see, to that effect, **judgment of 7 March 2013 in ITV Broadcasting and Others, C‑607/11, EU:C:2013:147, paragraph 20 and the case-law cited**).

37. The Court has also previously held that the concept of 'communication to the public' includes two cumulative criteria, namely, an 'act of communication' of a work and the communication of that work to a 'public' (judgment of 19 November 2015 in SBS Belgium, C‑325/14, EU:C:2015:764, paragraph 15 and the case-law cited).

38. That said, it must be stated, first, as regards the concept of the 'act of communication', that that refers to any transmission of the protected works, irrespective of the technical means or process used (see, to that effect, **judgment of 19 November 2015 in SBS Belgium, C‑325/14, EU:C:2015:764, paragraph 16 and the case-law cited**).

39. Moreover, every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question (**judgment of 19 November 2015 in SBS Belgium, C‑325/14, EU:C:2015:764, paragraph 17 and the case-law cited**).

40. Secondly, in order to fall within the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, it is necessary, as stated in paragraph 37 of the present judgment, that protected works must actually be communicated to a 'public'.

41. In that connection, it follows from the case-law of the Court, in the first place, that the term 'public' refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (see, to that effect, **judgment of 7 December 2006 in SGAE, C‑306/05, EU:C:2006:764, paragraphs 37 and 38 and the case-law cited**).

42. As regards, to begin with, the 'indeterminate' nature of the public, the Court has observed that it means making a work perceptible in any appropriate manner to 'persons in general', that is, not restricted to specific individuals belonging to a private group (see, to that effect, **judgment of 15 March 2012 in SCF, C‑135/10, EU:C:2012:140, paragraph 85**).

43. Next, as regards, the criterion of 'a fairly large number of people', this is intended to indicate that the concept of 'public' encompasses a 'certain de minimis threshold', which excludes from the concept groups of persons which are too small, or insignificant (see, to that effect, **judgment of 15 March 2012 in SCF, C‑135/10, EU:C:2012:140, paragraph 86**).

44. In order to determine the size of that audience, account must be taken of the cumulative effects of making works available to potential audiences (see, to that effect, **judgment of 7 December 2006 in SGAE,**

C-306/05, EU:C:2006:764, paragraph 39). It is relevant, inter alia, to know how many persons have access to the same work at the same time and how many of them have access to it in succession (see, to that effect, judgment of 15 March 2012 in Phonographic Performance (Ireland), C-162/10, EU:C:2012:141, paragraph 35).

45. In the second place, the Court has held that, in order to fall within the concept of 'communication to the public' the work broadcast must be transmitted to a 'new public', that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public (see, to that effect, judgments of 7 December 2006 in SGAE, C-306/05, EU:C:2006:764, paragraphs 40 and 42, and 4 October 2011 in Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraph 197).

46. In that context, the Court emphasised the indispensable role of the user. It has held that, in order for there to be a communication to the public, that user must, in full knowledge of the consequences of its actions, give access to the television broadcast containing the protected work to an additional public and that it appears thereby that, in the absence of that intervention those 'new' viewers are unable to enjoy the broadcast works, although physically within the broadcast's catchment area (see, to that effect, judgments of 7 December 2006 in SGAE, C-306/05, EU:C:2006:764, paragraph 42 and 4 October 2011 in Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraph 195).

47. Thus, the Court has already held that the operators of a café-restaurant, a hotel or a spa establishment are such users and make a communication to the public if they intentionally broadcast protected works to their clientele, by intentionally distributing a signal by means of television or radio sets that they have installed in their establishment (see, to that effect, judgments of 7 December 2006 in SGAE, C-306/05, EU:C:2006:764, paragraphs 42 and 47; 4 October 2011 in Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraph 196; and 27 February 2014 in OSA, C-351/12, EU:C:2014:110, paragraph 26).

48. It is therefore understood that the public which is the subject of the communication in these establishments is not merely 'caught' by chance, but is targeted by their operators (see, to that effect, judgment of 15 March 2012 in SCF, C-135/10, EU:C:2012:140, paragraph 91).

49. It must also be stated that although it is true that the profit-making nature of the broadcast of a protective work does not determine conclusively whether a transmission is to be categorised as a 'communication to the public' (see, to that effect, judgment of 7 March 2013 in ITV Broadcasting and Others, C-607/11, EU:C:2013:147, paragraph 43), it is not however irrelevant (see, to that effect, judgment of 4 October 2011 in Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraph 204 and the case-law cited), in particular, for the purpose of determining any remuneration due in respect of that transmission.

