Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

14 November 2019*

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Exclusive rights of performers — Article 2(b) — Reproduction right — Article 3(2)(a) — Making available to the public — Authorisation — Presumption — National scheme exempting a public institution responsible for the conservation and promotion of the national audiovisual heritage from the requirement to obtain the performer's written consent for the exploitation of archives containing fixations of that performer's performances)

In Case C-484/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 11 July 2018, received at the Court on 20 July 2018, in the proceedings

Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam),

PG,

GF

v

Institut national de l'audiovisuel,

interveners:

Syndicat indépendant des artistes-interprètes (SIA-UNSA),

Syndicat français des artistes-interprètes (CGT),

THE COURT (Fifth Chamber),

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

Advocate General: G. Hogan,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 21 March 2019,

* Language of the case: French.

after considering the observations submitted on behalf of:

– the Société de perception and de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam), PG and GF, by C. Waquet and H. Hazan, avocats,

– the Institut national de l'audiovisuel, the Syndicat indépendant des artistes-interprètes (SIA-UNSA) and the Syndicat français des artistes-interprètes (CGT), by C. Caron, avocat,

– the French Government, by D. Colas, B. Fodda, D. Segoin, A.-L. Desjonquères and A. Daniel, 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 May 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(b), Article 3(2)(a), and Article 5 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 request has been made in proceedings between the Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam), PG and GF, on the one hand, and the Institut national de l'audiovisuel ('the INA'), on the other, concerning the alleged infringement by the INA of the performers' rights held by PG and GF.

Legal context

European Union law

3 Recitals 9, 10, 21, 24 and 31 of Directive 2001/29 state:

'(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.

…

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

…

(24) The right to make available to the public subject matter referred to in Article 3(2) should be understood as covering all acts of making available such subject matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

…

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. … In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.'

4 Article 2 of that directive, entitled 'Reproduction right', reads as follows:

'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:

…

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

…'

5 Article 3 of that directive, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides, in paragraph 2(a):

'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;

…'

6 Article 5 of Directive 2001/29 sets out a series of exceptions and limitations to the exclusive rights provided for in Articles 2 to 4 of that directive, which Member States may or must provide for in their national law.

7 Article 10 of that directive, entitled 'Application over time', states:

'1. The provisions of this Directive shall apply in respect of all works and other subject matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.'

French law

8 The first paragraph of Article L. 212-3 of the code de la propriété intellectuelle (Intellectual Property Code) states:

'The fixation of his performance, its reproduction and communication to the public, as well as any separate use of the sound and image of the performance when it has been fixed for both sound and image, shall be subject to the written authorisation of the performer.

This authorisation and the remuneration to which it gives rise shall be governed by the provisions of Articles L. 762-1 and L. 762-2 of the code du travail (Labour Code), subject to the provisions of Article L. 212-6 of this Code.'

9 Article L. 212-4 of the Intellectual Property Code provides:

'The signature of the contract concluded between a performer and a producer for the production of an audiovisual work constitutes authorisation to fix, reproduce and communicate to the public the performer's performance.

This contract shall set separate remuneration for each mode of exploitation of the work.'

10 Under Article 49 of loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Law No 86-1067 of 30 September 1986 on freedom of communication) (JORF, 1 October 1986, p. 11749), as amended by Article 44 of loi n° 2006-961 du 1er août 2006 (Law No 2006-961 of 1 August 2006) (JORF, 3 August 2006, p. 11529) ('Article 49 as amended'):

'The [INA], a publicly owned industrial and commercial State body, is responsible for conserving and promoting the national audiovisual heritage.

I. — The [INA] shall preserve the audiovisual archives of national broadcasting companies and assist with their exploitation. The nature, chargeable rates, financial conditions of the documentary services and the manner in which these archives may be exploited shall be laid down by agreement between the Institute and each of the companies concerned. These agreements shall be approved by order of the ministers responsible for the budget and communication.

