JUDGMENT OF THE COURT (Third Chamber)

1 June 2006 *

In Case C-169/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (Belgium), made by decision of 4 April 2005, received at the Court on 15 April 2005, in the proceedings

Uradex SCRL

v

Union Professionnelle de la Radio et de la Télédistribution (RTD),

Société Intercommunale pour la Diffusion de la Télévision (BRUTELE),

* Language of the case: French.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský (Rapporteur), J.-P. Puissochet, S. von Bahr and U. Lõhmus, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 January 2006,

after considering the observations submitted on behalf of:

— Uradex SCRL, by A. Strowel, avocat, and G. Berrisch, Rechtsanwalt,

— Union Professionnelle de la Radio et de la Télédistribution (RTD) and Société Intercommunale pour la Diffusion de la Télévision (BRUTELE), by E. Cornu and F. de Visscher, avocats,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by D. Del Gaizo, avvocato dello Stato,

— the Swedish Government, by K. Wistrand, acting as Agent,

— the Commission of the European Communities, by W. Wils, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 14 February 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9(2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15) ('the Directive').

2 The reference was made in the course of proceedings between Uradex SCRL ('Uradex') and Union Professionnelle de la Radio et de la Télédistribution ('RTD') and Société Intercommunale pour la Diffusion de la Télévision ('BRUTELE'), in which Uradex seeks an order that the members of RTD, and BRUTELE in particular, be ordered to cease retransmission by cable of performances included in its catalogue.

Legal context

Community law

3 The 27th recital in the preamble to the Directive states:

'... the cable retransmission of programmes from other Member States is an act subject to copyright and, as the case may be, rights related to copyright; ... the cable operator must, therefore, obtain the authorisation from every holder of rights in each part of the programme retransmitted; ... pursuant to this Directive, the authorisations should be granted contractually ...'.

4 The 28th recital in the preamble to the Directive states:

'... in order to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorisation right to the extent that this is required by the special features of cable retransmission; ... the authorisation right as such remains intact and only the exercise of this right is regulated to some extent, so that the right to authorise a cable retransmission can still be assigned ...'.

5 Article 8(1) of the Directive provides:

'Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.'

6 Article 9 of the Directive, headed 'Exercise of the cable retransmission right', states as follows:

'1. Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society.

2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society ...

...'

National law

7 Within the meaning of the first paragraph of Article 36 of the Law of 30 June 1994 on copyright and related rights (*Moniteur belge*, 27 July 1994, p. 19297) ('the Law'):

'Unless otherwise agreed, performers assign to producers the exclusive right of audiovisual exploitation of their performances ...'.

8 Forming part of the section headed 'Cable retransmission', Article 51 of the Law provides:

'[I]n accordance with the preceding chapters and using the procedures defined below, the author and holders of related rights shall have the exclusive right to authorise the cable retransmission of their works or their performances.'

9 In the same section, Article 53(1) and (2) of the Law transposed into Belgian law, in analogous terms, Article 9(1) and (2) of the Directive respectively.

The dispute in the main proceedings

10 Uradex, a collecting society for the related rights of performers, brought an action before the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) seeking a ruling that, by retransmitting by cable the performances of artists within its catalogue without their permission and therefore in breach of Articles 51 and 53 of the Law, the member cable operator companies of RTD, and in particular BRUTELE, infringe the related rights managed by Uradex. It further sought a ruling that each of the companies in question be ordered to cease retransmission by cable of the performances.

11 Following the dismissal of its claims, Uradex lodged an appeal before the Cour d'appel de Bruxelles (Court of Appeal, Brussels).

12 With regard to performances both audiovisual and non-audiovisual, the Cour d'appel first took the view that although the collecting societies managing the related rights have the exclusive right to authorise or prohibit their retransmission by cable ('the retransmission right'), that right is, nevertheless, limited to the rights whose management has been transferred to the societies.

13 According to the Cour d'appel, Article 53(2) of the Law, which transposes Article 9(2) of the Directive, does not provide that the collecting society exercises the right of artists who have not mandated it to manage their rights to authorise or prohibit cable retransmission, as is the case, given Article 53(1) of the Law, for artists who have done so.

14 Article 53(2) of the Law provides only that the society is 'deemed to be mandated to manage their rights' which, in view of the essentially fiduciary nature of such management, essentially consists, in reality, in collecting the remuneration to which such performances give rise and in passing it on to the holder of the rights pertaining to those performances.

