Case C-775/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

15 December 2021

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

12 November 2020

Appellant (defendant at first instance):

Blue Air Aviation SA

Respondent (applicant at first instance):

UCMR – ADA Asociația pentru Drepturi de Autor a Compozitorilor

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Subject matter of the main proceedings

Appeal brought before the Curtea de Apel București (Court of Appeal, Bucharest, Romania; 'the Curtea de Apel') against the judgment of the Tribunalul București (Regional Court, Bucharest, Romania) which upheld an action for damages for an amount equivalent to the remuneration allegedly due for a communication to the public of musical works

Subject matter and legal basis of the request

An interpretation of Directive 2001/29/EC of the European Parliament and of the Council, in particular Article 3(1) thereof, is sought pursuant to Article 267 TFEU

Questions referred for a preliminary ruling

1. Must 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 be interpreted as meaning that the broadcasting, inside a commercial aircraft occupied by passengers, of a musical work or a fragment of a musical work on take-off, on landing or at any time during a flight, via the aircraft's public address system, constitutes a communication to the public within the meaning of that provision, particularly (but not exclusively) in the light of the criterion relating to the profit-making objective of the communication?

If the answer to the first question is in the affirmative:

2. Does the existence on board the aircraft of an address system required by air traffic safety legislation constitute a sufficient basis for making a rebuttable presumption as to the communication to the public of musical works on board that aircraft?

If the answer to that question is in the negative:

3. Does the presence on board the aircraft of an address system required by air traffic safety legislation and of software which enables the communication of phonograms (containing protected musical works) via that system constitute a sufficient basis for making a rebuttable presumption as to the communication to the public of musical works on board that aircraft?

Provisions of European Union law relied on

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 ('the Copyright Directive') (recital 27 and Article 3)

Provisions of national law relied on

Legea nr. 8/1996 privind dreptul de autor și drepturile conexe (**Law No 8/1996** on copyright and related rights)

Article 131^2

…

(2) The agreement of the parties on the negotiated methodologies shall be recorded in a protocol to be deposited with the Oficiul Român pentru Drepturile de Autor (Romanian Copyright Office). […] The methodologies thus published shall be effective against all users in the sector in respect of which they have been negotiated and against all importers and producers of media and equipment in respect of which a copyright levy is due under Article 107.

Codul de procedură civilă (Code of Civil Procedure)

Article 329

In the case of presumptions left to the scrutiny and discretion of a court, that court may rely on them only if they have the weight and force to establish the probability of the presumed fact; however, they shall be admissible only in cases where the law permits witness evidence.

Metodologia privind remunerațiile cuvenite titularilor de drepturi patrimoniale de autor de opere muzicale pentru comunicarea publică a operelor muzicale în scop ambiental (**Methodology concerning the remuneration due to the holders of economic copyrights in musical works for the communication to the public of musical works as background music**) (the 'Methodology concerning remuneration')

1. A person using musical works as background music shall be required, prior to any use of musical works, to obtain from the [Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor a Compozitorilor (Union of Composers and Musicologists of Romania – Association for the Copyright of Composers) ('the UCMR–ADA')] a non-exclusive authorisation (licence) for the use of musical works and to pay remuneration according to the table set out in this methodology, irrespective of the actual duration of the use.

2. For the purposes of this methodology, the following terms and expressions shall have the following meanings:

(a) 'communication to the public of musical works as background music' shall mean the communication of one or more musical works effected in a place open to the public or in any place where a number of persons outside the usual circle of family and acquaintances meet or to which they have access, simultaneously or successively, regardless of the manner in which the communication is made and the technical means used, for the purpose of creating background music for the performance of any other activity which does not necessarily require the use of musical works;

(b) 'a person using musical works as background music' shall mean any authorised legal or natural person holding or using in any way (ownership, management, concession, letting, subletting, lending, and so on) premises, whether closed or open, where systems and any other technical or electronic means such as televisions, radios, cassette players, stereo systems, computer equipment, CD players, amplification systems, and any other equipment which enables the reception, reproduction or broadcast of sound or images accompanied by sound, are installed or held.

