ECLI:EU:C:2023:307

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

20 April 2023 (*)

(Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Directive 2001/29/EC – Article 3(1) – Communication to the public – Concept – Broadcasting of background music – Directive 2006/115/EC – Article 8(2) – Equitable remuneration – Mere provision of physical facilities – Sound equipment on board trains and aircraft – Presumption of communication to the public)

In Joined Cases C-775/21 and C-826/21,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Curtea de Apel București (Court of Appeal, Bucharest, Romania), made by decisions of 12 November 2020 and 1 July 2021, received at the Court on 15 and 22 December 2021, in the proceedings

Blue Air Aviation SA

v

UCMR – ADA Asociaţia pentru Drepturi de Autor a Compozitorilor (C-775/21),

and

Uniunea Producătorilor de Fonograme din România (UPFR)

v

Societatea Națională de Transport Feroviar de Călători (SNTFC) ‘CFR Călători’ SA (C-826/21),

THE COURT (Sixth Chamber),

composed of P.G. Xuereb, President of the Chamber, T. von Danwitz and I. Ziemele (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Societatea Naţională de Transport Feroviar de Călători (SNTFC) ‘CFR Călători’ SA, by T. Preoteasa, acting as Agent,

– the Romanian Government, by E. Gane, A. Rotăreanu and A. Wellman, acting as Agents,

– the European Commission, by A. Biolan, P. Němečková and J. Samnadda, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 3 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 (OJ 2001 L 167, p. 10).

2 The requests have been made in two sets of proceedings between, first, in Case C-775/21, Blue Air Aviation SA (‘Blue Air’) and UCMR – ADA Asociaţia pentru Drepturi de Autor a Compozitorilor (‘the UCMR – ADA’), concerning Blue Air’s obligation to pay royalties to the UCMR – ADA for the broadcasting of background musical works on board passenger aircraft and second, in Case C-826/21, Uniunea Producătorilor de Fonograme din România (UPFR) and Societatea Naţională de Transport Feroviar de Călători (SNTFC) ‘CFR Călători’ SA (‘the CFR’), concerning the obligation to pay royalties for the provision on board trains of physical facilities capable of being used to carry out communication to the public of musical works.

Legal context

International law

3 On 20 December 1996, the World Intellectual Property Organisation (WIPO) adopted in Geneva (Switzerland) the WIPO Copyright Treaty (‘the WCT’), which was approved by Council Decision 2000/278/EC 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 2000 L 89, p. 6), and entered into force, as regards the European Union, on 14 March 2010 (OJ 2010 L 32, p. 1).

4 Article 8 of the WCT, headed ‘Right of Communication to the Public’, provides:

‘Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the [Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971) as amended on 28 September 1979], authors of literary and artistic works shall enjoy the exclusive right of authorising 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.'

5 Agreed Statements concerning the WCT were adopted by the WIPO Diplomatic Conference on 20 December 1996.

6 The Agreed Statement concerning Article 8 of the WCT is worded as follows:

'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 [Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), as amended on 28 September 1979]. …'

European Union law

Directive 2001/29

7 Recitals 1, 4, 6, 7, 9, 10, 23 and 27 of Directive 2001/29 state:

'(1) The [FEU] Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

…

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

…

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in

Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

…

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

…

(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.

…

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

…'

8 Article 3 of Directive 2001/29, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides:

'1. 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.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, 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:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

Directive 2006/115/EC

9 Article 8 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28), entitled 'Broadcasting and communication to the public', provides in paragraph 2:

'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.'

Romanian law

Law No 8/1996

10 Legea nr. 8/1996 privind dreptul de autor și drepturile conexe (Law No 8/1996 on copyright and related rights, *Monitorul Oficial al României*, Part I, No 60 of 26 March 1996) has been amended on several occasions, in particular by Law No 285/2004 (*Monitorul Oficial al României,* Part I, No 587 of 30 June 2004) ('Law No 8/1996'). The relevant provisions of that law are reproduced in paragraphs 11 to 20 below, in the version applicable to the disputes in the main proceedings.