II. — The [INA] shall exploit extracts from the audiovisual archives of national broadcasting companies under the conditions laid down in the specifications. As such, it shall have right to exploit these extracts at the end of a period of one year from the date on which they were first broadcast.

The [INA] shall remain the owner of the technical media and materials and holder of the rights to exploit the audiovisual archives of national broadcasting companies and the company referred to in Article 58 which were transferred to it before the publication of loi n° 2000-719 du 1er août 2000 (Law No 2000-719 of 1 August 2000) (amending Law No 86-1067 of 30 September 1986 on freedom of communication (JORF, 2 August 2000, p. 11903)). However, national broadcasting companies and the company referred to in Article 58 shall each retain a priority right to use these archives.

The [INA] shall exercise the exploitation rights to which this paragraph refers having due regard for the personal and economic rights of the holders of copyright or related rights and their successors in title. However, by way of derogation from Articles L. 212-3 and L. 212-4 of the Intellectual Property Code, the terms on which the works of performers in the archives to which this article refers are

exploited and the remuneration for that exploitation shall be governed by agreements concluded between the performers themselves or the employee organisations representing performers and the Institute. Those agreements must specify in particular the scale of remuneration and the arrangements for payment of that remuneration.'

The dispute in the main proceedings and the question referred for a preliminary ruling

11 The INA is a publicly owned industrial and commercial body of the French State which is responsible for conserving and promoting the national audiovisual heritage. In that capacity, it keeps, inter alia, the audiovisual archives of audiovisual producers, namely national broadcasting companies, and helps with the exploitation of those archives.

12 PG and GF are the successors in title of ZV, a musician who died in 1985.

13 During 2009, PG and GF became aware that INA was marketing, in its online shop, without their authorisation, video recordings and phonograms reproducing ZV's performances during the years 1959 to 1978. It is apparent from the file before the Court that those video recordings and phonograms had been produced and then broadcast by national broadcasting companies.

14 On 28 December 2009, PG and GF, on the basis of Article L. 212-3 of the Intellectual Property Code, brought an action against the INA in order to obtain compensation for the alleged infringement of the performer's rights which they hold.

15 By judgment of 24 January 2013, the tribunal de grande instance de Paris (Regional Court, Paris, France) upheld that action. That court considered, in particular, that the application of Article 49 as amended did not exempt the INA from the requirement to obtain the performer's prior authorisation for the use of the fixation of his performances. Thus, the sole purpose of the collective agreements provided for in the latter provision is to determine the remuneration due for new exploitations, provided that an initial exploitation has been authorised by the performers concerned. In the present case, proof of such authorisation has not been adduced by the INA. By judgment of 11 June 2014, the cour d'appel de Paris (Court of Appeal, Paris, France), before which the INA brought its appeal, essentially upheld the judgment given at first instance.

16 By judgment of 14 October 2015, the Cour de cassation (Court of Cassation, France) set aside in part the judgment of the cour d'appel de Paris (Court of Appeal, Paris). The Court of Cassation found that that Court of Appeal had erred in holding that the application of the derogating rules at issue was subject to proof that the performer had authorised the initial exploitation of his performance, thus adding to the law a condition that it did not impose.

17 By judgment of 10 March 2017, the cour d'appel de Versailles (Court of Appeal, Versailles, France), before which the case was brought back, dismissed PG's and GF's claims. That court considered, in essence, that Article 49 as amended establishes, for the sole benefit of the INA, a simple presumption of the performer's prior consent, which can be challenged, and thus does not call into question the performer's exclusive right. The agreements with the trade union organisations referred to in that article do not confer on them the right to 'authorise and prohibit', which is vested in the performer, but have the sole purpose of fixing the performer's remuneration.

18 PG, GF and Spedidam, which had intervened voluntarily before the cour d'appel de Versailles (Court of Appeal, Versailles), brought an appeal against the latter's judgment before the referring court. The referring court indicates that it has doubts as to the compatibility of the legal rules set out in Article 49 as amended with Articles 2, 3 and 5 of Directive 2001/29.

