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Music broadcasting at the dentist's and in hotel rooms. CJEU clarifies "communication to the public"

Francesco Spreafico · Sunday, March 25th, 2012

On 15 March 2012 the CJEU has ruled two cases where it had been asked to decide whether producers of phonograms (or the collecting society on their behalf) are entitled to obtain equitable remuneration when a user allows its clients to hear the phonogram by way of background music in a place subject to his control.

The first case, referred by the Court of Appeal of Turin (Italy), involved Società Consortile Fonografici (SCF), the Italian society that collects and distributes to artists and phonogram producers the royalties for the use in public of recorded music, and Mr. Marco Del Corso, a dentist who used to broadcast background music from the radio in the waiting room of his private dental practice, to entertain – free of charge – his patients while waiting for the treatment.

The second case was instead referred to the CJEU by the High Court (Commercial Division) (Ireland) in an action brought against Ireland by Phonographic Performance (Ireland) Limited (PPL), an Irish collecting society representing the rights of phonogram producers. PPL acted for the declaration that Ireland was in breach of its obligations under art. 4 of the Treaty for the Functioning of the European Union because it enacted and maintained in the Copyright and Related Rights Act 2000 a provision exempting hotel operators from paying royalties to phonogram producers for the installation in hotel rooms of television and/or radio sets used for the broadcasting of music as part of the services complimentary to the guests' accommodation.

The CJEU reached opposite conclusions in the two rulings. Its reasoning pivots on the interpretation of art. 8 par. 2 of Directive 2006/115/EC (that repealed Directive 92/100/EEC), that requires Member States to ensure that an equitable remuneration is paid by the user when "*a phonogram published for commercial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*".

According to the European Court, the interpretation must take into account the specific context in which the provision is applied and it must be consistent with the meaning given to the equivalent provisions contained in the TRIPS Agreement and the WIPO Performances and Phonograms

Treaty (that form part of the European Union legal order), and in the Rome Convention 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (that produces indirect effects within the European Union). For this reason, the European Court held that the meaning of "communication to the public" contained in art. 8 par. 2 of the directive must be interpreted considering that the right of phonogram producers to obtain remuneration is an economic right, compensatory in nature, that produces its effects only to the extent that the phonogram is used for communication to the public by a user. Thus, unlike authors, phonogram producers cannot prevent the communication to the public of the work, they just accrue a credit when the work is used.

The European Court also held that, in order to establish whether a user (in the cases at issue, the dentist or the hotel operator) is making a communication to the public – and, consequently, the phonogram producer has title to receive remuneration – the judge must first consider whether the user intervenes, in full knowledge of the consequences of its action, to give access to its clients to a broadcast containing the protected work. Additionally, the judge needs to evaluate whether: (a) the communication of the protected work is aimed at an indeterminate number of potential listeners and, therefore, at a fairly large number of persons; (b) the foregoing high number of persons has access to the same work at the same time and (iii) the communication carried out by the user has a profit-making nature.

By applying these criteria, the CJEU ruled that, in the case of the dentist, no communication to the public occurs.

It reached this conclusion on the basis of the consideration that, although the dentist wilfully intervenes in making available to its patients the phonograms (they can perceive the broadcast signal of the phonograms exactly because they enter the dentist's waiting room), the patients do not constitute a "public", because they are a determined, not large, circle of potential recipients. The number of patients present at the same time in the practice is very limited and it is rare that successive patients hear the same phonogram as the preceding ones, the circumstance depending on the time of arrival of the patient at the practice and the length of time he waits for the treatment. Therefore, the number of listeners of a single phonogram at the same time is extremely limited. Additionally, patients go to the dentist's to receive treatment: the circumstance that they hear music while waiting for treatment is just eventual and without any choice on their part. Such circumstance does not per se increase the number of patients or allow the dentist to raise the fee of his professional services. Therefore the communication of the music does not have profit-making nature as it does not bring to the dentist a direct economic benefit. On the basis of this analysis, the European Court concluded that phonogram producers are not entitled to obtain an equitable remuneration from the dentist.

The same criteria determined the European Court to rule that in the case of music made available in hotel rooms through TV or radio sets, the hotel operator makes a communication to the public.

In fact, hotel guests are able to listen to the phonograms only as a result of the deliberate intervention of that operator. Such guests are a large indefinite number which can be qualified as "public" within the meaning of art. 8 par 2 of Directive 2006/115/EC. Furthermore, the possibility to access music from guest rooms is an additional service that have an impact on the classification of the hotel and on the rates charged for the room. Therefore, the communication of music to guests has a profit-making nature for the hotel operator and, consequently, the phonogram producer has title to request the hotel operator to pay an equitable remuneration for the use of the

phonogram. The CJEU concluded the analysis holding that the exemption to the payment of the equitable remuneration contained in art. 10, par. 1, lett. (a), for private use of the phonogram, does not allow Member States to enact legislations that exempt hotel operators from paying a remuneration when they make a communication to the public of such phonogram.

The lesson coming from these rulings is that, with respect to the use of phonograms, the existence of a "communication to the public" must be assessed case by case, as it is not always clear-cut when the recipients are a "public" and when the use of the phonogram may bring a direct economic advantage to the user. Although the conclusions reached by the CJEU in the dentist's case may apply to other professional activities, in certain cases it might happen that offering clients the possibility to hear background music during the performance of the professional services brings a competitive advantage and some economic benefit to the professional. In such case, it could be disputed whether a remuneration is due to phonogram producers. The outcome of the second ruling, instead, could have a rather relevant impact on the prices of hotel rooms (and, consequently, on consumers), as the hoteliers might decide to increase the rates of the accommodation based on the fact that they have to pay a remuneration to phonogram producers in order to offer music as part of their services.

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