[…]

6. For the period during which a person using musical works as background music does not have a non-exclusive authorisation (licence) granted by the

UCMR–ADA, that person shall be obliged to pay to the UCMR–ADA an amount equivalent to three times the remuneration that would have been legitimately due had that person had a non-exclusive authorisation (licence).

7. Collective management organisations may monitor, through duly authorised representatives, the use of musical works as background music; those representatives shall have free access to any place where music is used as background music. Representatives of collective management organisations may use portable audio and/or video recording equipment in the premises where the musical works are used, and the recordings thus made shall constitute full proof of the use of the musical works as background music.

Succinct presentation of the facts and procedure in the main proceedings

1 On 22 April 2015, Blue Air Aviation SA (formerly Blue Air – Airline Management Solutions SRL) ('Blue Air') informed [the UCMR–ADA] that it owned 14 aircraft in which it intended to use (communicate to the public) music as background music, and asked to be issued an authorisation (a licence) for this purpose.

2 Following that request, an agreement was concluded between the parties for the grant of a non-exclusive licence (non-exclusive authorisation) for the use of musical works as background music for 14 aircraft, and a monthly remuneration of 2 800 Romanian lei (RON), plus VAT, was agreed. The authorisation was initially issued for the period from 1 May 2015 to 31 December 2015 and was subsequently extended.

3 On 2 March 2018, the UCMR–ADA brought before the Tribunalul București (Regional Court, Bucharest) an action against Blue Air seeking payment of certain remuneration, claiming that, although a non-exclusive authorisation (licence) had been granted in respect of some Blue Air aircraft, Blue Air was communicating to the public musical works in a greater number of aircraft than that for which it had obtained a non-exclusive licence in accordance with the law, and that those communications were not authorised and, as such, were subject to payment of compensation.

4 Blue Air stated that it operates 28 aircraft equipped with address systems which enable voice communication between cockpit crew and cabin crew, as well as with passengers, and that the presence of those address systems is required by the regulations applicable to commercial aviation. It maintains that around 22 aircraft have also been equipped with a software program which enables musical works to be communicated in the background (in the cabin of the aircraft), but states that it communicated to the public only one piece of music in 14 aircraft. The case file contains no further proof concerning the communication of music as background music in the cabin of passenger aircraft.

5 On 8 April 2019, the Tribunalul București upheld the action and ordered Blue Air to pay the amount of RON 201 336, equivalent, under paragraph 6 of the Methodology concerning remuneration, to three times the remuneration due for the communication to the public of musical works in aircraft in respect of which no non-exclusive authorisation (licence) has been granted. The Tribunalul București justified its reasoning as follows: 'the equipping of means of transport with devices enabling the communication to the public of musical works as background music gives rise to a rebuttable presumption of use, and it must be concluded that any aircraft equipped with an address system uses such a device for such communication to the public, without any further proof being necessary in that regard'.

6 Blue Air lodged an appeal against the judgment of the Tribunalul București before [the Curtea de Apel].

The essential arguments of the parties in the main proceedings

7 The UCMR–ADA bases its claims on the situations set out by the airline itself, taking the view that the address systems with which the aircraft are equipped justify a rebuttable presumption as to the communication of musical works, a presumption which was also expressly accepted by the court of first instance.

8 By its appeal, Blue Air challenges the judgment of the Tribunalul București, claiming, firstly, there is no proof of the communication to the public of musical works in the aircraft to which the judgment under appeal relates, and that the presumption applied by the court of first instance does not satisfy the conditions laid down in Article 329 of the Code of Civil Procedure since it is not based on circumstances capable of establishing a sufficient probability. Blue Air claims, in particular, that the existence of address systems inside aircraft is dictated by safety reasons relating to communication between members of the air crew (pilot/co-pilot to flight attendants) and communication between that crew and passengers, and that the mere existence of those systems cannot be equated with the communication itself. Secondly, Blue Air raises a criticism in law, claiming that the criterion relating to the profit-making objective is not satisfied, recalling in that regard the judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, paragraphs 205 and 206.