19 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 2(b), Article 3(2)(a) and Article 5 of Directive [2001/29] be interpreted as not precluding national rules, such as those laid down in Article 49 [as amended] [of the Law on freedom of communication], from establishing, for the benefit of the [INA], the beneficiary of the exploitation rights of national broadcasting companies in the audiovisual archives, derogating provisions under which the terms on which performers' works can be exploited and the remuneration for that exploitation are governed by agreements concluded between the performers themselves or the employee organisations representing performers and that institute, which must specify, inter alia, the scale of remuneration and the arrangements for payment of that remuneration?'

Application over time of Directive 2001/29

20 As noted in paragraph 13 above, the recordings in question were made during the years 1959 to 1978.

21 Under Article 10(1) of Directive 2001/29, the provisions of the directive are to apply in respect of all works and other subject matter referred to in that directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of the directive or the provisions referred to in Article 1(2) of the directive. Article 10(2) of Directive 2001/29 states that the directive is to apply 'without prejudice to any acts concluded and rights acquired before 22 December 2002'.

22 While the INA and the French Government argued at the hearing that Directive 2001/29 does not apply *ratione temporis* to the dispute in the main proceedings, the French Government claimed that it appears that the INA had rights to the recordings in question well before 22 December 2002, but Spedidam, for its part, stated that the INA had no rights acquired before that date.

23 It is for the referring court to determine whether, and to what extent, the parties to the main proceedings may rely on any rights acquired or acts concluded before 22 December 2002, which cannot be affected in any way by the provisions of Directive 2001/29.

Consideration of the question referred

24 As a preliminary remark, it should be noted, with regard to the legal context of this case, that it is apparent from the order for reference that, according to Article L. 212-3 of the Intellectual Property Code, the written authorisation of the performer is required for the fixation of his performance, its reproduction and its communication to the public. Under Article L. 212-4 of that code, the signature of a contract concluded between a performer and a producer for the production of an audiovisual work constitutes authorisation to fix, reproduce and communicate to the public the performer's performance.

25 Law No 2006/961 of 1 August 2006 amended paragraph II of Article 49 of the Law on freedom of communication by providing, inter alia, first, that 'the Institute shall exploit extracts from the audiovisual archives of national broadcasting companies under the conditions laid down in the specifications' and that, 'as such, it shall have the right to exploit those extracts at the end of a period of one year from the date on which they were first broadcast' and, second, that, 'by way of derogation from Articles L. 212-3 and L. 212-4 of the Intellectual Property Code, the terms on which the works of performers in the archives to which this article refers are exploited and the remuneration for that exploitation shall be governed by agreements concluded between the performers themselves or the

employee organisations representing performers and the Institute', and that 'those agreements must specify in particular the scale of remuneration and the arrangements for payment of that remuneration'.

26 It is apparent from the file before the Court that PG, GF and Spedidam consider that Article 49 as amended provides for exceptional arrangements, not in conformity with Article 5 of Directive 2001/29, in respect of the exclusive rights of performers referred to in Article 2(b) and Article 3(2)(a) of that directive, since it allows the INA to offer on its website the downloading in return for payment of performances by such performers, without having to prove their authorisation for such use.

27 On the other hand, the INA considers that that article constitutes neither an exception to, nor a limitation on performers' exclusive rights, since it merely sets the evidentiary rules governing those rights, by establishing a rebuttable presumption that performers' exploitation rights have been transferred to the INA, such a presumption avoiding the need for it to prove that it has the written authorisation or employment contract referred to in Articles L. 212-3 and L. 212-4 of the Intellectual Property Code. The INA adds that, on the basis of Article 49 as amended, it has concluded collective agreements with the employee organisations representing performers, which determine the conditions for the exploitation of their performances and their remuneration.

28 In the light of those considerations, it should be noted that, according to the Court's settled case-law, in the procedure laid down by Article 267 TFEU, the functions of the Court of Justice and those of the referring court are clearly distinct, and it falls exclusively to the latter to interpret national legislation (judgment of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 58 and the case-law cited).

