JUDGMENT OF THE COURT (Third Chamber)

14 July 2005 *

In Case C-192/04,

REFERENCE for a preliminary ruling under Article 234 EC, from the Cour de cassation (France), made by decision of 17 February 2004, received at the Court on 26 April 2004, in the proceedings

Lagardère Active Broadcast, the successor in title to Europe 1 communication SA,

v

Société pour la perception de la rémunération équitable (SPRE),

Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL),

and, as third party,

Compagnie européenne de radiodiffusion et de télévision Europe 1 SA (CERT),

* Language of the case: French.

THE COURT (Third Chamber),

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

Advocate General: A. Tizzano,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 2 March 2005,

after considering the observations submitted on behalf of:

— Lagardère Active Broadcast and Compagnie européenne de radiodiffusion et de télévision Europe 1 SA (CERT), by D. Le Prado, F. Manin and P.M. Bouvery, avocats,

— Société pour la perception de la rémunération équitable (SPRE), by O. Davidson, avocat,

— Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), by H. Weil and K. Mailänder, Rechtsanwälte,

— the French Government, by G. de Bergues and A. Bodard-Hermant, acting as Agents,

— the German Government, by A. Tiemann and H. Klos, acting as Agents,

— the Commission of the European Communities, by K. Banks, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 21 April 2005,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation 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 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).

2 The reference was made in proceedings between Lagardère Active Broadcast, the successor in title to Europe 1 communication SA (hereinafter 'Lagardère' or 'Europe 1'), and Société pour la perception de la rémunération équitable (hereinafter 'SPRE') and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (hereinafter 'GVL') concerning the obligation to pay equitable remuneration for the broadcasting of phonograms to the public by satellite and terrestrial repeater stations in France and Germany.

Law

The Community legislation

3 Directive 92/100 provides, in Article 8(1) and (2):

'1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

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. ...'

4 According to the sixth recital in the preamble to Directive 93/83:

'... a distinction is currently drawn for copyright purposes between communication to the public by direct satellite and communication to the public by communications satellite; ... since individual reception is possible and affordable nowadays with both types of satellite, there is no longer any justification for this differing legal treatment'.

5 According to the seventh recital in the preamble to that directive:

'... the free broadcasting of programmes is further impeded by the current legal uncertainty over whether broadcasting by a satellite whose signals can be received directly affects the rights in the country of transmission only or in all countries of reception together ...'.

6 The 13th recital to the same directive is worded as follows:

'... therefore, an end should be put to the differences of treatment of the transmission of programmes by communications satellite which exist in the Member States, so that the vital distinction throughout the Community becomes whether works and other protected subject-matter are communicated to the public. ...'.

7 The 17th recital to Directive 93/83 states:

'... in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version'.

8 Article 1(1) of Directive 93/83 provides:

'For the purpose of this Directive, "satellite" means any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication. In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the first case.'

9 Article 1(2)(a) and (b) of that directive provide:

'(a) For the purpose of this Directive, "communication to the public by satellite" means the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.'

10 Article 4(1) and(2) of Directive 93/83 provide:

'1. For the purposes of communication to the public by satellite, the rights of performers, phonogram producers and broadcasting organisations shall be protected in accordance with the provisions of Articles 6, 7, 8 and 10 of Directive 92/100/EEC.

2. For the purposes of paragraph 1, "broadcasting by wireless means" in Directive 92/100/EEC shall be understood as including communication to the public by satellite.'

The national legislation

11 According to Article L. 214-1 of the French Code de la propriété intellectuelle (Intellectual Property Code):

'Where a phonogram has been published for commercial purposes, the performer and the producer shall not be entitled to prevent:

...

2. broadcast thereof or simultaneous and integral distribution of that broadcast by cable.

The said uses of phonograms published for commercial purposes, whatever the place of fixation thereof, shall entitle the performers and producers to receive remuneration. That remuneration shall be paid by the persons who use the phonograms published for commercial purposes under the conditions mentioned in paragraphs 1 and 2 of this article.

The remuneration shall be based on the income from exploitation, failing which it shall be assessed on a flat-rate basis ...

...'

The main proceedings and the questions referred to the Court of Justice

12 Lagardère is a broadcasting company established in France. Its programmes are created in its Paris studios and are then transmitted to a satellite. The signals return to earth where they are received by repeater stations in French territory, which broadcast the programmes to the public on the frequency modulated (FM) band.

13 Since FM broadcasts do not cover the entire French territory, the satellite also sends signals to a transmitter at Felsberg, in Saarland (Germany), which is technically equipped to broadcast to France on long wave. That broadcasting is carried out by

Compagnie européenne de radiodiffusion et de télévision Europe 1 (hereinafter 'CERT'), a subsidiary of Lagardère. The programmes broadcast in the French language can, for technical reasons, also be received in German territory, but only in a limited area. They are not the subject of commercial exploitation in Germany.

14 Lagardère also has a digital audio terrestrial circuit which enables signals from the Paris studios to be sent to the transmitter in Germany in the event of malfunction of the satellite. Before the satellite system was adopted, that terrestrial circuit was the only means of sending signals to that transmitter. However, that circuit is still operational at the present time.