11 Article 13 of Law No 8/1996 states:

'The use of a work gives rise, for the author, to distinct and exclusive economic rights which allow him or her to authorise or prohibit:

…

(f) the direct or indirect communication of the work to the public, by any means, including making it available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them;

…'

12 Article 15(1) of that law reads as follows:

'Communication to the public means any communication of a work, made directly or by technical means, carried out in a place open to the public or in any place in which the persons present are outside the circle of family and acquaintances, including stage or film presentation, acting or recitation, or any other public means of directly performing or presenting a work, the public

exhibition of works of the plastic arts, the applied arts, photographic or architectonic works, the public showing of cinematographic works and other audiovisual works, including digital artworks, the presentation of works in a public place by means of sound or audiovisual recordings, as well as the presentation of works in a public place by any means of radio or television broadcasting. Communication to the public also means any communication, wireless or not, by which works are made available to the public, including via the internet or other information networks, so that every member of the public can have access to such works from a place and at a time individually chosen by them.

…'

13 As provided in Article 105(1)(f) of that law:

'… the producer of sound recordings shall have the exclusive economic right to authorise or prohibit the following:

…

(f) the broadcasting and communication to the public of his or her own sound recordings, except those published for commercial purposes, in which case he or she shall be entitled only to equitable remuneration'.

14 Article 106^{5} of the same law provides:

'1. Performers and producers of phonograms shall be entitled to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes or for their reproduction by broadcasting or any means of communication to the public.

2. The amount of that remuneration shall be determined by methodologies, in accordance with the procedure laid down in Articles 131, 131^{1} and 131^{2}.'

15 Article 123(1) to (3) of Law No 8/1996 states:

'1. Holders of copyright and related rights may exercise the rights granted to them under this Law either individually or, on the basis of an authorisation, through collective management organisations, subject to the conditions laid down in this Law.

2. The collective management of copyright may be carried out only in respect of works previously brought to the public's attention and the collective management of related rights may be carried out only in respect of previously fixed or broadcast performances and of phonograms or videograms previously brought to the public's attention.

3. Holders of copyright or related rights may not assign the economic rights granted under this Law to collective management organisations.'

16 Article 123^{1}(1) (e) and (f) of that law provides:

'Collective management shall be compulsory in order to exercise the following rights:

…

(e) the right of communication of musical works to the public, with the exception of the public showing of cinematographic works;

(f) the right to an equitable remuneration granted to performers and producers of phonograms for the communication to the public and broadcasting of commercial phonograms or reproductions thereof.'

17 Article 130(1)(a) and (b) of Law No 8/1996 is worded as follows:

'Collective management organisations have an obligation:

(a) to grant, in exchange for a fee, non-exclusive authorisations in the form of a non-exclusive licence to users who apply for them in writing before any use of the protected repertoire;

(b) to draw up methodologies for their fields of business, including the appropriate copyright fees, which must be negotiated with users with a view to the payment of those fees, in the event of works whose method of use makes it impossible for the copyright holders to grant individual authorisation.'

18 Under Article 131(1) of the same law:

'In order to initiate the negotiation procedures, collective management organisations shall submit to [the Oficiul Român pentru Drepturile de Autor (Romanian Copyright Office)] an application accompanied by the methodologies proposed for negotiation in accordance with Article 130(1)(a).

…'

19 Article 131^{1}(1) to (3) of Law No 8/1996 provides:

'1. The methodologies shall be negotiated by the collective management organisations and the representatives referred to in Article 131(2)(b), …

2. Collective management organisations may require flat-rate or proportional remuneration from the same category of users, calculated on the basis of the income that the user derives from the activity in the context of which the repertoire is used, for example: broadcasting, cable retransmission or communication to the public, taking into account European practice regarding the results of negotiations between users and collecting societies. In the case of broadcasting, proportionate remuneration shall be fixed on a differentiated basis, in direct proportion to the share of the use of the repertoire collectively managed in that activity and, in the absence of revenue, on the basis of the expenditure incurred by use.

3. The flat-rate or proportional remuneration referred to in paragraph 2 may be claimed only if and in so far as the use relates to works for which copyright or related rights continue to enjoy the protection provided for by law.

…'

20 Article 131^{2}(2) of that Law is worded as follows:

'The agreement of the parties on the negotiated methodologies shall be recorded in a protocol to be deposited with the 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.'

Code of Civil Procedure

21 Article 249 of the Code of Civil Procedure provides:

'A person who makes a claim in the course of proceedings must prove that claim, except in certain cases provided for by law.'