29 Thus, it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of national provisions. 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 (see, to that effect, judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 22 and the case-law cited).

30 It is also appropriate to recall the Court's settled case-law according to which, when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with EU law is inherent in the system of the Treaty on the Functioning of the European Union, since it enables national courts, for matters within their jurisdiction, to ensure that EU law is fully effective when they determine the disputes before them (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited).

31 In the order for reference, the national court states that the INA, which, as noted in paragraph 11 above, is responsible for conserving and promoting the national audiovisual heritage, was unable to exploit part of its assets because it did not hold, in the production files of the audiovisual programmes in question, the employment contracts concluded with the performers concerned. As the INA did not have the written authorisation referred to in Article L. 212-3 of the Intellectual Property Code of the performers or their successors in title, whom it could have proved difficult, or even impossible, to identify and locate, or the employment contract concluded by them with the producers of such programmes, the INA was prevented from invoking the presumption of authorisation provided for in Article L. 212-4 of the Intellectual Property Code.

32 The referring court adds that it was thus in order to enable the INA to fulfil its public service mission that Law No 2006/961 of 1 August 2006 amended paragraph II of Article 49 of the Law on freedom of communication in the manner referred to in paragraph 24 above. That court also states that the

national legislation at issue in the main proceedings does not fall within the scope of any of the exceptions and limitations which the Member States are entitled to lay down on the basis of Article 5 of Directive 2001/29.

33 Moreover, as noted in paragraphs 15 to 17 above, while the tribunal de grande instance de Paris (Regional Court, Paris) and the cour d'appel de Paris (Court of Appeal, Paris) held that Article 49 as amended did not exempt the INA from the requirement to obtain the performer's prior authorisation to use the fixation of his performances, the Court of Cassation, on appeal, concluded, in essence, that the application of the 'derogating' rules at issue in the main proceedings was not subject to proof that the performer had authorised the initial exploitation of his performance. Consequently, the cour d'appel de Versailles (Court of Appeal, Versailles), whose judgment is the subject of an appeal in cassation before the referring court, interpreted Article 49 as amended as establishing for the benefit of the INA a simple presumption that the performer had given his prior consent to the commercial exploitation of the fixation of his performances contained in its archives.

34 In those circumstances, by its question, the referring court must be regarded as asking, in essence, whether Article 2(b) and Article 3(2)(a) of Directive 2001/29 must be interpreted as precluding national legislation which establishes, as regards the exploitation of audiovisual archives by a body set up for that purpose, a rebuttable presumption that the performer has authorised the fixation and exploitation of his performances, where that performer is involved in the recording of an audiovisual work so that it may be broadcast.

35 Under Article 2(b) and Article 3(2)(a) of Directive 2001/29, Member States are to provide for the exclusive right for performers to authorise or prohibit the reproduction and making available to the public of fixations of their performances.

36 At the outset, it should be noted that the protection which those provisions confer on performers must be given a broad scope (see, by analogy, judgment of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 30, and the case-law cited). As stated in recitals 21 and 24 of Directive 2001/29, it is appropriate, on the one hand, to give a broad definition to acts covered by the right of reproduction in order to ensure legal certainty within the internal market. On the other hand, the right to make protected subject matter available to the public, referred to in Article 3(2)(a) of that directive, must be understood as covering all acts of making such matter available to the public not present at the place where the act of making available originated.

37 Consequently, that protection must be understood, in particular, in the same way as the protection conferred by copyright, as not being limited to the enjoyment of the rights guaranteed by Article 2(b) and Article 3(2)(a) of Directive 2001/29, but also extends to the exercise of those rights (see, to that effect, judgment of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 31).

38 It is also important to note that the rights guaranteed to performers by Article 2(b) and Article 3(2)(a) of Directive 2001/29 are of a preventive nature, in that any act of reproduction or making available to the public of the fixations of their performances requires their prior consent. It follows that, subject to the exceptions and limitations laid down exhaustively in Article 5 of the directive, any use of such protected subject matter by a third party without such prior consent must be regarded as infringing the holder's rights (see, to that effect, judgments of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraphs 33 and 34, and of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 29 and the case-law cited).