9 Blue Air has requested that a question be referred to the Court of Justice of the European Union ('the Court') for a preliminary ruling.

10 According to the forms of order sought by the UCMR–ADA, on conclusion of the debate regarding Blue Air's request that a reference be made to the Court, the criterion relating to the making of profit is relevant only in the case of related rights, and not also in the case of copyright, in respect of which the Copyright Directive and national legislation confer on the holder the exclusive right to authorise or prohibit communication, and not merely a right to fair remuneration as in the case of related rights.

Succinct presentation of the reasoning in the request for a preliminary ruling

11 In the context of the appeal pending before the referring court, the first question to be resolved is a factual one, that is to say, whether or not the existence of acts of communication to the public (in aircraft for which there is no licence), which is denied by Blue Air, can be regarded as demonstrated. Only if the answer is in the affirmative does a subsequent legal issue arise, namely whether the communication in the background of a piece of music on an aircraft constitutes an act of communication to the public within the meaning of the Copyright Directive, in particular in the light of the criterion relating to the profit-making objective of the communication.

12 Conversely, in the context of the reference to the Court, the latter question prevails. It is first necessary to clarify whether or not, in law, such a communication in the background falls within the scope of Article 3 of the Copyright Directive given that the national implementing provisions must be interpreted in accordance with the objectives and scheme of that directive. Only if the answer is in the affirmative does the subsequent question arise as to the standard of proof that must be used in assessing whether or not the communication of music as background music took place. Otherwise, if the communication of music as background music does not constitute an act of communication to the public, the claims for payment of remuneration for such an act are in any event unfounded in law and the concrete proof of the communication in the background becomes irrelevant.

13 The referring court recalls the case-law of the Court according to which a deliberate act of communication of a work to a new public constitutes a communication to the public for the purposes of the Copyright Directive and, in the context of the assessment of whether or not there is an act of communication to the public, a relevant criterion is the profit-making nature of the communication (judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, paragraphs 203 to 206).

14 In the light of the judgment of 7 December 2006, *SGAE*, C-306/05, paragraphs 44 to 46, the referring court concludes that, if the flight operator were to offer passengers systems allowing them individually to access musical works or works of intellectual creation in general (for example, touch screens, radio sets, devices with headphones making it possible to select certain audio-visual or musical works), such a service would constitute a communication to the public and would undoubtedly be offered with the aim of increasing the commercial attractiveness of the flight and thus with the aim of making a profit.

15 In the present case, the profit-making nature of the communication is highly debatable in the case of the offer of pieces of music as background music, throughout the passenger cabin, on take-off, on landing, or at a specific time during the flight. In such a case, it is difficult to presume that a potential customer chooses a particular airline in the hope of listening to music during certain periods

of the flight since the relevant criteria for selecting a flight are different, such as the price, the time and the duration of the flight, services such as luggage facilities, fast boarding, catering, the products offered on board, and so on.

16 The referring court goes on to recall, to that effect, the judgment of 15 March 2012, *SCF*, C-135/10, paragraphs 97 to 101, stating, with regard to the present case, that the passengers of an airline expect to be transported safely, on time and in reasonable comfort, and that the fact that they benefit, by chance and without any active choice on their part, from listening to certain pieces of music communicated in the background is not likely to influence their choice of one air carrier over another. In conclusion, as regards the profit-making nature, the referring court considers, as a preliminary point, that it cannot be deemed to exist in the case of the broadcasting of music in the background inside the cabin of an aircraft in order to create a sense of relaxation at times such as before take-off or after landing. On the other hand, it is stated that the profit-making nature is evident in the case of a rehabilitation centre where patients go for long periods of waiting and treatment and that the broadcasting of certain television programmes provides them with greater comfort (judgment of 31 May 2016, *Reha Training*, C-117/15, paragraph 63).