50. It is in the latter context that the 'receptivity' of the public may be relevant, as the Court held in paragraph 91 of its judgment of 15 March 2012 in SCF (C-135/10, EU:C:2012:140), in which it answered both the question relating to the existence of a communication to the public and the right to receive remuneration for such a communication.

51. Thus, the Court held that the broadcast of protected works has a profit-making nature where the user is likely to obtain an economic benefit related to the attractiveness of, and, therefore, the greater number of people attending the establishment in which it makes those broadcasts (see, to that effect, judgment of 4 October 2011 in Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 205 and 206).

52. As regards the broadcast of phonograms in a dental practice, the Court considered, by contrast, that that is not the case, since the patients of a dentist do not, as a general rule, give any importance to such a broadcast, so that it is not of such a nature as to increase the practice's attractiveness and, therefore, the number of people going to that practice (see to that effect, in judgment of 15 March 2012 in SCF, C-135/10, EU:C:2012:140, paragraph 97 and 98).

53. In the light of various criteria laid down by the case-law of the Court, it must be determined whether the broadcast of television programmes, such as that at issue in the main proceedings, may be categorised as a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115.

54. In that connection, in the first place, as stated in paragraph 47 of the present judgment, the Court has already held that the operators of a café-restaurant, a hotel or a spa establishment carry out an act of communication where they intentionally broadcast protected works to their clientele by intentionally distributing a signal by means of television or radio sets which they have installed in their establishment.

55. Those situations are fully comparable with that at issue in the main proceedings in which, as is apparent from the order for reference, the operator of a rehabilitation centre intentionally broadcasts protected works to its patients by means of television sets installed in several places in that establishment.

56. Therefore, it must be held that such an operator carries out an act of communication.

57. In the second place, as regards the body of patients of a rehabilitation centre, such as that at issue in the main proceedings, it must be observed, first of all, that it is apparent from the documents submitted to the Court that they are persons in general.

58. Next, the circle of persons constituted by those patients is not 'too small or insignificant', it being

understood, in particular, that those patients may enjoy works broadcast at the same time in several places in the establishment.

59. In those circumstances, it must be held that the body of patients of a rehabilitation centre, such as that at issue in the main proceedings, constitute a 'public', within the meaning of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115.

60. Finally, the patients of such a rehabilitation centre cannot, in principle, enjoy works broadcast without the targeted intervention of the operator of that centre. Furthermore, since the origin of the dispute in the main proceedings concerns the payment of royalties for copyright and related rights for the making available of protected works in that centre, it must be observed that those patients were clearly not taken into account when the original authorisation for the work to be made available was given.

61. It follows that the patients of a rehabilitation centre, such as that at issue in the main proceedings, constitutes a 'new public' within the meaning of the case-law referred to in paragraph 45 of the present judgment.

62. Having regard to the foregoing considerations, it must be held that the operator of a rehabilitation centre, such as that at issue in the main proceedings, carries out a communication to the public.

63. In the third place, as regards the profit-making nature of such a communication, it must be stated, as the Advocate General observed in point 71 of his Opinion, that, in the present case, the broadcasting of television programmes on television sets, in so far as it is intended to create a diversion for the patients of a rehabilitation centre, such as that at issue in the main proceedings, during their treatment or in the waiting time, constitutes the supply of additional services which, while not having any medical benefit, does have an impact on the establishment's standing and attractiveness, thereby giving it a competitive advantage.

64. It follows that, in a situation such as that at issue in the main proceedings, the broadcasting of television programmes by the operator of a rehabilitation centre, such as Reha Training, has a profit-making nature, capable of being taken into account in order to determine the amount of remuneration due, where appropriate, for such a broadcast.

65. Having regard to all of the foregoing considerations, the answer to the first three questions is that, in a case such as that in the main proceedings, in which it is alleged that the broadcast of television programmes by means of television sets that the operator of a rehabilitation centre has installed in its premises affects the copyright and related rights of a large number of interested parties, in particular, composers, songwriters and music publishers, but also performers, phonogram producers and authors of literary works and their publishers, it must be determined whether such a situation constitutes a 'communication to the public', with regards to both Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 and in accordance with the same interpretation criteria. Furthermore, those two provisions must be interpreted as meaning that such a broadcast constitutes an act of 'communication to the public'.

