



EUROPEAN COMMISSION

ORIGINAL

Brussels, 20 July 2010
JURM (2010) 55

**TO THE PRESIDENT AND MEMBERS OF THE COURT OF
JUSTICE OF THE EUROPEAN UNION**

WRITTEN OBSERVATIONS

Submitted pursuant to Article 23 of the Statute of the Court of Justice

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in Case C-162/10

A request for a preliminary ruling by the High Court of Ireland pursuant to Article 267 of the TFEU in the proceedings before that court between

Phonographic Performance (Ireland) Limited

and

Ireland and the Attorney General

regarding the interpretation of Council Directive 92/100 of 19 November 1992 on rental and lending right and certain rights related to copyright in the field of intellectual property, as codified by Directive 2006/115/EC of the European Parliament and the Council of 12 December 2006 (OJ L 376, 27.12.2006, p. 28–35) ("the Directive")

This is a reference from the High Court of Ireland ("the Referring Court") about the interpretation of Articles 8 and Article 10 of Council Directive 92/100 of 19 November 1992 on rental and lending right and certain rights related to copyright in the field of intellectual property ("Directive 92/100"). Following codification, Directive 92/100 was repealed and replaced by Directive 2006/115/EC of the European Parliament and the Council of 12 December 2006 (OJ L 376, 27.12.2006, p. 28–35) ("the Directive")¹. The facts of the main proceedings concern the period prior *and* subsequent to the adoption of the codified version of the Directive. For ease of reference, the Commission proposes to refer in these observations to the Directive, as codified.

1. FACTS AND PROCEDURE

1. The plaintiff, the Phonographic Performance (Ireland) Limited ("PPL Ireland") is a collecting society which represents the rights of phonogram producers in sound recordings or phonograms in Ireland. The defendant is the state of Ireland.
2. The main proceedings concern an action brought by PPL Ireland against Ireland for a declaration that Ireland is in breach of its obligations under Article 4 of the Treaty on European Union and damages for breach of those obligations.
3. The Commission refers to the agreed findings of fact and the application thereto of Irish law which are set out in paragraphs 5, 6, 7 and 14 of the Reference.
4. The allegation by PPL Ireland concerns 97(1) of the Copyright and Related Rights Act 2000 ("Section 97(1)"). PPL Ireland alleges that since the entry into force of Section 97(1), the effect of this provision is to exempt certain establishments from payment of single equitable remuneration where sound recordings are caused to be heard in guest bedrooms in hotels and guest houses via particular apparatus, as part of the service provided by these establishments including by way of sound systems playing physical or digital sound recordings or via/radio/and/or television (paragraph 5 of the Reference).

¹ The case law of this Court states that the text of a directive which is in force at the time of the facts of the main proceedings should be the applicable text. and will only refer where necessary to Directive 92/100 Case C-487/07 L'Oreal, paragraph 3.

5. It is PPL Ireland's main claim that by enacting and maintaining in force Section 97 (1), Ireland is in breach of Articles 8 and 10 of the Directive.
6. For the purposes of the claim before it, the Referring Court notes that the effect of Section 97 (1) is that no payment of equitable remuneration is required by a hotel or guesthouse which:
 - provides TV or radio sets and by cable or other technology, distributes to those TV and radio sets a signal received centrally playing of sound recordings which causes the sound recordings to be heard by guests in its bedrooms;
 - provides other apparatus for guests' own use which allows sound recording to be played in physical or digital form in its bedrooms.
7. Although the substance of the claim concerns use of sound recordings in the bedrooms of hotels and guesthouses, the Referring Court notes that the effect of section 97 (1) is also that no payment of equitable remuneration would be required for a like use of sound recordings in hospitals, nursing homes, residential care facilities, prisons or other similar institutions.
8. The question that the Referring Court has to determine arises is whether Section 97 (1) is compatible with Article 8(2) and Article 10 of the Directive.
9. The arguments of the parties in the main proceedings can be summarised briefly.
10. PPL Ireland considers that Article 8 and in particular paragraph 2 of the Directive requires a payment of a single equitable remuneration in the factual circumstances set out above; and that under Article 10 of the Directive Member States do not have the possibility to derogate from the requirement to pay a single equitable remuneration in the factual circumstances to which Section 97 (1) would apply.
11. PPL Ireland relies on this Court's previous case law in *Stichting ter Exploitatie van Naburige rechten (SENA) v Nederlandse Omroep Stichting (Nos)* ("SENA") and *SGAE v Rafael Hoteles SA*² ("Rafael Hoteles"). According to PPL Ireland, in the light of the Courts case's case law, the phrase "communication to the public" and

² *SENA v NOS* Case C-245/00 [2003] ECR I-1257, paragraph 23; and *SGAE v Rafael Hoteles SA* Case C-306/05 [2006] ECR I-11519.

therefore the level of protection in Article 8(2) of the Directive as it applies to holders of related rights such as phonogram producers, should be assimilated to the level of protection accorded to authors in Article 3 (1) of Directive 2001/29 of 22 May 2001 on the harmonisation of copyright and related rights copyright in the Information Society³ ("Directive 2001/29").

12. On the other hand, Ireland contends that the protection accorded under Article 3 (1) of Directive 2001/29 and Article 8 (2) of the Directive is different. In particular, Ireland argues that the rights and the rightsholders to which each measure applies are distinct and this results in a different level and scope of protection: in the case of Article 3(1) on which this Court has based its ruling in Rafael Hoteles, the protection is accorded to authors whereas in the case of Article 8 (2), this protection is accorded to phonogram producers and performers.
13. In Ireland's view, the differences have as their basis the relevant international conventions which give rise to the respective right namely the Rome Convention 1961 in the case of Article 8 (2) and the WCT Treaty in the case of Article 3 (1) of Directive 2001/29. Each Directive must be interpreted in a manner consistent with the respective international norms. Moreover, Ireland points to further differences in the way Article 8 (2) is formulated, in particular the reference to a "single equitable remuneration" does not include the right to claim a remuneration beyond the remuneration payable by the broadcaster.
14. In order to determine whether there is a breach of Ireland's obligations under the Treaty and hence whether Ireland is liable in the national proceedings before it, the Referring Court seeks an interpretation of Articles 8 and 10 of the Directive.
15. The Referring Court has asked the following questions five questions:
 - (i) *Is a hotel operator which provides in guest bedroom televisions and/or radios to which it distributes a broadcast signal a "user" making a "communication to the public" of a phonogram which may be played in a broadcast for the purposes of Article 8(2) of Codified Directive 2006/115 of the European Parliament and the Council of 12 December 2006?*

³ Case C-341/95 Bettati [1998] ECR I 4355, paragraph 20.