39 That interpretation is in line with the objective of providing a high level of protection for performers' rights referred to in recital 9 of Directive 2001/29, as well as the need, mentioned, in essence, in recital 10 of that directive, for performers to obtain appropriate remuneration for the use of fixations of their performances in order to enable them to continue their creative and artistic work.

40 However, as the Court, in its judgment of 16 November 2016, *Soulier and Doke* (C-301/15, EU:C:2016:878, paragraph 35), has previously pointed out with regard to authors' exclusive rights, Articles 2(b) and Article 3(2)(a) of Directive 2001/29 do not specify how the performer's prior consent is to be given, so that those provisions cannot be interpreted as requiring such consent to necessarily be expressed in writing or explicitly. On the contrary, it must be concluded that those provisions also allow the consent to be expressed implicitly, provided, as the Court pointed out in paragraph 37 of that judgment, that the conditions under which implicit consent may be accepted are strictly defined, in order not to deprive the very principle of prior consent of any effect.

41 In the present case, as noted in paragraphs 31 to 33 above, Article 49 as amended establishes, in the case of a performer who is involved in an audiovisual work, a rebuttable presumption that that performer has authorised the fixation and exploitation of his performance, which makes it possible to get round the requirement, provided for in Article L. 212-3 of the Intellectual Property Code, to have that performer's written authorisation for such uses.

42 In that regard, first of all, it should be noted that a performer who is himself involved in the making of an audiovisual work so that it may be broadcast by national broadcasting companies, and who is thus present at the place where such a work is recorded for those purposes, first, is aware of the envisaged use of his performance (see, by analogy, judgment of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 43) and, second, gives his performance for the purposes of such use, with the result that it is possible to take the view, in the absence of evidence to the contrary, that he has, as a result of that involvement, authorised the fixation of that performance and its exploitation.

43 Next, in so far as it is apparent that the rules at issue in the main proceedings allow the performer or his successors in title to demonstrate that the performer has not consented to subsequent exploitations of his performances, the presumption referred to in paragraph 34 above is rebuttable. Thus, as those rules merely derogate from the requirement, laid down in Article L. 212-3 of the Intellectual Property Code but not provided for by EU law, for the performer's written authorisation, those rules concern only the procedures for proving that such authorisation has been granted.

44 Finally, such a presumption enables a fair balance of rights and interests between the different categories of rightholders referred to in recital 31 of Directive 2001/29 to be maintained. In particular, as stated in essence in recital 10 of that directive, to be able to continue their creative and artistic work, performers have to receive an appropriate reward for the use of the fixations of their work, as must producers in order to be able to finance that work. In the present case, because the INA does not hold in its archives the written authorisations of the performers or their successors in title, or the employment contracts concluded by them with the producers of the audiovisual programmes in question, it would be impossible for that institute to exploit part of its collection, which would be detrimental to the interests of other rightholders, such as the rights of the directors of the audiovisual works in question, of the producers of those works, namely the national broadcasting companies, the legal predecessors of the INA, or of other performers who may have performed in connection with the production of the same works.

45 Such a presumption cannot, in any event, affect a performer's right to obtain appropriate remuneration for the use of fixations of their performances.

46 In the light of all of the foregoing considerations, the answer to the question referred is that Article 2(b) and Article 3(2)(a) of Directive 2001/29 must be interpreted as not precluding national legislation which establishes, as regards the exploitation of audiovisual archives by a body set up for that purpose, a rebuttable presumption that the performer has authorised the fixation and exploitation of his performances, where that performer is involved in the recording of an audiovisual work so that it may be broadcast.

Costs

47 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 2(b) and Article 3(2)(a) 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 not precluding national legislation which establishes, as regards the exploitation of audiovisual archives by a body set up for that purpose, a rebuttable presumption that the performer has authorised the fixation and exploitation of his performances, where that performer is involved in the recording of an audiovisual work so that it may be broadcast.

[Signatures]