

JUDGMENT OF THE COURT (Fifth Chamber)

18 November 2020 (\*)

(Reference for a preliminary ruling – Intellectual property – Rights related to copyright – Directive 92/100/EEC – Article 8(2) – Directive 2006/115/EC – Article 8(2) – Communication to the public of an audiovisual work incorporating a phonogram or a reproduction of a phonogram – Single equitable remuneration)

In Case C-147/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 13 February 2019, received at the Court on 20 February 2019, in the proceedings

**Atresmedia Corporación de Medios de Comunicación SA**

v

**Asociación de Gestión de Derechos Intelectuales (AGEDI),**

**Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE),**

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič (Rapporteur), E. Juhász, C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: E. Tanchev,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 30 January 2020,

after considering the observations submitted on behalf of:

- Atresmedia Corporación de Medios de Comunicación SA, by C. Aguilar Fernández, L.J. Vidal Calvo and M. González Gordon, abogados,
- Asociación de Gestión de Derechos Intelectuales (AGEDI), by J.J. Marín López, abogado,
- Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE), by A. López Sánchez, abogado,
- the Spanish Government, initially by A. Rubio González, and subsequently by S. Jiménez García, acting as Agents,
- the European Commission, by É. Gippini Fournier and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

gives the following

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61) and of 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 (OJ 2006 L 376, p. 28).
- 2 The request has been made in proceedings between, on the one hand, Atresmedia Corporación de Medios de Comunicación SA ('Atresmedia'), an undertaking which owns a number of television channels, and, on the other, the Asociación de Gestión de Derechos Intelectuales (AGEDI) and Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) – entities that manage, respectively, the intellectual property rights of phonogram producers and such rights of performers – concerning the payment by Atresmedia of a single equitable remuneration for the broadcasting, on television channels operated by it, of audiovisual works incorporating phonograms.

### Legal context

#### *International law*

##### *The Vienna Convention on the Law of Treaties*

- 3 Article 31(2)(a) of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331) provides:

'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

...'

##### *The Rome Convention*

- 4 Unlike all the Member States with the exception of the Republic of Malta, the European Union is not a party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961 ('the Rome Convention').

- 5 Article 3 of that convention provides:

'For the purposes of this Convention:

...

- (b) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

...

- (e) "reproduction" means the making of a copy or copies of a fixation;

...’

### *The WPPT*

6 The World Intellectual Property Organisation (WIPO) adopted, on 20 December 1996, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (‘the WPPT’). Those treaties were approved on behalf of the European Community 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, in so far as concerns the European Union, on 14 March 2010.

7 Article 2(b) of the WPPT provides:

‘For the purposes of this Treaty:

...

(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’.

8 The Diplomatic Conference on certain copyright and neighbouring rights questions of 20 December 1996 adopted the following agreed statement concerning Article 2(b) of the WPPT:

‘It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.’

### *EU law*

#### *Directive 92/100*

9 The seventh and 10th recitals of Directive 92/100 stated:

‘Whereas the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky; whereas the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned;

...

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

10 Article 8 of that directive, entitled ‘Broadcasting and communication to the public’, provided in paragraph 2 thereof:

‘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.’

11 Directive 92/100 was codified and repealed by Directive 2006/115.

*Directive 2001/29/EC*

12 Article 2 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), entitled ‘Reproduction right’, provides:

‘Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;

...’

*Directive 2006/115*

13 Recitals 5 and 7 of Directive 2006/115 state:

‘(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

...

(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.’

14 The wording of Article 8(2) of Directive 2006/115 is identical to that of Article 8(2) of Directive 92/100.

*Spanish law*

15 Article 108(4) of Real Decreto Legislativo 1/1996, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia (Royal Legislative Decree 1/1996, approving the amended text of the Intellectual Property Law, which sets out, clarifies and harmonises the legislative provisions in force in that area) of 12 April 1996 (BOE No 97, 22 April 1996, p. 14369), in the version applicable to the dispute in the main proceedings (‘the LPI’), provides:

‘Users of a phonogram published for commercial purposes or of a reproduction of that phonogram that is used for any form of communication to the public shall have an obligation to pay a single equitable remuneration to the performers and phonogram producers, between whom that remuneration shall be shared. In the absence of agreement between them as to how that remuneration is to be shared, this shall be in equal parts ...’

16 Article 114(1) of the LPI provides:

“‘Phonogram’ means any exclusively aural fixation of the performance of a work or of other sounds.’