(ii) If the answer to paragraph (1) is in the affirmative, does Article 8 (2) of Directive 2006/115/EC oblige Member States to provide a right to payment of equitable remuneration from the hotel operators in addition to equitable remuneration from the broadcaster of the playing of the phonogram?

(iii) If the answer to paragraph (i) is in the affirmative, does Article 10 of Directive 2006/115 permit member States to exempt hotel operators from the obligation to pay "a single equitable remuneration" on the grounds of private use" within the meaning of Article 10 (a)?

(iv) Is a hotel operator which provides in a guest bedroom apparatus (other than a television or radio) and phonograms in physical or digital form which may be played or heard from such apparatus a "user" making a "communication to the public within the meaning of Article 8(2) of Directive 2006/115/EC?

(v) If the answer to paragraph (iv) is in the affirmative, does Article 10 of Directive 2006/115/EC permit Member States to exempt hotel operators from the obligation to pay "a single equitable remuneration" on the grounds of "private use" within the meaning of Article 10 (1) (a) of Directive 2006/115/EC"

2. PRELIMINARY REMARKS

16. The Court has not previously ruled on the scope of Article 8 and 10 of the Directive, as it applies to the rights of phonogram producers. As far as this Directive is concerned, the case law of the Court has to date been limited in SENA to the scope of what constitutes "equitable remuneration" but not the acts which give rise to payment of that remuneration within the meaning of Article 8.
17. Indeed, the Commission notes, that the Court has not previously had to consider to any extent, the differences in level and scope of protection with respect to distinct categories of rightsholders. In order to properly situate the protection accorded to phonogram producers at international level and at EU level, the Commission will first to have to distinguish between the various Treaties and the level of protection accorded to different categories of rightsholder. The Commission would like to point out that this Court has previously considered the author's exclusive right of communication to the public in the Rafael Hoteles case in the light of Article 8 of the WCT and Article 11bis of the Berne Convention as incorporated in TRIPS.⁴

⁴ In Egeda, Case C-293/98, ECR [2000] I-629, the Court also had to consider the author's right to authorise the communication to the public by satellite of copyright works in Directive 93/83 and held that pending adoption of Directive 2001/29 which proposed to harmonise the author's exclusive right

2.1. Case C-135/10 SCF v Marco del Corso

18. This Reference raises similar issues of law and fact to another pending preliminary reference to the Court -Case C-135/10 SCF v Marco del Corso. Case C-135/10 concerns the scope of Article 8 (2) of the Directive as it applies to phonogram producers and the relationship between Article 8 (2) and the relevant intentional conventions in this area. The Commission will, therefore, make reference to its observations in that case. Unlike Case C-135/10, this reference also concerns the scope of Article 10 of the Directive.
19. In addition, another element which is introduced by the Referring Court in this case for the purposes of the interpretation of Article 8(2) is the comparison the Referring Court undertakes between the notion of “communication to the public” in Article 3 (1) of Directive 200129, on the one hand and the reference to the same term in Article 8(2) of the Directive, on the other hand.

2.2. Member State liability

20. Given that the national proceedings concern an action for liability and damages on the part of the State, at the outset, the Commission would like to situate this reference in the context of the conditions established by the case law of the Court in order to find a Member State liable for breach of its obligations.
21. If Section 97 (1) is found to be incompatible with the Directive, the national court would, nevertheless, still have to consider whether all the other conditions which give rise to State liability and reparation for a breach of EU law have been fulfilled, as set out by this Court on a number of occasions but most notably in Case C-392/93 The Queen v HM Treasury, ex parte British Telecommunications plc Judgment of the Court of 26 March 1996 ("the British Telecom judgment").⁵

of communication to the public, that the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel is an 'act of communication to the public' or 'reception by the public' is not governed by Directive 93/83, and must consequently be decided in accordance with national law.

⁵ Case C-392/93 The Queen v HM Treasury, ex parte British Telecommunications plc Judgment of the Court of 26 March 1996, paragraphs 40 and 41. [ECR]; Judgments in Joined Cases C-6/90 and C-9/90 Francovich and others [1991] ECR I-5357, paragraph 35 and in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-0000, paragraph 31.

22. The Court has stated that in the case of a breach of EU law for which a Member State may be held responsible where it acts in a field in which it has a wide discretion in taking legislative decisions, there is a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.
23. According to this Court's case law, a breach is sufficiently serious where, in the exercise of its legislative powers, a Member State has manifestly and gravely disregarded the limits of the exercise of its powers. Factors which the competent court may take into consideration include the clarity and precision of the rule breached.⁶ It is in principle for the national courts to verify whether or not the conditions governing State liability for breach of EU law are fulfilled.

3. LAW

3.1. The international treaties

24. The international intellectual property law framework is made up of the following treaties⁷:
- The Berne Convention for the protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ("the Berne Convention");
 - The Agreement on Trade-Related Aspects of Intellectual Property Rights as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation ("the TRIPs Agreement");
 - The World Intellectual Property Organisation (WIPO) adopted in Geneva, on 20 December 1996, the WIPO Performances and Phonograms Treaty ("the WPPT") and the WIPO Copyright Treaty ("WCT");
 - The Rome Convention 1961 for the protection of performers, producers of phonograms and broadcasting organisations (done at Rome on October 1961) ("the Rome Convention");

⁶ See *The Queen v HM Treasury ex parte British Telecommunications*, paragraph 31 referred to above.

⁷ www.wipo.int/treaties/en

25. The international legal framework, as is the case at national level, has historically recognised different categories of rightsholders with varying levels of protection. The different categories of rightsholder are dealt with separately in different treaties.
26. The Berne Convention and the WCT concern the rights of authors in their literary, artistic or musical works of creation. The Rome Convention and the WPPT concern the rights of "related rightsholders" or "neighbouring rightsholders" whose rights are deemed to be adjacent to or connected to the work of the author. These related rightsholders are performers, phonogram producers and broadcasting organisations that have rights in performances, sound recordings (records) or broadcasts respectively. The TRIPS Agreement sets enforcement norms and certain minimum elements of substantive protection in relation to all rightsholders.