22 Article 329 of that code is worded as follows:

'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.'

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

23 The 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, *Monitorul Oficial al României*, Part I, No 710 of 7 October 2011), as amended by Decision No 198 of the Romanian Copyright Office of 8 November 2012 (*Monitorul Oficial al României*, Part I, No 780 of 20 November 2012), provides:

'1. A person using musical works as background music shall be required, prior to any use of musical works, to obtain from the UCMR – ADA an authorisation in the form of a non-exclusive licence for the use of musical works and to pay remuneration according to the table set out in the present methodology, irrespective of the actual duration of the use.

2. For the purposes of the present 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 forth) premises, whether closed or open, where systems and any other technical or electronic means such as televisions, radios, cassette players, stereo systems, computer equipment, compact-disc 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 an authorisation in the form of a non-exclusive 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 an authorisation in the form of a non-exclusive 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.'

24 Annexed to that methodology is a scale of remuneration payable for the communication to the public of musical works as background music, individualised by type of commercial premises or vehicles in which that communication takes place. Point 11 of that scale provides, for the carriage of passengers by air, a flat-rate remuneration of 200 Romanian lei (RON) per month and per aircraft.

Methodology concerning the communication to the public of phonograms published for commercial purposes or reproductions thereof and scales of economic rights of performers and phonogram producers

25 The Metodologia privind comunicarea publică a fonogramelor publicate în scop comercial sau a reproduerilor acestora și tabelele cuprinzând drepturile patrimoniale ale artiștilor interpreți ori executanți și producătorilor de fonogram (Methodology concerning the communication to the public of phonograms published for commercial purposes or reproductions thereof and scales of economic rights of performers and phonogram producers, *Monitorul Oficial al României*, Part I, No 982 of 8 December 2006), as amended by Decision No 189 of the Romanian Copyright Office of 29 November 2013 (*Monitorul Oficial al României*, Part I, No 788 of 16 December 2013), provides:

'1. "Communication to the public of phonograms published for commercial purposes or reproductions thereof" shall mean the communication of such phonograms or reproductions in public places (whether closed or open), regardless of the manner in which the communication is made, by the use of mechanical, electro-acoustic or digital means (amplification systems, sound or audiovisual recording devices, radio receivers or televisions, IT equipment, and so on).

…

3. "Phonogram user" shall mean, for the purposes of the present methodology, any authorised natural or legal person who communicates to the public phonograms published for commercial purposes or reproductions thereof, in spaces held in any way (ownership, management, letting, subletting, lending, and so forth.)

…

5. The user shall be required to obtain authorisations in the form of non-exclusive licences issued by collective management organisations of the … phonogram producers for the communication to

the public of phonograms published for commercial purposes …, in return for remuneration according to the scales set out below, irrespective of the actual duration of the communication to the public.'

26 The annex to that methodology contains two scales, the first of which provides for the remuneration payable for activities carried out in background music, individualised by type of commercial premises or vehicles in which those activities take place. Point E3, point 1, of the first scale provides, for passenger rail transport, for a monthly remuneration of RON 30 per carriage with a sound system.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-775/21

27 The UCMR – ADA is a collective management organisation which handles music copyright.

28 On 2 March 2018, that body brought an action before the Tribunalul București (Regional Court, Bucharest, Romania) against the air transport company Blue Air, seeking payment of remuneration still due and of penalties for the communication to the public of musical works on board aircraft operated by Blue Air, for which Blue Air had not obtained a licence.

29 Before that court, Blue Air submitted that it operates 28 aircraft and that, although it has the software necessary for the broadcasting of musical works in 22 of those 28 aircraft, it communicated to the public, after obtaining the required licence, only one musical work as background music, in 14 of those aircraft.

30 Following those clarifications, the UCMR – ADA expanded its requests for payment, taking the view that the existence of sound systems in approximately 22 aircraft justified the conclusion that protected works had been communicated to the public in all of the aircraft of Blue Air's fleet.

31 By judgment of 8 April 2019, the UCMR – ADA's action was upheld. In essence, the Tribunalul București (Regional Court, Bucharest) held, on the basis of the judgments of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764), and of 15 March 2012, *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141), that the fact that Blue Air equipped the means of transport operated by it with devices enabling the communication to the public of musical works as background music gave rise to a rebuttable presumption that those works were used; this required it to be held that any aircraft equipped with a sound system uses that device for the communication of the musical work in question to the public, without any further proof being necessary in that regard.