17 The Curtea de Apel considers, on the other hand, that the other relevant criteria according to the case-law of the Court (the existence of a new public which is sufficiently large with regard to the *de minimis* criterion (see also judgment of 13 February 2014, *Svensson*, C-466/12, paragraph 21) and the intention to make the musical content accessible to that public) appear to be satisfied in the present case, but nevertheless considers it appropriate for them also to be subject to the Court's analysis in its overall assessment of the first question raised.

18 As regards the interpretation of the UCMR–ADA, according to which the criterion relating to the making of profit is relevant only in the case of related rights and not also in the case of copyright, the referring court refers to the case-law of the Court (judgments of 7 December 2006, *SGAE*, C-306/05; of 15 March 2012, *SCF*, C-135/10, paragraphs 88 and 89; and of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, paragraph 36), observing that the criterion relating to the profit-making nature is relevant to the assessment of communication to the public both in the case of copyright and, a fortiori, in the case of related rights.

19 The referring court observes that the right to authorise or prohibit is laid down in an almost identical manner by the Copyright Directive as regards copyright (Article 3(1)) and related rights (Article 3(2)) and that therefore the interpretation according to which the criterion relating to the making of profit must have a similar weight in the assessment of communication to the public also in the case of copyright appears to be more well founded. The nuance resulting from the considerations set out in the abovementioned decisions, from which it appears that greater weight can be given to the profit-making objective in the case of related rights, will be subject to the Court's assessment in the present case.

20 As regards the standard of proof which must be used when assessing whether or not there has been a communication of music as background music, the practice of the national courts is that, in so far as the operator carrying on a specific economic activity or operating a means of transport is listed in the methodologies agreed between collective management organisations and associations of users, a rebuttable presumption is made that, at the place in question, copyright-protected works are communicated to the public. Account is taken of the fact that, under Article 131²(2) of Law No 8/1996, those methodologies are effective against all users in the sector in respect of which they have been negotiated. There are also practical reasons underlying this presumption since it is essentially impossible for collective management organisations systematically to monitor all the places where acts of use of works of intellectual creation could take place.

21 On the other hand, case-law assesses the necessary standard of proof differently and there are three lines of case-law. The referring court considers that the following are correct: (1) the line of case-law according to which the presumption is rebutted in the case of relevant and credible defences, bearing in mind that the burden of actually proving the existence of acts of use lies with the collective management organisation, and (2) the line of case-law according to which the presumption of use deriving from the existence of address systems is corroborated only by the presence of further proof (documents issued by the certifying authorities, partial admission made by the party concerned, and so on).

22 The Curtea de Apel further observes that according to recital 18 thereof, the Copyright Directive is without prejudice to the arrangements in the Member States concerning the management of rights but emphasises that the particularities of a national collective management regime, such as the flat-rate methodologies used in Romania, cannot alter the uniform interpretation and application of Article 3 of the Copyright Directive. The principal objective of the directive in question, which is to harmonise the provisions of national law on the legal content of copyright to guarantee legal certainty, would be compromised if a coherent and uniform interpretation of what does and does not constitute communication to the public were not adopted.

23 Therefore, the relevant and contested facts constitute the subject matter of the proof and if the UCMR–ADA claims that there have been acts of communication to the public in aircraft for which Blue Air did not have a licence, it must prove the existence of those acts. In that regard, reference is made to paragraph 7 of the Methodology concerning remuneration. Mere acceptance of the claims of the applicant at first instance would turn the remuneration due to authors into a genuine charge due solely on account of the existence of a means of transport equipped with ordinary and compulsory technical devices. Such a legal classification would divert copyright and the remuneration due for the use of works of intellectual creation from their intended purpose.

24 In the view of the referring court, the answer to the second and third questions must be in the negative. The Curtea de Apel states that equipping Blue Air aircraft

with address systems or even software systems which enable the communication in the background of music throughout the passenger cabin – not on the individual initiative of the passengers but following a decision of the crew – cannot be treated as an act of communication to the public and cannot constitute a sufficient basis for making a rebuttable presumption as to communication to the public of musical works on board the aircraft in question, if there are no further consistent and convincing items of evidence or clues attesting to the existence of such acts of communication.