3.2. The relevant provisions of international law

27. For the purposes of this Reference, the relevant provisions of the international treaties which together make up the international framework are Articles 12, 15 and 16 of the Rome Convention and Article 2, 14 and 15 of the WPPT. These provisions concern phonogram producers. The rights of authors as set out in Article 11bis of the Berne Convention and Article 8 of the WCT which were the subject of the Rafael Hoteles case will also be discussed, by way of comparison.

3.2.1. Phonogram producers

28. Article 12, 15 and 16 of the Rome Convention provide as follows:

Article 12

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

Article 15

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

(a) private use;

(b) use of short excerpts in connection with the reporting of current events;

(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;

(d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

Article 16

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

(a) as regards Article 12:

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

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

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

(iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection;

[]

29. Article 2 (b), (d) (g), Article 15 and 16 of the WPPT including the relevant Agreed Statements provide as follows:

Article 2 (b) (d) and (g)

(b) “phonogram” means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

(d) “producer of a phonogram” means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;

(g) “communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of

sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 14

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 15

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

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

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

[[Agreed statement 12 concerning Article 15: It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

Article 16

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

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

3.2.2. Authors

30. Article 11 and Article 11 bis (i) of the Berne Convention provide:

'1. Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

2. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.'

Article 11bis (1)

'Authors of literary and artistic works shall enjoy the exclusive right of authorising:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.'

31. Article 8 of the WCT including the relevant Agreed Statement provides as follows:

Without prejudice to the provisions of Article 11 (1) (ii), 11 bis (1) (ii) and 11 ter (1) (ii), 14 (1) (ii) and 14 (bis)(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing 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 these works from a place and at a time individually chosen by them.

Agreed statement concerning Article 8: It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).

4. EU LAW

4.1. Status of the international treaties in the EU legal order

32. It is settled case law that a EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the EU.⁸
33. The Court has reiterated this point in the field of intellectual property on more than one occasion most notably in the *Rafael Hoteles* judgment which concerned the rights of authors.
34. The EU is not party to the Berne Convention as only states can accede to that Agreement. However, as the Court noted in the *Rafael Hoteles* case at paragraph 4, under Article 9 (1) of the TRIPS Agreement to which the EU is a party, Members are required to comply with Articles 1-21 of the Berne Convention.⁹
35. The EU is not party to the Rome Convention as only states can be party to that Agreement. The EU is not obliged by TRIPS or any other international convention to comply with its provisions. However, most EU Member States are party to the Rome Convention. The Commission would like to point out that some of our Member States that are party to the Rome Convention have made reservations under Article 16 of the Rome Convention which allows restrictions to the applications of Article 12 of the Rome Convention. These declarations have been deposited at WIPO.¹⁰ It is the Commission's understanding that Ireland, Italy and the United Kingdom have made reservations under Article 16 (ii) which limits Article 12 in the case of certain uses. Other Member States have made reservations to limit Article 12 in other respects and in one case not to apply it at all.

⁸ SENA v NOS, paragraph 35 cited above.

⁹ The TRIPS Agreement was approved on behalf of the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

¹⁰ <http://www.wipo.int/treaties/en/>

36. The EU is, however, party to the WPPT along with its Member States. The WPPT is a separate agreement to the Rome Convention. The relationship with the Rome Convention is set out in its Article 1 which states that nothing in the WPPT "shall derogate from existing obligations that Contracting Parties have to each other" under the Rome Convention and that the WPPT "shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties." Neither the EU nor its Member States have made reservations to the WPPT.
37. The EU and its Member States are party to WCT and the WPPT and both treaties were approved on behalf of the Community with regard to matters in its competence.¹¹ Directive 2001/29 serves to implement the principal obligations set out in both Treaties.

4.2. Article 8 and 10 of the Directive

38. Article 8 (2) provides as follows:

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.

39. Article 10 (1)-(3) provide as follows:

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

(a) private use;

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations

¹¹ 2000/278/EC: Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty OJ L 89, 11.4.2000, p. 6–7

of films, as it provides for in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention.

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

40. Recitals 7 and 16 of the Directive provides as follows:

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

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

4.3. Background to Article 8 and 10 of the Directive

41. The Original Proposal for the Directive (COM (90) 586 Final –SYN 319) ("Original Proposal") did not make any provision for a right for phonogram producers to a single equitable remuneration in what is now Article 8. This was inserted with the Amended Proposal (COM (92) 159 Final –SYN 319) in what was then Article 6bis of the Amended Proposal.

42. In the Amended Proposal, the Commission stated that "[i]n the proposed formulation, these rights largely correspond to the provisions of the Rome Convention, but go to some extent beyond the protection provided in this Convention... This protection constitutes a common minimum level which Member States may exceed in their national law, as is already often the case".

43. In relation to Article 6bis, paragraph 2, now Article 8 (2), the Commission stated:

"Paragraph 2 provides for a remuneration for performing artists and producers of phonograms, if a phonogram published for commercial purposes was used for broadcasting or for communication to the public. This provision has been implemented in principle by most Member States in their law; it is a minimum provision."

44. In the case of Article 10, this was part of the Original Proposal (then Article 8). In its Original Proposal, the Commission acknowledged that Article 8, as it then was,

follows Article 15 of the Rome Convention. This includes regulating limitations to the neighbouring rights by way of reference to the respective provisions in the field of authors' rights (Article 15 (2) of the Rome Convention). In this respect the Commission stated that it would not pursue "detailed harmonization of the limitations on neighbouring rights for the purpose of this Directive [as this] would adversely affect this system of reference and would to some extent result in a broader protection for neighbouring right owners than for authors. This again would be contrary to the concept of protection in the field of authors' rights and neighbouring rights in most Member States."