32 Blue Air appealed against that decision to the Curtea de Apel București (Court of Appeal, Bucharest, Romania), which is the referring court, submitting, inter alia, that it had not communicated background music on board the aircraft it operates for which no licence had been obtained, and that the mere existence of physical facilities did not amount to a communication to the public of musical works. It added that, through the broadcasting of background music, it was not pursuing any profit motive. Lastly, it stated that the existence of sound systems in aircraft is dictated by safety reasons, in order to enable communication between members of the air crew and communication between that crew and the passengers.

33 The referring court states that the question whether, given the absence of a profit-making objective, the communication of a musical work as background music constitutes a communication

to the public within the meaning of Article 3 of Directive 2001/29, is not without uncertainty. Furthermore, if that question is answered in the affirmative, the referring court raises the question of the standard of proof required in that regard. It notes that, in accordance with the case-law of certain national courts, where an establishment carrying out a particular economic activity is cited in the methodology referred to in paragraph 23 of the present judgment, there is a rebuttable presumption that works protected by copyright are communicated to the public in that place. Such a presumption would be justified, in particular, by the fact that it is impossible for collective management organisations handling copyright systematically to monitor all the places where acts of use of works of intellectual creation could take place.

34 In those circumstances the Curtea de Apel București (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 3(1) of Directive 2001/29/EC … 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?'

Case C-826/21

35 The UPFR is a collective management organisation handling the related rights of phonogram producers.

36 On 2 December 2013, that body brought an action against the CFR, a rail transport company, seeking payment of remuneration still due and of penalties for the communication to the public of musical works on board passenger carriages operated by the CFR. It maintained, in that context, that the applicable railway legislation required some of the trains operated by the CFR to be equipped with sound systems and argued that the presence of such systems amounted to communication to the public of works within the meaning of Article 3(1) of Directive 2001/29.

37 That action was dismissed by the Tribunalul București (Regional Court, Bucharest), which held that while the mere installation of a sound system which makes public access to sound recordings technically possible constitutes a communication to the public of musical works, it had not been proved that the trains in service had been equipped with such a system.

38 The UPFR brought an appeal against that decision before the Curtea de Apel Bucureşti (Court of Appeal, Bucharest), which is the referring court.

39 The referring court notes that, in national case-law, it is the majority view, inter alia on the basis of the judgment of 7 December 2006, *SGAE* (C-306/05, EU:C:2006:764), that the presence of sound systems in a train carriage amounts to a communication to the public of musical works. However, the referring court is uncertain in that regard.

40 In those circumstances the Curtea de Apel București (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a rail carrier which uses train carriages in which sound systems intended for the communication of information to passengers are installed thereby make a communication to the public within the meaning of Article 3 of Directive 2001/29/EC …?

(2) Does Article 3 of Directive 2001/29/EC … preclude national legislation which establishes a rebuttable presumption of communication to the public on the basis of the existence of sound systems, where those sound systems are required by other provisions of law governing the carrier's activity?'

Procedure before the Court

41 By decision of 1 March 2022, Cases C-775/21 and C-826/21 were joined for the purposes of the written and oral parts of the procedure and of the judgment, in accordance with Article 54 of the Rules of Procedure of the Court of Justice.

Consideration of the questions referred

The first question in Case C-775/21

42 By its question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the broadcasting, in a means of passenger transport, of a musical work as background music constitutes a communication to the public within the meaning of that provision.

43 Under Article 3(1) of Directive 2001/29, Member States are to 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.

44 As the Court has repeatedly held, under that provision, authors thus have a right which is preventive in nature and which enables them to intervene between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such communication (judgment of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 62 and the case-law cited).

45 As Article 3(1) of Directive 2001/29 does not define the concept of 'communication to the public', the meaning and scope of that concept must be determined in light of the objectives pursued by that directive and the context in which the provision being interpreted is set (judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 17 and the case-law cited).

46 In that regard, the Court has recalled that that concept must, as stated in recital 23 of Directive 2001/29, be understood in a broad sense, covering all communication to the public not present at the place where the communication originates and, thus, any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. It is, indeed, clear from recitals 4, 9 and 10 of that directive that the principal objective of the directive is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their work, including when a communication to the public takes place (judgment of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 63 and the case-law cited).