66. In view of the reply given to the first three questions, it is unnecessary to reply to the fourth question.

Costs

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

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

In a case such as that in the main proceedings, in which it is alleged that the broadcast of television programmes by means of television sets that the operator of a rehabilitation centre has installed in its premises affects the copyright and related rights of a large number of interested parties, in particular, composers, songwriters and music publishers, but also performers, phonogram producers and authors of literary works and their publishers, it must be determined whether such a situation constitutes a 'communication to the public', within the meaning of both 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 and Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and in accordance with the same interpretive criteria. Furthermore, those two provisions must be interpreted as meaning that such a broadcast constitutes an act of 'communication to the public'.

OPINION OF ADVOCATE GENERAL
BOT

delivered on 23 February 2016 (1)

Case C‑117/15

Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH

v

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)

(Request for a preliminary ruling
from the Landgericht Köln (Regional Court, Cologne, Germany))

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

1. By its questions referred for a preliminary ruling, the Landgericht Köln (Regional Court, Cologne) is seeking to ascertain whether a situation such as that at issue in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes it possible for television programmes to be viewed and heard by its patients, constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2) and Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (3) and whether the concept of 'communication to the public' for the purposes of those two provisions must be given a uniform interpretation.

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

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

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

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

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

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

I – Legislative framework

A – EU law

1. Directive 2001/29

8. Recitals 9, 20 and 23 of Directive 2001/29 read as follows:

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

...

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular [Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, (4) as amended by Council Directive 93/98/EEC of 29 October 1993 (5)], and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

...

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

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

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

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

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

2. Directive 2006/115

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

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

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

'Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user,

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

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

B – German law

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

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

1. the right of recitation, performance and presentation (Article 19);
2. the right to make available to the public (Article 19a);
3. the right to broadcast (Article 20);
4. the right of communication by video or audio media (Article 21);
5. the right to communicate radio broadcasts and to make them available to the public (Article 22).'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

work at the same time but it is also relevant to know how many of them have access to it in succession;
– the public to which the work is communicated is a new public, that is to say, a public which the author of the work did not contemplate when he authorised its use by communication to the public, unless the subsequent communication uses a specific technical means which differs from that of the original communication; and
– it is not irrelevant that the act of exploitation in question serves a profit-making purpose and also that the public is receptive to that communication and is not merely "reached" by chance, although this is not an essential condition for the existence of communication to the public?
(2) In cases such as that in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes it possible for television programmes to be viewed and heard, is the question whether there is communication to the public to be assessed according to the concept of "communication to the public" under Article 3(1) of Directive 2001/29 or under Article 8(2) of Directive 2006/115 if the copyright and related rights of a wide range of persons concerned — in particular composers, songwriters and music publishers, but also performing artists, phonogram producers and authors of literary works as well as their publishing houses — are affected by the television programmes which have been made accessible?
(3) In cases such as that in the main proceedings, in which the operator of a rehabilitation centre installs television sets on its premises, to which it transmits a broadcast signal and thus makes television programmes accessible to its patients, is there a "communication to the public" pursuant to Article 3(1) of Directive 2001/29 or pursuant to Article 8(2) of Directive 2006/115?
(4) If the existence of communication to the public within this meaning is confirmed for cases such as that in the main proceedings, does the Court of Justice uphold its case-law according to which no communication to the public takes place in the event of the radio broadcasting of protected phonograms to patients in a dental practice (see the judgment of 15 March 2012 in SCF, C‑135/10, EU:C:2012:140) or similar establishments?'

III – My analysis

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

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

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

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

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

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

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

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

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

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

34. Lastly, as GEMA rightly states, the different nature of the rights protected under Directives 2001/29 and 2006/115 cannot hide the fact that those rights have the

same trigger, namely the communication to the public of protected works. (15)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

52. The Court explained that the cumulative effect of making the works available to potential recipients should be taken into account. Regard must therefore be

had not only to the number of persons who have access to the same work at the same time, but also to the number of persons who have access to it successively. (24)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

68. Consequently, in my view, the judgment in SCF (C‑135/10, EU:C:2012:140), in which the Court rejected the existence of the profit-making nature of the broadcasting of phonograms in a dental practice on the ground that they have access to those phonograms 'by

chance and without any active choice on their part', should not be applied to the present case. (38)