4.4. Scope of Article 8 and Article 10 of the Directive

45. The Commission observes that according to settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, in particular, Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 50, and Case C-53/05 *Commission v Portugal* [2006] ECR I-0000, paragraph 20).
46. Therefore, the original "source of inspiration"¹² of Article 8 and 10 is the Rome Convention, and in particular, Article 12 and 15 respectively. Article 12 Rome Convention has meanwhile been supplemented, for all those who ratified the 1996 WIPO Treaties, by Article 15 of the WPPT.
47. Article 12 of the Rome Convention is limited to "direct" *use* of the phonogram *for* broadcasting or *for* a communication to the public (emphasis added). The main changes introduced by the WPPT are the inclusion of the term "indirect" within Article 15, a definition of "communication to the public" of a performance or a phonogram Article 2(g) which excludes from its scope broadcasting ("transmission to the public by any medium, otherwise than by broadcasting of sounds"); the introduction of Article 16 on limitations and exceptions; and more generally the Preamble to the WPPT which states, inter alia, that there is a "need to maintain a

¹² SENA v Nos, paragraph 35, referred to above.

balance between the rights of performers and producers and phonograms and the larger public interest."¹³

48. In terms of the scope and level of protection, the Commission submits that phonogram producers, therefore, do not enjoy an exclusive right in relation to all acts of "communication to the public" unlike authors. Article 12 was conceived to compensate for the fact that phonogram producers did not enjoy an exclusive right to authorise or prohibit "any communication to the public" in the Rome Convention. This has not changed with the WPPT. Essentially, the absence of an exclusive right to prohibit or authorise broadcasts or other "communications to the public" is compensated by the right to claim a "single equitable remuneration" once certain specified uses is made of a phonogram.
49. Rather, Article 8(2) of the Directive, in line with Article 12 Rome Convention, merely requires equitable remuneration in cases where a certain specified "use" is made of a commercial phonogram for a communication to the public. In the case of the remuneration right granted under Article 12 of the Rome Convention and Article 15 of the WPPT, this has been described as "secondary use of a phonogram."¹⁴
50. This construction has the following consequences when interpreting the scope of protection on what types of "use" trigger the remuneration claim and whether Member States can exempt certain types of use.
51. First, in Article 12 Rome Convention, the notion of "use" is accordingly qualified to the extent that the "use" has to be "direct". This decision of the drafters of the Rome Convention would seem to exclude "indirect" uses such as re-broadcasting and distribution of broadcast signals to guests in individual hotel rooms.
52. Second, according to Article 10 Contracting States to the Rome Convention, may choose to introduce certain exceptions to the right of remuneration including for private use;

¹³ See International Copyright and Neighbouring Rights: The Berne Convention and Beyond Sam Ricketson Jane C Ginsburg Volume II Oxford University Press Second Edition 2006 Chapter 19.34, 19.35, 19.36, 19.37 F the WIPO Performances and Phonograms Treaty.

¹⁴ See WIPO Intellectual Property Handbook: Policy, Law and Use Chapter 5 International Treaties and Conventions on Intellectual Property available at www.wipo.org

53. Third, under Article 16(1) (a) (i) and (ii) of the Rome Convention, Contracting States to the Rome Convention can declare that they will not apply Article 12 at all or that they restrict the Article 12 Rome Convention to certain of the "uses" mentioned in Article 12 Rome Convention.¹ This again indicates that Article 12 is not only confined to providing equitable remuneration for certain uses but also that the definition and substantive scope is at the discretion of the Contracting States. Whilst Article 16 of the Rome Convention is not reproduced in the text of the Directive, the Commission submits that this is because reservations are a characteristic of Treaties. Recital 7 certainly acknowledges that harmonisation should be achieved without any conflict with the international treaties on which copyright law is based in Member States.
54. Fourth, the WPPT does not change these essential features. Article 15 of the WPPT states explicitly that equitable remuneration is also due for the "indirect" use of a phonogram for the purposes of broadcasting or any communication to the public. Under Article 15 of the WPPT, the distribution of a broadcast signal containing a phonogram into a hotel room could arguably give rise to a claim for equitable remuneration. Article 15 (3) also allows Contracting Parties to limit the application of Article 15 as is the case with Article 12 of the Rome Convention. In addition, Article 16 of the WPPT also allows Contracting Parties to provide for certain limitations and exceptions, not just in relation to the right to equitable remuneration in Article 15 but to all the rights in the WPPT.
55. The question then arises whether Article 15 WPPT informs the interpretation of Article 8(2) of the Directive. The EU legislature has not sought to amend the Directive in order to introduce any change in substantive protection introduced by Article 15 of the WPPT. It has only introduced Article 16 of the WPPT which concerns limitations and exceptions in what is now Article 10 (3) of the Directive. The principal obligations under the WPPT have been implemented on behalf of the EU in Directive 2001/29.
56. In the view of the Commission, as it also stated in Case C-135/10, the text of Article 8(2) makes no reference to either "direct" or "indirect" use and therefore it was always capable of being interpreted to include both direct and indirect use, even prior to the adoption of the WPPT, and to that extent goes further than Article 12 of the Rome Convention. Indeed, the Commission's Amended Proposal acknowledges

in this respect that the protection introduced by Article 6bis goes further than the Rome Convention. Given that Article 8(2) could always be so interpreted, no textual amendment was required to be introduced by the EU legislator in order to implement its obligations under Article 15 of the WPPT.

57. As previously mentioned, the only amendment introduced to the Directive in respect of the EU international obligations under the WPPT is in the case of Article 10 which was amended to introduce Article 10 (3) the so called "three steps test" to the exceptions in Article 10, as required by Article 16 of the WPPT. This means that all exceptions to the rights of phonogram producers are now governed by the "three steps test" by virtue of its inclusion in Article 16 of the WPPT, irrespective of whether these are of an exclusive nature as in Article 3 (2) of Directive 2001/29 or merely a right to claim remuneration as set out in Article 8(2) of the Directive. The Referring Court has not asked any question in relation to Article 10 (3) as such. However, the compatibility of an exception in the list of exceptions in Article 10 will always have to be assessed in the light of the test set out in Article 10 (3). The "three steps test" is the standard by which all exceptions or limitations to the exclusive rights of copyright and related rights are measured.¹⁵
58. This test is also set out in TRIPS, any therefore any dispute arising from the application of the test (or anything else in TRIPS) can be the subject matter of a WTO Panel. Article 13 of the TRIPS Agreement has been interpreted by a ruling of the Dispute Settlement Body ("DSB") of the World Trade Organization ("WTO") concerning Section 110(5) of the US Copyright Act.¹⁶ The three conditions of the test must be satisfied before it can apply. The three conditions are namely (1) certain special cases; (2) no conflict with the normal exploitation of the work; and (3) no

¹⁵ Article 9(1) and Article 9(2) Berne Convention; Article 10 (2)WCT; Article 16 (2) of the WPPT and Agreed Statements.