47 In that regard, as the Court has held more than once, the concept of 'communication to the public', within the meaning of Article 3(1), includes two cumulative criteria, namely an act of communication of a work and the communication of that work to a public, and requires an individual assessment (judgments of 2 April 2020, *Stim and SAMI*, C-753/18, EU:C:2020:268, paragraph 30, and of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 66 and the case-law cited).

48 For the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another (see, to that effect, judgments of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 25, and of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 67 and the case-law cited).

49 Among those criteria, the Court has emphasised, first, the indispensable role played by the user and the deliberate nature of his or her intervention. That user makes an act of communication when he or she intervenes, in full knowledge of the consequences of his or her action, to give his or her customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work (judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, paragraph 26 and the case-law cited).

50 Furthermore, the Court has held that it is relevant that a communication to the public, within the meaning of Article 3(1) of Directive 2001/29, is of a profit-making nature (judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 38 and the case-law cited). However, it has acknowledged that a profit-making nature is not necessarily an essential condition for the existence of a communication to the public (judgments of 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 42 and the case-law cited, and of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 49).

51 Second, in order to be categorised as a 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, the protected works must also in fact be communicated to a public (judgment of 28 October 2020, *BY (Photographic evidence)*, C-637/19, EU:C:2020:863, paragraph 25 and the case-law cited).

52 In that regard, the Court has stated that the concept of 'public' refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of people (judgment of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 69 and the case-law cited).

53 In the present case, in the first place, as is apparent from the case-law cited in paragraph 49 above, it is clear that the broadcasting in a means of passenger transport of a musical work as

background music by the operator of that means of transport constitutes an act of communication for the purposes of Article 3(1) of Directive 2001/29 since, in so doing, that operator intervenes, in full knowledge of the consequences of its conduct, to give its customers access to a protected work, in particular where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work.

54 In the second place, a musical work of that kind is actually communicated to a public, within the meaning of the case-law referred to in paragraph 51 above. While it is true, as the Court has held, that the concept of 'public' includes a certain *de minimis* threshold, which excludes from that concept groups of persons which are too small, or insignificant, the Court has also emphasised that, in order to determine that number, account must be taken, in particular, of the number of persons who may have access to the same work at the same time, but also of how many of them may access it in succession (see, to that effect, judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraphs 43 and 44, and of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 68 and the case-law cited).

55 As the referring court points out, it is not disputed, in the present case, that the work at issue in the main proceedings had actually been broadcast in half of the aircraft operated by Blue Air, during flights operated by that airline, with the result that the public in question consists in all the groups of passengers who, simultaneously or successively, took those flights, and such a number of persons concerned cannot be regarded as too small, or even as an insignificant number, within the meaning of the case-law referred to in paragraph 54 above.

56 In that context, the fact, mentioned by the referring court, that the profit-making nature of such a communication is highly debatable, as regards the broadcasting, as background music, of extracts from musical works to all the passengers of an aircraft, at the time of take-off, landing or at any other time of the flight, is not decisive. A profit-making nature of that kind is not a prerequisite for finding that there is a communication to the public within the meaning of Article 3(1) of Directive 2001/29, since the Court has held that that nature is not necessarily an essential condition which determines the existence of a communication to the public, as is apparent from the case-law referred to in paragraph 50 above.

57 Having regard to the foregoing considerations, the answer to the first question in Case C-775/21 is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that the broadcasting, in a means of passenger transport, of a musical work as background music constitutes a communication to the public within the meaning of that provision.

The second and third questions in Case C-775/21 and the first question in Case C-826/21

58 According to the settled case-law of the Court, in the procedure laid down in Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. With that in mind, the Court may have to reformulate the questions referred to it. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 22 June 2022, *Volvo and DAF Trucks*, C-267/20, EU:C:2022:494, paragraph 28 and the case-law cited).

59 In the present case, in the light of all the information provided by the referring court in its requests for a preliminary ruling, it is necessary, with a view to providing that court with a useful answer, to reformulate the questions referred for a preliminary ruling.

