



A dentist who broadcasts phonograms free of charge in his private dental practice is not making a 'communication to the public' within the meaning of EU law

Such broadcasting does not, therefore, give rise to a right to remuneration for phonogram producers

EU law¹ requires Member States to provide, in their legislation, a right to a single equitable remuneration for producers of phonograms published for commercial purposes, to be paid by the user of such phonograms for broadcasting or for any communication to the public.

In addition, intellectual property rights are also protected by international law, in particular by the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement'), the World Intellectual Property Organisation Performances and Phonograms Treaty ('WPPT') and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations ('Rome Convention').

The Società Consortile Fonografici ('SCF') acts as a collecting agency, both within and outside Italy, and manages, collects and distributes the royalties of its associated phonogram producers.

In the exercise of its activity as agent, SCF conducted negotiations with the Association of Italian Dentists (Associazione Dentisti Italiani) with a view to concluding a collective agreement quantifying the relevant equitable remuneration for any 'communication to the public' of phonograms, including such communication in private professional practices. As those negotiations were unsuccessful, SCF brought an action in the Italian courts against Mr Del Corso, seeking a declaration that he was broadcasting phonograms protected by property rights as background music in his private dental practice in Turin and that such activity gave rise to the payment of equitable remuneration.

The Corte d'appello di Torino (Court of Appeal, Turin, Italy) before which the dispute came, asks the Court of Justice, essentially, whether the Rome Convention, the TRIPS Agreement and the WPPT are directly applicable in the legal order of the EU and whether individuals may rely on them directly. Next, it wishes to know whether the definition of 'communication to the public' in those international conventions is the same as that in EU law and whether it covers the broadcasting, free of charge, of phonograms within private dental practices.

In today's judgment, the Court of Justice points out, first of all, that the TRIPS Agreement and the WPPT were signed and approved by the European Union and that, consequently, they form an integral part of the EU legal order. As for the Rome Convention, while it is not part of the EU legal order, it has indirect effects within the European Union as the EU is required not to stand in the way of the obligations of the Member States under that convention.

¹ 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). That directive, which was in force at the time of the facts of the dispute, was codified and repealed by 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). That directive entered into force on 16 January 2007.

However, The Court holds that individuals may not rely directly either on that convention or on the TRIPS Agreement or the WPPT.

Moreover, the Court points out that the concept of 'communication to the public' provided for by Union law must be interpreted in the light of the equivalent concepts contained in those international agreements and in such a way that they are compatible with those agreements.

The Court goes on to answer the question whether the concept of 'communication to the public' covers the broadcasting of phonograms free of charge in a private dental practice. In that regard, the Court makes clear that the situation of each user and of all the persons to whom he communicates the protected phonograms must be assessed. In that context, account must be taken of several complementary criteria, which are not autonomous and are interdependent.

Those criteria include, first and foremost, according to the case-law of the Court, the indispensable role of **the user**. The user makes a communication to the public when it intervenes, in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers. Second, the Court has identified certain aspects of the **concept of public**. Thus, the term 'public' refers to an **indeterminate number** of potential listeners and a **fairly large number of persons**. Third, the Court has held that the **profit-making nature of 'communication to the public'** is also a relevant criterion. It is thus understood that the public which is the subject of the communication is both targeted by the user and receptive, in one way or another, to that communication, and not merely 'caught' by chance.

In the light of those criteria, the Court holds that a dentist who broadcasts phonograms free of charge in his dental practice, for the benefit of his clients and enjoyed by them without any active choice on their part, is not making a 'communication to the public' for the purposes of EU law.

Thus, although such a dentist intervenes deliberately in the broadcasting of phonograms, his patients generally form a very consistent group of persons and thus constitute a **determinate circle of potential recipients**, and not persons in general. As regards the number of persons to whom the same broadcast phonogram is made audible by the dentist, the Court holds that, in the case of the patients of a dentist, the **number of persons is not large, indeed it is insignificant**, given that the number of persons present in his practice at the same time is, in general, very limited. Moreover, although there are a number of patients in succession, the fact remains that, as those patients attend one at a time, they do not generally hear the same phonograms, or the broadcast phonograms, in particular. Finally, such a broadcast is **not of a profit-making nature**. The patients of a dentist visit a dental practice with the sole objective of receiving treatment, as the broadcasting of phonograms is not a part of dental treatment. They have access to certain phonograms by chance and without any active choice on their part, according to the time of their arrival at the practice and the length of time they wait and the nature of the treatment they undergo. Accordingly, it cannot be presumed that the usual customers of a dentist are receptive as regards the broadcast in question.

Therefore such an act of transmission does not entitle the phonogram producers to the payment of remuneration.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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