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

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

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

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

IV – Conclusion

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

(1) The concept of 'communication to the public' must be defined in accordance with the same criteria, whether for the purposes of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society or for the purposes of Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

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

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

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1. Original language: French.
2. OJ 2001 L 167, p. 10.
3. OJ 2006 L 376, p. 28.
4. OJ 1992 L 346, p. 61.
5. OJ 1993 L 290, p. 9, 'Directive 92/100'.
6. BGBl. 1965 I, p. 1273.
7. Judgment in SCF (C‑135/10, EU:C:2012:140, paragraph 74).
8. Judgment in SCF (C‑135/10, EU:C:2012:140, paragraph 75).
9. Judgment in SCF (C‑135/10, EU:C:2012:140, paragraph 76).
10. Judgment in SCF (C‑135/10, EU:C:2012:140, paragraph 77).
11. Judgment in SCF (C‑135/10, EU:C:2012:140, paragraph 79).
12. See, inter alia, judgment in Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraph 187 the case-law cited).
13. See, inter alia, judgment in Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraph 188).
14. See judgments in SCF (C‑135/10, EU:C:2012:140, paragraphs 81 to 92) and Phonographic Performance (Ireland) (C‑162/10, EU:C:2012:141, paragraphs 31 to 38).
15. See paragraph 19 of GEMA's observations.
16. See, inter alia, judgment in Luksan (C‑277/10, EU:C:2012:65, paragraph 43 and the case-law cited).
17. See, inter alia, judgment in SGAE (C‑306/05, EU:C:2006:764, paragraph 31 and the case-law cited).
18. See, inter alia, judgment in SBS Belgium (C‑325/14, EU:C:2015:764, paragraph 15 and the case-law cited).
19. See, inter alia, judgment in OSA (C‑351/12, EU:C:2014:110, paragraph 32 and the case-law cited).
20. See, inter alia, judgment in Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraphs 194 and 195 and the case-law cited). See also judgments in SCF (C‑135/10, EU:C:2012:140, paragraph 82) and Phonographic Performance (Ireland) (C‑162/10, EU:C:2012:141, paragraph 31).
21. See, inter alia, judgment in OSA (C‑351/12, EU:C:2014:110, paragraph 25 and the case-law cited).
22. See, respectively, the judgments in Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraph 196); Phonographic Performance (Ireland) (C‑162/10, EU:C:2012:141, paragraph 40), and OSA (C‑351/12, EU:C:2014:110, paragraph 26).
23. See, inter alia, judgment in OSA (C‑351/12, EU:C:2014:110, paragraph 27 and the case-law cited).

24. See, inter alia, judgment in OSA (C‑351/12, EU:C:2014:110, paragraph 28 and the case-law cited).
25. See, inter alia, judgments in Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraph 200) and Circul Globus Bucureşti (C‑283/10, EU:C:2011:772, paragraphs 36, 37 and 40).
26. Judgment in SCF (C‑135/10, EU:C:2012:140, paragraphs 95 and 96).
27. See point 52 of this Opinion.
28. See paragraph 5 of Reha Training's observations.
29. The Court ruled in its judgments in SGAE (C‑306/05, EU:C:2006:764); Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631), and OSA (C‑351/12, EU:C:2014:110), that the clientele of a hotel, a public house and a spa establishment do constitute a 'public' (see, respectively, paragraphs 42, 199 and 32).
30. See, inter alia, judgment in SGAE (C‑306/05, EU:C:2006:764, paragraph 40).
31. See, inter alia, judgment in Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraph 198 and the case-law cited).
32. See, inter alia, judgment in Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraph 198 and the case-law cited).
33. See, inter alia, judgment in Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraph 204 and the case-law cited).
34. See, inter alia, judgment in ITV Broadcasting and Others (C‑607/11, EU:C:2013:147, paragraph 42 and the case-law cited).
35. See, inter alia, judgments in SCF (C‑135/10, EU:C:2012:140, paragraph 91) and Phonographic Performance (Ireland) (C‑162/10, EU:C:2012:141, paragraph 37).
36. See, in particular, paragraphs 50 to 56 of the German Government's observations.
37. See judgment in SGAE (C‑306/05, EU:C:2006:764, paragraph 43). My italics. See also, to that effect, judgment in Padawan (C‑467/08, EU:C:2010:620, paragraph 58).
38. Judgment in SCF (C‑135/10, EU:C:2012:140, paragraph 98).