

Court of Justice of the European Union: Interpretations of ‘Communication to the Public’

IRIS 2012-6:1/3

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On 15 March 2012, the Court of Justice of the European Union published two decisions (case C-162/10 and case C-135/10) on the right to equitable remuneration when a user allows his own clients to hear music as background music in a place subject to the user’s control.

In case C-135/10, SCF, the Italian broadcasting and neighbouring rights collecting agency sued Mr Marco Del Corso, a dentist who played background music, free of charge, in the waiting room of his dental practice. At national level, the Court of Appeal of Turin (Italy) requested a preliminary ruling on the question whether the free broadcasting of background music in a non-public place where persons were engaged in professional economic activity, such as a dentist’s, to patients who were not given any active choice, constitutes ‘communication to the public’ for the purposes of the application of Article 3(2)(b) of Directive 2001/29 and whether such an act of transmission entitles the phonogram producers to payment of remuneration.

In case C-162/10, PPL, the Irish collecting society representing the rights of phonogram producers to sound recordings or phonograms sued the Irish government before the High Court for breach of EU law in exempting hotel operators from the obligation to pay equitable remuneration for broadcasting music in hotel bedrooms. At national level, the High Court of Ireland requested a preliminary ruling on the following questions:

Is a hotel operator who provides televisions and/or radios in guest bedrooms, a ‘user’ making the music available to the hotel guests a ‘communication to the public’ for the purpose of Article 8(2) Directive 2006/115/EC Is a hotel operator who does not provide radios and/or televisions, but who does provide other devices using which phonograms in digital or physical format can be heard, a ‘user’ making a ‘communication to the public’? Does the exemption from the obligation of paying remuneration on grounds of private use apply in this case?

The question in these two cases was whether playing background music constitutes a ‘communication to the public’. The reasoning of the CJEU leads to divergent decisions.

First of all, in order to determine whether playing music is communication to the public, the CJEU determines the role played by the user. Without the user's intervention, the customers could not enjoy the broadcast works. The Court also specifies that 'communication to the public' means making sounds, or recordings of sounds, by means of a phonogram, available to the public. Providing devices for playing music and broadcasting music specifically to be heard by means of those devices therefore constitutes communication to the public.

Secondly, the CJEU explained the term 'public' in earlier cases. 'Public' implies an indeterminate number of potential listeners as well as a large number of persons. The term 'indeterminate' refers to persons in general, not restricted to specific individuals belonging to a private group. In case C-135/10, patients of a specific dentist constitute a consistent group of people because they have (only) access to treatments by that particular dentist. They are therefore not 'persons' in the general sense. Furthermore, as the number of persons that could be present at the dentist's at any given time is very limited, they do not generally hear the same music. Hotel guests on the other hand, in case C 162/10, comprise an indeterminate number of potential listeners insofar as their access to the music is the result of their own choice and limited only by the capacity of the hotel. As such, they are 'persons in general'. Hotel guests are a large number of persons, so they can be considered 'public'.

Thirdly, the extent to which a profit is made has to be considered. Providing an additional service to clients by playing music could affect the price. Playing background music does not impact on the income of a dentist. It is not to be expected that broadcasting music in a dental practice will produce an increase in patients or income. The hotel allows its customers to listen to the music as an additional service, which has an influence on the hotel's standing and on the price of the rooms. It is likely that guests are interested in this additional service and will pay more because of it. The hotel operator therefore stands to make a profit by playing this music.

Therefore, the CJEU decided that in case C-135/10 playing background music does not constitute 'communication to the public' for the purpose of the Directive whereas in case C-162/10 it does.

Finally the Court rejected the application of any exemption of private use to the hotel operator as hotel guests are 'public' and public is (by its very definition) not private.

In conclusion, in order to decide whether a specific case involves 'communication to the public', a court needs to assess if there is a 'public' (indeterminate, large number of potential listeners), if these persons have simultaneous access to the music, and if the user aims at making a profit through this music. If the case meets these conditions, the user makes a 'communication to the public' and must

therefore pay an equitable remuneration.

Judgment of the Court of Justice of the European Union, Case C-132/10, Società Consortile Fonografici v. Marco Del Corso, 15 March 2012

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-135/10>

Judgment of the Court of Justice of the European Union, Case C-162/10, Phonographic Performance (Ireland) Limited v. Ireland, 15 March 2012

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-162/10>