17 Article 116(2) of the LPI, which appears under the title governing the rights of phonogram producers, contains identical wording to that of Article 108(4) thereof.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

18 On 29 July 2010, AGEDI and AIE brought an action before the Juzgado de lo Mercantil de Madrid No 4 Bis (Commercial Court, Madrid, Spain) against Atresmedia seeking payment of compensation in respect of acts of communication to the public of phonograms published for commercial purposes, or reproductions of those phonograms, carried out between 1 June 2003 and 31 December 2009 via the television channels operated by Atresmedia, and for the unauthorised reproduction of phonograms in connection with those acts of communication to the public.

19 Since that action was declared unfounded by the Juzgado de lo Mercantil de Madrid (Commercial Court, Madrid), AGEDI and AIE brought an appeal against that court's judgment before the Audiencia Provincial de Madrid (Provincial Court, Madrid, Spain), which set aside that judgment and upheld their application in its entirety.

20 Atresmedia brought an appeal on a point of law before the referring court against the judgment of the Audiencia Provincial de Madrid (Provincial Court, Madrid).

21 The referring court notes that the appeal relates exclusively to whether the communication to the public of audiovisual works carried out by Atresmedia via its television channels gives rise to the right to the single equitable remuneration provided for in Spanish law in Article 108(4) and Article 116(2) of the LPI, which correspond, in EU law, to Article 8(2) of Directive 92/100 and to Article 8(2) of Directive 2006/115. In particular, that court states that it falls to it to determine whether, from the moment when a phonogram published for commercial purposes, or a reproduction of that phonogram, has been incorporated or 'synchronised' in an audiovisual recording containing the fixation of an audiovisual work, the performers and phonogram producers concerned may demand that single equitable remuneration.

22 The referring court adds that since AGEDI and AIE claim compensation from Atresmedia in respect of the communication to the public of audiovisual works carried out between 1 June 2003 and 31 December 2009, both Directive 92/100 and Directive 2006/115 are applicable *rationae temporis* to the main proceedings.

23 In those circumstances the Tribunal Supremo (Supreme Court, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does the concept of the "reproduction of a phonogram published for commercial purposes" referred to in Article 8(2) of Directives 92/100 and 2006/115 include the reproduction of a phonogram published for commercial purposes in an audiovisual recording containing the fixation of an audiovisual work?

(2) In the event that the answer to the previous question is in the affirmative, is a television broadcasting organisation which, for any type of communication to the public, uses an audiovisual recording containing the fixation of a cinematographic or audiovisual work in which a phonogram published for commercial purposes has been reproduced, under an obligation to pay the single equitable remuneration provided for in Article 8(2) of the aforementioned directives?

### **Consideration of the questions referred**

24 It should be noted, as a preliminary point, that it is common ground in the main proceedings that phonograms published for commercial purposes, or reproductions of those phonograms, were incorporated

in audiovisual recordings containing the fixation of audiovisual works, those audiovisual recordings being subsequently communicated to the public via television channels operated by Atresmedia.

- 25 In that regard, the referring court's questions do not concern the reproduction of such phonograms when they are being incorporated in those audiovisual recordings. That court makes clear that such an incorporation was carried out with the authorisation of the rightholders concerned and in return for remuneration paid to them in accordance with the applicable contractual arrangements.
- 26 The referring court nevertheless seeks to ascertain whether the performers and phonogram producers concerned must receive the single equitable remuneration provided for in Article 8(2) of Directive 92/100 and Article 8(2) of Directive 2006/115, where such audiovisual recordings are subsequently communicated to the public.
- 27 In those circumstances, it must be found that, by its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 8(2) of Directive 92/100 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that the single equitable remuneration referred to in those provisions must be paid by the user where he or she makes a communication to the public of an audiovisual recording containing the fixation of an audiovisual work in which a phonogram or a reproduction of that phonogram has been incorporated.
- 28 It should be noted that, according to Article 8(2) of Directive 92/100 and Article 8(2) of Directive 2006/115, the Member States are to 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.
- 29 As the Court has already pointed out, that remuneration represents the consideration for the use of a commercial phonogram during such a broadcast or communication to the public (see, to that effect, judgment of 6 February 2003, *SENA*, C-245/00, EU:C:2003:68, paragraph 37, and of 14 July 2005, *Lagardère Active Broadcast*, C-192/04, EU:C:2005:475, paragraph 50).
- 30 Those provisions confer on the persons covered by them a right that is compensatory in nature, triggered by the broadcasting or communication to the public of the performance of the work fixed on a phonogram published for commercial purposes, or on a reproduction of such a phonogram (see, to that effect, judgment of 8 September 2020, *Recorded Artists Actors Performers*, C-265/19, EU:C:2020:677, paragraph 54 and the case-law cited).
- 31 In those circumstances, it is necessary to determine whether an audiovisual recording containing the fixation of an audiovisual work, such as that referred to in paragraph 27 above, must be classified as a 'phonogram' or 'reproduction of that phonogram' within the meaning of Article 8(2) of Directive 92/100 or Article 8(2) of Directive 2006/115.
- 32 In the first place, it should be noted that neither Directives 92/100 and 2006/115 nor the other EU directives in the area of copyright law define the concept of 'phonogram' or contain an express reference to the law of the Member States for the purpose of determining the scope of that concept.
- 33 According to settled case-law, the terms of a provision of EU 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 Union; that interpretation must take into account the wording of that provision and its context, and in particular its origins and international law, as well as the objectives pursued by the rules of which it forms part (judgment of 8 September 2020, *Recorded Artists Actors Performers*, C-265/19, EU:C:2020:677, paragraph 46 and the case-law cited).
- 34 In that regard, it should be borne in mind that the provisions of Directive 92/100 and Directive 2006/115 must be interpreted in the light of international law, and in particular of the treaty law which those instruments are specifically intended to implement, as is expressly referred to in the 10th recital of