60 In particular, the action in Case C-826/21 was brought by a collective management organisation handling related rights of phonogram producers in order to obtain payment, by the CFR, of equitable remuneration for the communication to the public of musical works on board passenger carriages operated by the CFR. Consequently, taking into account the application to the present dispute of Article 105(1)(f) of Law No 8/1996, referred to in paragraph 10 above, which provides for the economic right of the producer of sound recordings to authorise the broadcasting and communication to the public of his or her own sound recordings, it is apparent that the interpretation of Article 8(2) of Directive 2006/115 is also relevant to the outcome of that dispute.

61 In those circumstances, it must be held that, by its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that the installation, on board a means of transport, of sound equipment and, where appropriate, of software enabling the broadcasting of background music, constitutes a communication to the public within the meaning of those provisions.

62 It should be borne in mind that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the objectives pursued by the rules of which it forms part and its context. As regards, in particular, Article 3(1) of Directive 2001/29, that provision must be interpreted in a manner that is consistent with the relevant provisions of the WCT, since Directive 2001/29 is intended to implement certain obligations incumbent on the European Union under that convention (see, to that effect, judgments of 17 April 2008, *Peek & Cloppenburg*, C-456/06, EU:C:2008:232, paragraph 33, and of 21 June 2012, *Donner*, C-5/11, EU:C:2012:370, paragraph 23).

63 In the first place, as regards the wording of the provisions at issue, it was recalled in paragraph 43 above that it follows from Article 3(1) of Directive 2001/29 that the Member States are required to ensure that authors enjoy 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.

64 Furthermore, pursuant to Article 8(2) of Directive 2006/115, the legislation of the Member States must ensure, first, 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, second, that that remuneration is shared between the relevant performers and phonogram producers.

65 In that regard, it should be borne in mind that, according to the case-law of the Court, since the EU legislature did not express a different intention, the concept of ‘communication to the public’ used in both of the abovementioned provisions must be interpreted as having the same meaning (see, to that effect, judgments of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 33, and of 17 June 2021, *M.I.C.M.*, C-597/19, EU:C:2021:492, paragraph 41 and the case-law cited).

66 In the second place, as regards the objective pursued by those provisions, it follows from the case-law referred to in paragraph 46 above that that concept must indeed be understood in a broad

sense, covering all communication to the public not present at the place where the communication originates and, thus, any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting, the main objective of Directive 2001/29 being to establish a high level of protection for authors.

67 That said, it should be noted, in the third place, as regards the context of the provisions at issue, that it is apparent from recital 27 of Directive 2001/29 – which reproduces, in essence, the Agreed Statement concerning Article 8 of the WCT, as the Court observed in the judgment of 22 June 2021, *YouTube and Cyando* (C-682/18 and C-683/18, EU:C:2021:503, paragraph 79) – 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 Directive'.

68 In that regard, if the mere fact that the use of sound equipment and, as appropriate, software, is necessary in order for the public to be able actually to enjoy the work resulted automatically in the intervention of the operator of that system being classified as an 'act of communication', any 'provision of physical facilities for enabling or making a communication', including where the presence of such facilities is required by the national legislation governing the activity of the transport operator, would constitute such an act, which is, however, expressly excluded by recital 27 of Directive 2001/29 (see, to that effect, judgment of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 79).

69 In the light of those considerations, it must be held that the fact of having, on board a means of transport, sound equipment and, where appropriate, software enabling the broadcasting of background music does not constitute an act of communication for the purposes of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115, since it is a mere provision of physical facilities for enabling or making a communication.

70 Admittedly, the Court has already ruled that the operators of a public house, a hotel or a spa establishment perform an act of communication when they deliberately transmit protected works to their customers, by intentionally distributing a signal by means of television or radio sets which they have installed in their establishment (see, to that effect, judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 47; of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 196; and of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 26). Similarly, the operator of a rehabilitation centre which intentionally transmits protected works to its patients by means of television sets installed in several places in that establishment carries out an act of communication (judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraphs 55 and 56).

71 However, the mere installation of sound equipment in a means of transport cannot be comparable to acts by which service providers intentionally transmit protected works to their customers by distributing a signal by means of receivers which they have installed in their establishment, allowing access to such works.

72 Since the installation, on board a means of transport, of sound equipment and, where appropriate, of software enabling the broadcasting of background music, does not constitute an 'act of communication', there is no need to consider whether a possible communication has been made to a public, within the meaning of the case-law.