¹⁶ A dispute brought by the European Communities to examine Section 110(5) of the U.S. Copyright Act. The EC alleged that Section 110 (5) was inconsistent with obligations of the United States under the TRIPS Agreement. The Panel determined that Section 110 (5)(A)(the "homestyle exemption") did not violate the TRIPS Agreement, but that Section 110 (5)(B) (the "Fairness in Music Licensing Act of 1998") was inconsistent with U.S. obligations.

unreasonable prejudice of the legitimate interests of the rightholder. These conditions are all cumulative.¹⁷

59. The "three steps test" has only been applied to date, at international level in the case of authors' exclusive rights. The Commission submits that the application of the "three steps test" to a right of equitable remuneration such as that in Article 8 (2) would require a purposive analysis which takes account of the specific features of this right including the difference in scope and level of protection.

4.5. The difference between Article 3 (1) of Directive 2001/29 and Article 8 (2) of the Directive

60. Article 3(1) of Directive 2001/29 applies to authors only and provides an exclusive right to authorise or prohibit any communication to the public, including the exclusive right of making available to the public as required by Article 8 WCT. Article 3 (1) provides as follows:

"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".

61. Article 3(1) should be construed alongside the relevant recital 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.

62. The Court has already ruled on the scope of protection accorded to authors within the meaning of Article 3(1). The Commission makes reference to the analysis of the Court especially at paragraphs 40-43 of its judgment in Rafael Hoteles.¹⁸ The Court noted that "communication to the public" as it concerns the author's exclusive right

¹⁷ In this regard, the Commission would draw the Court's attention to its observations in two pending references before this Court Case C-462/09 Stichting de ThuisKopie and Case C-145/10 Eva Maria Painer where the application of the "three steps test" in Article 5 (5) of Directive 2001/29 which is almost identical to the text of Article 10 (3) is discussed

¹⁸ Rafael Hoteles, referred to above at 2.

was not defined either in Article 3 (1) of Directive 2001/29, the Berne Convention or the WCT. The Court relied upon Article 11*bis* (1)(ii) of the Berne Convention construed alongside Article 8 of the WCT to arrive at a broad interpretation of the scope of the right. Therefore, Article 3 (1) and the relevant recital 23 of Directive 2001/29 have been interpreted, as regards the author's exclusive right of communication of the public in the *Rafael Hoteles* case.¹⁹ No other rightholder is concerned in Article 3 (1).

63. This led the Court to conclude that in the factual proceedings at stake in Rafael Hoteles that a communication made by a broadcasting organisation other than the original one is a transmission which is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public. It follows from Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that additional public may access it.
64. The Commission would like to emphasise the different nature and scope of the rights as between authors and phonogram producers. In the main proceedings, PPL Ireland is arguing for the assimilation of the Court's ruling in Rafael Hoteles on the scope of the exclusive rights of authors' to the right to claim remuneration as it applies to phonogram producers. In the Commission's view such a conclusion would be contrary to the specific nature and scope of the protection accorded to phonogram producers and contrary to the intention and text of Article 8 (2) of the Directive. Moreover, there is no support for such an approach in any of the international conventions. Indeed, the WPPT did not change the status quo in relation to the "exclusive right" and phonogram producers remain with a right to claim remuneration only.
65. At this stage, it may be useful to set out how the protection accorded to phonogram producers under Article 12 of the Rome Convention and in particular Article 15 of the WPPT given that it is the more recent Treaty. The rights are different in nature and scope to that of authors whose rights might also subsist in a phonogram but

¹⁹ See above.

whose rights are governed by Article 11bis of the Berne Convention and Article 8 of the WCT. In this respect, it is important to realise that in a single product such as a CD i.e. a recorded performance of the work of a particular author, there may be many rights at stake namely, the rights of the author[s] in the lyrics and composition; the rights of the performer in the performance as captured in the recorded performance; and the rights of the phonogram producer. The level and scope of protection accorded to these individual rightsholders varies and reflects the contribution to a greater or lesser extent that each rightholder has made to the final product which incorporates the work of the author. It is to be noted in this respect that it is the author who is recognised as being primordial amongst rightsholders and who accordingly receives the highest level of protection under the Berne Convention and the WCT.

66. Articles 1 and 2 of the WPPT set out the relationship between the WPPT and other Conventions and in particular states that the rights of phonogram producers and performers are different in character to those of authors whose rights also subsist in the phonogram. Article 1(2) states that no provision of this Treaty may be interpreted as prejudicing the protection accorded to copyright in literary and artistic works. The Agreed Statement to Article 1(2) confirms that Contracting Parties are not precluded from providing exclusive rights to a performer or producer of phonograms beyond those provided under this Treaty. The WPPT does not provide exclusive rights under Article 15, although it does so in other respects for phonogram producers.
67. It is important to understand the difference between a right to claim remuneration only and the grant of an exclusive right. The grant of exclusive right in all the relevant international copyright and neighbouring rights treaties, is a right to "authorise" certain acts in relation to a work or in the case of phonogram producers, protected subject matter such as phonograms²⁰. See for example, Article, 7, 8, 9 10, 11, 12, 13 and 14 WPPT and commensurate provisions of the WCT. The notion of an exclusive right carries with it the notion of being able both to authorise and to prohibit the relevant acts in relation to the work or protected subjected matter. In

²⁰ See for example, Article, 7, 8, 9 10, 11, 12, 13 and 14 WPPT.

setting out exclusive rights in the *acquis*, the EU legislature has always used the formulation "authorise or prohibit."²¹