Directive 92/100 and in recital 7 of Directive 2006/115 (see, to that effect, judgment of 8 September 2020, *Recorded Artists Actors Performers*, C-265/19, EU:C:2020:677, paragraph 51 and the case-law cited).

35 As the Advocate General observed in point 36 of his Opinion, it is apparent from the Explanatory Memorandum to the Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright (COM(90) 586 final), which preceded the adoption of Directive 92/100, that, for the purposes of that directive, it was necessary to refer to the concepts appearing, inter alia, in the Rome Convention, since the terms used in that directive were fundamental in the area of copyright and related rights and their meaning had already been harmonised to a considerable extent indirectly by treaty law.

36 Admittedly, the provisions of that convention do not form part of the EU legal order, since the European Union is not a party to that convention. However, the Court has already pointed out that the Rome Convention has indirect effects within the European Union (see, to that effect, judgment of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraphs 42 and 50).

37 According to the wording of Article 3(b) of the Rome Convention, the concept of ‘phonogram’ is defined as any ‘exclusively aural’ fixation of sounds of a performance or of other sounds. It follows that the fixation of images and sounds cannot come within that concept, since such a fixation cannot be described as ‘exclusively aural’.

38 It should, moreover, be borne in mind that the concept of ‘phonogram’ in Article 8(2) of Directive 2006/115, which replaced without amendment Article 8(2) of Directive 92/100, must be interpreted in accordance with the equivalent concept contained in the WPPT (see, to that effect, judgments of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 58, and of 8 September 2020, *Recorded Artists Actors Performers*, C-265/19, EU:C:2020:677, paragraph 62), as the provisions of that treaty form an integral part of the EU legal order and are, therefore, applicable in the European Union (see, to that effect, judgment of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraphs 38 and 39).

39 Under Article 2(b) of the WPPT, ‘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’.

40 In that regard, it follows from the ‘Guide to the Copyright and Related Rights Treaties Administered by WIPO’, an interpretative document drawn up by WIPO which, without being legally binding, nevertheless assists in interpreting the WPPT (see, by analogy, as regards the Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), in the version resulting from the amendment of 28 September 1979, judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 201 and the case-law cited), that the WPPT has updated the definition of ‘phonogram’ in Article 3(b) of the Rome Convention, with ‘the effect ... that, in a case where an audiovisual fixation does not qualify as a work, a fixation of the sounds of a performance or of other sounds, or of a representation of sounds, incorporated in such an audiovisual fixation, is to be regarded as a “phonogram”’, as the Advocate General also noted, in essence, in point 50 of his Opinion.

41 It must, therefore, be held that both the wording of Article 2(b) of the WPPT and the document referred to in the previous paragraph preclude a fixation of sounds incorporated in a cinematographic or other audiovisual work from being covered by the concept of ‘phonogram’ within the meaning of that provision.

42 Admittedly, as AGEDI, AIE and the Spanish Government have pointed out, the agreed statement on Article 2(b) of the WPPT adopted by the Diplomatic Conference of certain copyright and neighbouring rights questions of 20 December 1996 – which constitutes, in accordance with Article 31(2)(a) of the Vienna Convention on the Law of Treaties, an essential element for the interpretation of the aforementioned provision – states that ‘the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work’.