15 In addition, the Cour d'appel took the view that, with regard to audiovisual performances, Uradex cannot, having regard to Article 36 of the Law, exercise the cable retransmission right even in respect of the artists who transferred the management of their rights to that society. That provision establishes a legal presumption that the artist has assigned his retransmission right to the producer. A collecting society works on behalf of the artists and performers whom it represents and cannot manage more rights than are held by those artists and performers. Authorisation from Uradex is thus required only if, in accordance with Article 36 of the Law, it rebuts that presumption by showing the existence of agreements between the artists concerned and the producers excluding any assignment of the retransmission right or, failing that, if it represents producers of audiovisual work. That is not the case here.

16 It follows from the foregoing that the Cour d'appel granted the appeal only in part. On the one hand, it held, in particular, that BRUTELE, by transmitting non-audiovisual performances, is in breach of the related rights of the artists and performers who transferred the management of those rights to Uradex and, consequently, the Cour d'appel ordered it to cease those retransmissions unless it had authorisation from Uradex. On the other hand, it dismissed the remainder of the appeal.

17 Uradex brought a further appeal before the Cour de cassation (Court of Cassation) claiming, with regard first to the related rights whose holders have not transferred their management to it, that it follows from Article 53 of the Law and from Article 9 of the Directive that a collecting society is not only deemed to be mandated in respect of management limited to the collection of remuneration, but that those

articles also give it the right of retransmission. In addition, according to Uradex, that society exercises such a right even with regard to audiovisual performances, since those articles make no distinction according to whether or not the retransmission right has been assigned to a third party.

18 In those circumstances, the Cour de cassation decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 9(2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission be interpreted as meaning that, where a collecting society is deemed to be mandated to manage the rights of a copyright owner or holder of related rights who has not transferred the management of his rights to a collecting society, that society does not have the power to exercise that rightholder's right to grant or refuse authorisation to a cable operator for cable retransmission, since it is mandated only to manage the pecuniary aspects of that rightholder's rights?'

The question referred for a preliminary ruling

19 It follows from Article 8(1) of the Directive and from the 27th recital in the preamble thereto that the cable operator may retransmit the programmes in question only if it obtains contractual authorisation from all the rightholders, in other words both from those who transferred the management of their rights to a collecting society and from those who did not. It is in exchange for that authorisation that, in principle, the rightholders receive remuneration.

20 However, in the interests of legal certainty, in order that the cable operators may be sure that they have actually acquired all the rights linked to the retransmitted

programmes and in order that external persons holding rights over certain elements of those programmes cannot, by asserting their rights, challenge the smooth operation of the contractual arrangements authorising the retransmission of those programmes, the Directive provides, in Article 9(1), that those rightholders may exercise the retransmission right only through a collecting society. In that way, the Directive restricts the number of parties with which the cable operators have to negotiate in order to obtain authorisation for retransmission, particularly for remuneration, whilst observing the copyright and related rights of all rightholders.

21 It is in that context that Article 9(2) of the Directive provides that where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category is to be deemed to be mandated to manage his rights. Thus, that provision merely gives concrete expression to the rule stated in Article 9(1) with regard to the particular situation of such a rightholder.

22 Furthermore, where it provides that the collecting society which is deemed to be mandated to manage 'his rights', Article 9(2) of the Directive does not contain any limitation with regard to the scope of that management of the rightholder's rights. Thus, it does not follow from its wording that that management should relate only to the financial aspects of the rights in question and exclude the retransmission right.

23 Moreover, the heading of Article 9 of the Directive, 'Exercise of the cable retransmission right', means that all the provisions of that article relate to precisely such a right.

24 However, it should be added, in the context of the dispute in the main proceedings, that, as stated in the 28th recital in the preamble to the Directive, the Directive does not preclude assignment of the retransmission right. That assignment may be made both on the basis of a contract and by virtue of a legal presumption. Thus, the Directive does not prevent an author, artist, performer or producer from losing, pursuant to a national provision such as Article 36(1) of the Law, his status of 'rightholder' of that right within the meaning of Article 9(2) of the Directive, with the consequential severance of all legal links existing under that provision between him and the collecting society.

25 Having regard to the foregoing, the answer to the question referred must be that Article 9(2) of the Directive is to be interpreted as meaning that, where a collecting society is deemed to be mandated to manage the rights of a copyright owner or holder of related rights who has not transferred the management of his rights to a collecting society, that society has the power to exercise that rightholder's right to grant or refuse authorisation to a cable operator for cable retransmission and, consequently, its mandate is not limited to management of the pecuniary aspects of those rights.

Costs

26 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 (Third Chamber) hereby rules:

Article 9(2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission is to be interpreted as meaning that, where a collecting society is deemed to be mandated to manage the rights of a copyright owner or holder of related rights who has not transferred the management of his rights to a collecting society, that society has the power to exercise that rightholder's right to grant or refuse authorisation to a cable operator for cable retransmission and, consequently, its mandate is not limited to management of the pecuniary aspects of those rights.

[Signatures]