68. In short, the exclusive rightholder can extract more value from an exclusive right in economic terms including by freely negotiating for payment at market value as opposed to a right to remuneration which implies that remuneration may be set, at the outset or limited by conditions, as is the case with Article 8(2). An exclusive rightholder can license freely to more than one party or limit or prohibit the use of his rights with an exclusive right. These means of enforcement are not available in the case of a right to remuneration either in the marketplace economically or in relation to use by third parties, by reference to the courts. This means that where a right to claim remuneration is granted, as opposed to an exclusive right to authorise or prohibit, the relevant rightholder cannot prevent the use of the phonogram or license its use by any third party.
69. It is clear from the text of Article 3 (1) and also Article 3(2) that there is no reference to the introduction of an exclusive right for phonogram producers in relation to acts of communication to the public. Nor does the WPPT contain any such reference. The EU legislature, therefore, only chose to implement the obligation to provide an exclusive right of making available for phonogram producers and performers as required by Article 14 of the WPPT. The EU legislature was, however, not precluded from introducing an exclusive right.
70. There is no compelling reason of policy to treat a right to remuneration such as Article 8 (2) as on par with the exclusive right of communication that authors have under Article 3 (1). Given that related rightsholders are accorded the right of making available, it could be argued that for practical purposes, this might pre-suppose that an act of making available is only technically possible where there is also some form of communication to the public in a general sense in order to effect a making available in the interactive "on demand" environment. The Commission does not dispute that this might be the practical effect. However, as a matter of law, it is only authors within the meaning of Article 3(1) that have been accorded both the

²¹ See for example, Article 8(1) and Article 8(3) of Directive 92/100 in the case of performers and broadcasting organisations respectively. See also Article 6 of Directive 92/100 and also Article 2, 3 4 of Directive 2001/29 which sets out the main exclusive rights.

exclusive right of reproduction to be interpreted broadly alongside the exclusive right of making available.

71. Phonogram producers have not been accorded any protection for the acts of communication that might precede the acts of making available within the meaning of Article 3(2), either at international level or at EU level. In this respect, the Commission refers to its submissions in Case C-135/10 on the differences between Article 3(2) of Directive 2001/29. In conclusion, as a matter of EU law, neither phonogram producers nor performers have an exclusive right of communication to the public and the right accorded to phonogram producers who merely have a claim to equitable remuneration along with performers should not be assimilated to the author's exclusive right of communication to the public.

5. NATIONAL LAW

72. Section 17(2) (b), Section 21, Section 37 (1) (b) and Section 38 of the Copyright and Related Acts 2000 provides as follows:

17.—(1) Copyright is a property right whereby, subject to this Act, the owner of the copyright in any work may undertake or authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright in a work of that description. (2) Copyright subsists, in accordance with this Act, in—

(a) original literary, dramatic, musical or artistic works,

(b) sound recordings, films, broadcasts or cable programmes,

[] **21.—**In this Act, “author” means the person who creates a work and includes: (a) in the case of a sound recording, the producer;

37.—(1) Subject to the exceptions specified in *Chapter 6* and to any provisions relating to licensing in this Part, the owner of the copyright in a work has the exclusive right to undertake or authorise others to undertake all or any of the following acts, namely:

(a) to copy the work;

(b) to make available to the public the work;

[]

and those acts shall be known and in this Act referred to as “acts restricted by copyright”.

38.—(1) Notwithstanding the provisions of section 37, where a person proposes to—

(a) play a sound recording in public, or (b) include a sound recording in a broadcast or a cable programme service, he or she may do so as of right where he or she—(i) agrees to make payments in respect of such playing or inclusion in a broadcast or a cable programme service to a licensing body, and (ii) complies with the requirements of this section.

97.—(1) [Subject to *subsection (2)*,] it is not an infringement of the copyright in a sound recording, broadcast or cable programme to cause a sound recording, broadcast or cable programme to be heard or viewed where it is heard or viewed—(a) in part of the premises where sleeping accommodation is provided for the residents or inmates, and (b) as part of the amenities provided exclusively or mainly for residents or inmates.

73. Its is common ground that phonogram producers hold exclusive rights in their phonograms in Ireland as a copyright owner, on par with authors (paragraph 6 of the Reference). Although the Referring Court does not expressly state so, Article 37 (1) (b) would also mean that under Irish law, in effect, phonogram producers have an exclusive right to authorise or prohibit all acts commensurate with the rights that an author would have in relation to their works including the exclusive right of communication to the public. To that extent, Ireland has availed itself of the discretion allowed under the Directive, to provide greater protection for phonogram producers than required either by the Directive or Directive 2001/29 or any international Treaty which applies.
74. As far as Section 38 (1) (b) is concerned this provision provides for "licences of right" with fair payment and lays down rules for the playing of sound recording in public and requirements as to payment to the relevant licensing body (paragraph 7 of the Reference). In the circumstances set out in Section 38 (1) (b), phonogram producers cannot enforce their exclusive right granted under Irish law, but have a statutory right to claim payment.
75. As far as Section 97 is concerned, as a matter of construction of the Irish Copyright and Related Rights Acts 2000, this exemption applies to the exclusive right in Section 37.
76. It is not clear to the Commission whether the playing of music in the establishments covered by Section 97(2) is also excluded from the licence of right with statutory payment within the meaning of Section 38 (1) (b). The Referring Court does not to say so expressly but it appears to be the plaintiff's case that the effect of Section 97

(2) is also to exclude the "fair payment" required by Section 38 (1) (b). (paragraphs 7 and 12).

77. It must be borne in mind, that given that this is a case which involves a claim for damages for a potential breach by Ireland of its obligations arising under Article 8(2) of the Directive. Both under the Rome Convention, the WPPT and under the Article 8(2) of Directive, Member States enjoy a degree of discretion in relation to the scope and level of protection and exceptions to the right to ensure a single equitable remuneration.
78. The discretion under the Directive allows Member States to provide for greater protection than required for by Article 8(2) as set out in Recital 16. This Ireland has done with the grant of an exclusive right even though there is no requirement to do so. In addition, Article 10 in the light of Article 15 of the Rome Convention; and Article allows Member States to provide for certain optional exceptions to the right to a single equitable remuneration including for private use. Moreover, under the Rome Convention itself, Contracting Parties may enter certain reservations to Article 12 in order to limit its application in relation to certain uses and those uses are not specified. It would appear that Contracting Parties are free to stipulate the type of use.
79. The Commission observes that some EU Member States that are party to the Rome Convention have made reservations under Article 16 of the Rome Convention which allows restrictions to the applications of Article 12 of the Rome Convention. These declarations have been deposited at WIPO.²² It is the Commission's understanding that Ireland, Italy and the United Kingdom have made reservations under Article 16 (ii) which limits Article 12 in the case of certain uses. Other Member States have made reservations to limit Article 12 in other respects and in one case not to apply it at all. As far as the EU international obligations are concerned, given that it is only Member States that are party to the Rome Convention and without prejudice to the view this Court might ultimately adopt on the interpretation of Article 8 and Article 10, Member States that are party to the Rome Convention are not precluded from doing so.