- 43 However, that agreed statement cannot call into question the foregoing considerations.
- 44 It may be inferred from that agreed statement that a phonogram incorporated in a cinematographic or other audiovisual work loses its status as a ‘phonogram’ in so far as it forms part of such a work, without that fact having any effect on the rights in that phonogram were it to be used independently from the work at issue.
- 45 That interpretation is, moreover, supported by the document referred to in paragraph 40 above, from which it is apparent that that agreed statement is intended to specify that ‘phonograms may only be used in [a cinematographic or other audiovisual work] on the basis of appropriate contractual arrangements, duly taking into account the rights of producers of phonograms provided for in [the WPPT]. If they are used again independently from the audiovisual work, they are to be regarded as phonograms’.
- 46 In the present case, first, it has already been noted in paragraph 25 above that the phonograms at issue in the main proceedings were incorporated into audiovisual works with the authorisation of the rightholders concerned and in return for remuneration paid to them in accordance with the applicable contractual arrangements. Secondly, it has not been argued that those phonograms are reused independently from the audiovisual work in which they were incorporated.
- 47 In those circumstances, it must be held that an audiovisual recording containing the fixation of an audiovisual work cannot be classified as a ‘phonogram’ within the meaning of Article 8(2) of Directive 92/100 or Article 8(2) of Directive 2006/115.
- 48 In the second place, as regards the concept of ‘reproduction [of a] phonogram’, within the meaning of those provisions, which is not defined by those directives – which furthermore do not contain any express reference to the law of the Member States in order to define the scope of that concept – it must be noted that Article 3(e) of the Rome Convention, which must be taken into account for the reasons set out in paragraphs 34 to 36 above, defines ‘reproduction’ as ‘the making of a copy or copies of a fixation’.
- 49 However, it must be stated that that definition refers to the act of making a reproduction of the fixation in question, as the Advocate General observed, in essence, in point 71 of his Opinion.
- 50 Such an act, which is the subject of the right preventive in nature referred to in Article 2 of Directive 2001/29, is not covered by the provisions of Article 8(2) of Directive 92/100 and Article 8(2) of Directive 2006/115, which do not provide for such a preventive right, but a right compensatory in nature; the triggering element of that latter right is, as noted in paragraph 30 above, the communication to the public of the performance of a work fixed on a phonogram or on a reproduction of that phonogram, such a reproduction having to be understood, in the context of those provisions, as a copy of the phonogram resulting from such an act of reproduction.
- 51 Since, for the reasons set out in paragraphs 34 to 41 above, an audiovisual recording containing the fixation of an audiovisual work cannot be classified as a ‘phonogram’ within the meaning of Article 8(2) of Directive 92/100 or Article 8(2) of Directive 2006/115, such a recording cannot, on the same grounds, constitute a copy of that phonogram or, therefore, be covered by the concept of ‘reproduction’ of that phonogram, within the meaning of those provisions.
- 52 In those circumstances, it must be held that an audiovisual recording containing the fixation of an audiovisual work cannot be classified as a ‘phonogram’ or ‘reproduction of that phonogram’ within the meaning of Article 8(2) of Directive 92/100 or Article 8(2) of Directive 2006/115.
- 53 It follows that the communication to the public of such a recording does not give rise to the right to remuneration provided for in those provisions.
- 54 It should be added that such an interpretation does not disregard the objectives of Directive 92/100 or Directive 2006/115, set out respectively in the seventh recital of Directive 92/100 and in recital 5 of

Directive 2006/115; those objectives seek to ensure the continuity of the creative and artistic work of authors and performers by providing for harmonised legal protection which guarantees the possibility of receiving appropriate income and recouping investments, and thus of enabling a proper balance to be achieved between the interests of performers and phonogram producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast that phonogram or communicate it to the public on terms that are reasonable (see, to that effect, judgment of 6 February 2003, *SENA*, C-245/00, EU:C:2003:68, paragraph 36).

55 In circumstances such as those at issue in the main proceedings, those objectives must be achieved by the conclusion, when the phonograms or reproductions of those phonograms are incorporated into the audiovisual works concerned, of appropriate contractual arrangements between the holders of the rights in phonograms and the producers of such works, so that remuneration for the related rights in the phonograms at the time of such incorporation is paid by means of such contractual arrangements.

56 In the light of all the foregoing considerations, the answer to the questions referred is that Article 8(2) of Directive 92/100 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that the single equitable remuneration referred to in those provisions must not be paid by the user where he or she makes a communication to the public of an audiovisual recording containing the fixation of an audiovisual work in which a phonogram or a reproduction of that phonogram has been incorporated.

### **Costs**

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Fifth Chamber) hereby rules:

**Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property 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 single equitable remuneration referred to in those provisions must not be paid by the user where he or she makes a communication to the public of an audiovisual recording containing the fixation of an audiovisual work in which a phonogram or a reproduction of that phonogram has been incorporated.**

[Signatures]

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\* Language of the case: Spanish.