73 In the light of all the foregoing considerations, the answer to the second and third questions in Case C-775/21 and the first question in Case C-826/21 is that Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that the installation, on board a

means of transport, of sound equipment, and, where appropriate, of software enabling the broadcasting of background music, does not constitute a communication to the public within the meaning of those provisions.

The second question in Case C-826/21

74 In the light of the considerations set out in paragraph 60 above, in order to provide a useful answer to the referring court, it must be found that, by its question, that court asks, in essence, whether Article 8(2) of Directive 2006/115 must be interpreted as precluding national legislation, as interpreted by the national courts, which establishes a rebuttable presumption that musical works are communicated to the public because of the presence of sound systems in means of transport.

75 As a preliminary point, it should be noted that the premiss on which the referring court relies, according to which the national legislation establishes a rebuttable presumption that musical works are communicated to the public because of the presence of sound systems in means of transport, is disputed by the Romanian Government in its written observations.

76 It should, however, be borne in mind that, according to the settled case-law of the Court, in the procedure laid down by Article 267 TFEU, the functions of the Court and those of the referring court are clearly distinct and it falls exclusively to the latter to interpret national legislation (judgment of 17 March 2022, *Daimler*, C-232/20, EU:C:2022:196, paragraph 91 and the case-law cited).

77 Thus, it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of provisions of national law. The Court must take account, under the division of jurisdiction between the Courts of the European Union and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (judgment of 17 March 2022, *Daimler*, C-232/20, EU:C:2022:196, paragraph 92 and the case-law cited).

78 In that regard, it is apparent in particular from recitals 1, 6 and 7 of Directive 2001/29 that the objectives of that directive are, inter alia, to remedy the legislative differences and legal uncertainty surrounding the protection of copyright, since that insecurity may hinder the smooth functioning of the internal market and the development of the information society in Europe, and to prevent Member States from reacting inconsistently to technological developments. Furthermore, those recitals state that, in the absence of harmonisation at EU level, significant differences in protection could occur, leading to fragmentation of the internal market and legislative inconsistencies. In addition, again according to those recitals, significant legal differences and uncertainties in protection may hinder economies of scale for new products and services protected by copyright and related rights.

79 As the Court has already held, acceptance of the proposition that a Member State may give wider protection to copyright holders by laying down that the concept of ‘communication to the public’ also includes activities other than those referred to in Article 3(1) of Directive 2001/29 would have the effect of creating legislative differences and thus, for third parties, legal uncertainty (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 34).

80 It follows that Article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that

provision (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 41).

81 Such an interpretation is, in the light of the case-law cited in paragraph 65 above, applicable by analogy to the concept of 'communication to the public' within the meaning of Directive 2006/115.

82 In the present case, it is apparent from the answer to the first question in Case C-826/21 that Article 8(2) of Directive 2006/115 must be interpreted as meaning that the installation, on board a means of transport, of sound equipment and, where appropriate, of software enabling the broadcasting of background music for the benefit of travellers independently of their will, does not constitute a 'communication to the public' within the meaning of that provision.

83 That provision therefore precludes national legislation which establishes a rebuttable presumption that there is a communication to the public because of the presence of such sound systems. Such legislation may have the consequence of requiring payment of remuneration for the mere installation of those sound systems, even in the absence of any act of communication to the public, contrary to the aforementioned provision.

84 In the light of the foregoing considerations, the answer to the question referred is that Article 8(2) of Directive 2006/115 must be interpreted as precluding national legislation, as interpreted by the national courts, which establishes a rebuttable presumption that musical works are communicated to the public because of the presence of sounds systems in means of transport.

Costs

85 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **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**

must be interpreted as meaning that the broadcasting, in a means of passenger transport, of a musical work as background music constitutes a communication to the public within the meaning of that provision.

2. **Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property**

must be interpreted as meaning that the installation, on board a means of transport, of sound equipment, and, where appropriate, of software enabling the broadcasting of background music, does not constitute a communication to the public within the meaning of those provisions.

3. **Article 8(2) of Directive 2006/115**

must be interpreted as precluding national legislation, as interpreted by the national courts, which establishes a rebuttable presumption that musical works are communicated to the public because of the presence of sound systems in means of transport.

[Signatures]

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* Language of the case: Romanian.