²² <http://www.wipo.int/treaties/en/>

6. THE QUESTIONS

80. Article 8(2) of Directive 92/100 is to be construed as far as possible in the light of both Article 12 of the Rome Convention on which it is inspired and Article 15 of the WPPT and not by reference to any other rights of any other category of rightholder such as authors. This means that the protection accorded to phonogram producers should not be assimilated, or interpreted as analogous to the broad right of communication to the public granted to authors to prohibit or authorise any action of communication to the public.
81. The Commission consider that the secondary uses to which a phonogram producer may make a claim for payment under Article 8(2) are both direct use (as per Rome 12 Convention and indirect use (as per Article 15 of the WPPT) when the phonogram is used *for* (emphasis added) any communication to the public. Furthermore, whether the relevant rightholder can claim payment of remuneration depends on whether the act in question is one which is in relation to a use which is within its scope and which has not been restricted by a Contracting Party.
82. The Court has previously considered Article 8(2) in the case of SENA. However, that judgment is limited to a consideration of what constitutes equitable remuneration which is not defined by Directive 92/100. The Court ruled in this respect that it is settled case-law that “the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Community.”²³
83. The Court considered that what constitutes equitable remuneration itself was to be left to MS who are bound by any criteria in Directive 92/100.
84. Whilst the SENA judgment remains useful for this case with respect to how the single equitable remuneration should be calculated where it is due, the Court was not called upon to interpret the particular uses of the phonogram which would give rise to a claim for payment itself.

²³ Judgment of 14 June 2007, Case C-246/05, *Armin Häupl* (Le Chef de Cuisine) ECR I-4673, point 43

85. The Commission submits that certain issues need to be borne in mind in replying to the questions submitted by the Referring Court

- (a) First, in order not to arrive at a result which assimilates the right of phonogram producers with the right of authors, it should be recognised that the notion of "any communication to the public" differs depending on the context i.e. authors' exclusive right of communication to the public on the one hand or the phonogram producers' right to claim a single equitable remuneration for the use of a phonogram for communication to the public on the other hand in Article 8(2).
- (b) Secondly, that there is a difference between authorising the communication to the public itself and claiming remuneration for the use of a phonograph when this use is made for communication to the public.
- (c) Third, as far as the Directive itself is concerned, the issue for this Court is whether an exception for private use is precluded under Article 10 (1) – (3) as an exception to the right to claim a single equitable remuneration under Article 8 where the Directive allows a certain discretion to Member States both in the scope and level of protection and also the exceptions
- (d) Fourth, the issue that will have to be determined by the Referring Court in the light of the response of this Court on Article 8 and 10 is where the EU legislature has only provided for the right to claim a single equitable remuneration under Article 8 of the Directive and a Member State provides for greater protection in the form of an exclusive right, in which circumstances would an exception for certain establishments for private use which applies in relation to the exclusive right in the law of that Member States go beyond the exceptions permitted under Article 10 (1)–(3) of the Directive in circumstances where the Directive allows a certain discretion to Member States, both in the scope and level of protection and also the exceptions.

6.1. The first question

86. The term "communication to the public" as the Commission has previously mentioned is defined in the WPPT. The Commission respectfully submits that the Court should construe Article 8(2) in relation to the definition of "communication to the public" as it appears in the WPPT. In the view of the Commission, in the light of that definition the playing of music on the understanding that the sounds emitted are those of the phonograms in a manner in which they can be made audible, could fall within the scope of the type of secondary use of phonograms for which a claim of remuneration is payable.

87. However, the definition of "communication to the public" in Article 2 (g) of the WPPT is not especially helpful in providing any assistance on what constitutes "the public" or "to the public." The emphasis in the definition in Article 2 (g) is on the scope of "communication." Here it might be useful to also refer to the previous case law of the Court in relation to authors' rights especially in determining whether the private nature of an environment to which individuals only have access by specific agreement with the owner or operator, would be "to the public".
88. The Commission has once again referred to the Court's case law in Rafael Hoteles in Case C-135/10 which concerned the playing of music in private hotel practices. The Commission has submitted that the following criteria would be useful: (a) the public or private nature of the place where the phonogram is used; (b) the value to the hotel of playing the music; and (c) the circle of recipients. In Rafael Hoteles, the Court concluded that the private nature of hotel rooms does not preclude the communication of a work within the meaning of Article 3(1) and that the playing of music "must be considered an additional service performed with the aim of obtaining some benefit" and that as far as the circle of recipients is concerned, "the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers" (see paragraphs 44, 48-54 of that judgment). It is difficult for the Commission to arrive at a different conclusion even in the case of a narrower right such as that set out in Article 8(2) where the use of the phonograms in question, by way of distribution of broadcast signals via television sets or radio is made within hotel rooms.

6.2. The Second Question

89. As far as the second question is concerned, the Commission is of the view that the Directive does not oblige Member States to provide a right to payment of equitable remuneration from the hotel operator in addition to equitable remuneration from the broadcaster for the playing of the phonogram. The Commission observes, as the Court recognised in SENA, Member States have a certain discretion in deciding what is equitable remuneration. It would be inconsistent with the nature, level and scope of the narrower protection accorded under Article 8 (2) of the Directive as opposed to that granted under Article 3 (1) of Directive 2001/29 to require that payment be made in each circumstance of use but especially where payment has already been made upstream by the broadcaster.

90. Although the Court made its adjudication in SENA in the context of what could constitute uniform equitable remuneration as between phonogram producers and performers, the Commission considers that the very notion of "equitable remuneration" should allow Member States a degree of discretion in relation to what is "equitable" provided that overall, there is adherence to the concept of equitable remuneration.
91. It is useful to recall here what this Court stated in SENA at paragraphs 34, 35 and 36:

"In the absence of any Community definition of equitable remuneration, there is no objective reason to justify the laying down by the Community judicature of specific methods for determining what constitutes uniform equitable remuneration, which would necessarily entail its acting in the place of the Member States, which are not bound by any particular criteria under Directive 92/100 (see, to that effect, Case C-131/97 *Carbonari* [1999] ECR I-1103, paragraph 45). It is therefore for the Member States alone to determine, in their own territory, what are the most relevant criteria for ensuring, within the limits imposed by Community law, and particularly Directive 92/100, adherence to that Community concept.

In that connection, it is apparent that the source of inspiration for Article 8(2) of Directive 92/100 is Article 12 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations signed in Rome on 26 October 1961. That convention provides that the payment of equitable remuneration, and the conditions for sharing that remuneration are, in the absence of agreement between the various parties concerned, to be established by domestic law and simply lists a number of factors, which it states to be non-exhaustive, non-binding and potentially relevant, for the purposes of deciding what is equitable in each case.

In those circumstances, the Court's role, in the context of a dispute brought before it, can only be to call upon the Member States to ensure the greatest possible adherence throughout the territory of the Community to the concept of equitable remuneration, a concept which must, in the light of the objectives of Directive 92/100, as specified in particular in the preamble thereto, be viewed as enabling a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable."

92. Moreover, in the view of the Commission, the basis for any payment of remuneration has to be interpreted in the framework of the entire discretion accorded not only under Article 8(2) of the Directive but also the relevant provisions of the Rome Convention which allow Member States to limit the application of Article 12

either with an exception or by way of a reservation. The same is true for the WPPT, as regards exceptions.

6.3. The Third Question

93. Member States are not precluded from introducing an exception for private use as set out in Article 10 (1) (a) which reflects Article 15 (1) (a) of the Rome Convention. The EU legislature did not delete this option which is at Member States' discretion when the Directive was amended to introduce Article 10 (3). The inclusion of Article 10 (3) now makes this exception subject to the "three steps test." Prior to the inclusion of Article 10 (3), the reference to "private use" could be freely determined. There is no definition of "private use" for the purposes of this Directive, the Commission is of the view that this combined with Article 10 (3) means that should a Member State choose to define in its legislation certain places as constituting a private place within the meaning of Article 10 (1), it may do so provided that the requirements of Article 10 (3) are met.
94. The Commission submits that the application of the "three steps test" to a right of equitable remuneration such as that in Article 8 (2) would require a purposive analysis which takes account of the specific features of this right including the difference in scope and level of protection as between authors and phonogram producers. Any such analysis would need to take account of the specific features of the right to ensure a single equitable remuneration is paid by the user where a phonogram is used for any communication to the public
95. It follows, that a Member State is not precluded from defining the places within establishments where use of a phonogram would constitute private use for the purposes of exempting an establishment within the meaning of Article 10 (1) (a).

6.4. The fourth and fifth questions

96. A subsidiary line of questioning concerns whether a hotel operator engages in indirect use of a phonogram for purposes of effecting a communication to the public when he merely provides equipment and physical phonograms (other than television sets or radio) but phonograms in physical or digital form that the hotel guest can then play himself. If the provision of these physical facilities were a relevant "use" covered within the scope of Article 8(2) of the Directive, the final question of the national

court is whether this use could be exempt from the payment of a "single equitable remuneration" on account of the private nature of the use within the terms of Article 10(1) (a) of the Directive.

97. Making available the equipment and the phonogram so that a hotel guest can play a phonogram in a bedroom would be activities covered by the agreed statement concerning Article 8 WCT ("provision of physical facilities ... does not in itself amount to communication). Far from limiting itself to the rights of "communication to the public" or of "making available" a work to the public (the rights conferred in Article 8 WCT), the agreed statement specifies that the mere provision of physical facilities for "enabling or making a communication" does not in itself amount to "a communication within the meaning of the WCT or the Berne Convention". This broad wording implies that the provision of "physical facilities" does not amount to a communication under any relevant international treaty. This Agreed Statement is repeated in recital 27 of Directive 2001/29. The Court in *Rafael Hoteles*²⁴ confirmed that this does not amount to a "communication to the public" in the case of the installation of television sets which make the distribution signals technically possible.
98. There is no commensurate Agreed Statement for the WPPT. Nevertheless, in the view of the Commission, this statement which pertains to the broad communication right stipulated by Article 8 WCT, would also apply, in the light of the arguments above, *a fortiori*, to the right to claim equitable remuneration as set out in Article 12 Rome Convention, Article 15 of the WPPT and Article 8(2) of the Directive. It would be a perverse result to do otherwise. This is especially so in the case of the provision of physical apparatus (other than television or radio sets) which allows the playing of music but which do not even make it technically possible to distribute broadcast signals.
99. Accordingly, a hotel operator who provides apparatus other than television sets or radios in guest bedrooms which enables phonograms to be played for the enjoyment

²⁴ *Rafael Hoteles*, paragraph 45-47, cited above.

of his guests is not "using" the phonograms for the purposes of communicating them to the public. No response, is therefore, required to the last question.

7. CONCLUSION

100. In the light of its observations, the Commission respectfully suggests to this Court that the questions posed by the Referring Court should be answered as follows:

(i) Where phonograms are included as part of a broadcast signal and a hotel operator provides televisions and or /radio sets in guest bedrooms to which it distributes that broadcast signal thereby allowing the phonograms to be made audible in hotel bedrooms, this would constitute use of the phonograms for the purposes of Article 8(2) of the Directive

(ii) Article 8(2) does not oblige Member States to provide a right to payment of equitable remuneration from the hotel operator in addition to equitable remuneration paid to the broadcaster for the playing of the phonogram.

(iii) For the purposes of exempting an establishment from Article 8 (2) A Member State is not precluded from defining the places within particular establishments where use of a phonogram would constitute private use in accordance with Article 10.

(iv) The mere provision of physical apparatus which would allow the playing of music in physical or digital form especially does not constitute use of a phonogram within the meaning of Article 8(2).

(v) In the light of the response to (iv) no reply is suggested for (v) above.

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