15 Since Lagardère uses for its broadcasts phonograms protected by intellectual property law, in France it pays for the use thereof a royalty accruing to the performers and producers of the phonograms (hereinafter 'the royalty for phonogram use'). That royalty is levied on a collective basis by SPRE. For its part, CERT paid an annual flat-rate royalty in Germany for broadcasting the same phonograms to GVL, a company incorporated under German law which is the counterpart of SPRE.

16 In order to avoid double payment of the royalty for phonogram use, an agreement concluded between Europe 1 and SPRE, which was renewed until 31 December 1993, provided that the amount of the royalty payable by Europe 1 to performers and producers would be decreased by the amount paid by CERT to GVL.

17 Although with effect from 1 January 1994 there was no longer any agreement authorising Europe 1 to make that deduction, it continued nevertheless to do so. Considering that the deduction was unjustified, SPRE commenced proceedings against Europe 1 before the Tribunal de grande instance (Regional Court) de Paris which upheld its claim that the latter should pay the entire royalty. Lagardère, the successor in title to Europe 1, appealed to the Cour de cassation (Court of Cassation).

18 Considering that the proceedings raised questions of the interpretation of Directives 92/100 and 93/83, particularly in the light of a decision of the German Bundesgerichtshof (Germany) of 7 November 2002, the Cour de cassation stayed its proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. Where a broadcasting company transmitting from the territory of one Member State uses, in order to extend the transmission of its programmes to a part of its national audience, a transmitter situated nearby on the territory of another Member State, of which its majority-held subsidiary is the licence holder, does the legislation of the latter State govern the single equitable remuneration which is required by Article 8(2) of Directive 92/100 ... and Article 4 of Directive 93/83 ... and is payable in respect of the phonograms published for commercial purposes included in the programmes retransmitted?

2. If so, is the original broadcasting company entitled to deduct the sums paid by its subsidiary from the remuneration claimed from it in respect of all the transmissions received within national territory?'

The questions

The first question

19 By its first question, the national court seeks essentially to ascertain whether, in the case of broadcasting of the kind at issue in the main proceedings, Directive 93/83 prevents the remuneration for phonogram use from being governed not only by the law of the Member State in whose territory the broadcasting company is established but also by the legislation of the Member State in which, for technical reasons, the terrestrial transmitter broadcasting to the first State is located.

20 Lagardère, SPRE and the French Government consider that, since Article 1(2)(b) of Directive 93/83 provides that communication to the public by satellite occurs solely in the Member State where the programme-carrying signals are introduced into the chain of communication, that provision clearly identifies a single law applicable to the royalty for phonogram use — French law in the case before the national court — and excludes the application of the legislation of more than one Member State at the same time.

21 GVL, the German Government and the Commission of the European Communities submit that a communication of the kind at issue in the main proceedings is not covered by that provision and that, therefore, that provision does not preclude application of the legislation of two Member States at the same time.

22 It is therefore necessary to consider at the outset whether broadcasting of the kind at issue in this case constitutes a 'communication to the public by satellite' within the meaning of Article 1(2)(a) of Directive 93/83.

23 The latter provision defines communication to the public by satellite as 'the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth'.

24 First, it is clear from Article 1(1) of Directive 93/83 that a satellite of that kind must operate, for the purposes of such communication, on the frequency bands which are, under the telecommunications legislation, reserved for the broadcasting of signals to be received by the public (hereinafter 'the public frequency bands') or for closed, point-to-point communication ('hereinafter 'the non-public frequency bands'). In the latter case, it is nevertheless necessary, pursuant to that provision, for individual reception to take place in circumstances comparable to those that apply in the first case.

25 Since both the French Government, in response to a written question put to it by the Court, and the lawyers for Lagardère, at the hearing, confirmed that the transmission of the signals does not take place on public frequency bands, it is necessary to consider whether, in the case of broadcasting of the kind at issue in this case, individual reception of signals may take place in circumstances comparable to those of communication on public frequency bands.

26 Since the second sentence of Article 1(1) of Directive 93/83 does not expressly define the scope of the obligation which it lays down, it is necessary to define its scope in the light of the purpose of that directive.

27 In that connection, it is clear in the first place from the seventh recital in its preamble that that directive is intended to lessen continuing uncertainty is as to

whether, for broadcasting 'by a satellite whose signals can be received directly', rights must be acquired only in the country of transmission.

28 Moreover, according to the 13th recital thereto, Directive 93/83 is intended to bring to an end differences of treatment of the transmission of programmes by communications satellite — that it is to say those operating on non-public frequency bands — which exist in the Member States, so that the vital distinction will be, throughout the Community, whether works and other protected subject-matter are communicated to the public.

29 It must then be noted, as observed by the Advocate General in point 39 of his Opinion and as is clear from the Proposal for a Council Directive of 11 September 1991 on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission (COM(91) 276 final), that, originally, such communication to the public direct from a satellite was possible only by means of signals broadcast on frequencies reserved by law for reception by the public. On the other hand, such communication by signals broadcast on non-public frequency bands was not envisageable. Nevertheless, as a result of technological development of satellites and of aerials for use by the general public, it has become possible to broadcast direct to the public on non-public frequency bands. Thus, even though the latter are not, under the telecommunications legislation, formally reserved for communication to the public, at the time of adoption of Directive 93/83 programme-carrying signals could already de facto be received by the public direct from satellites using those frequency bands.

30 Thus, the Community legislature sought to cover satellite communications using non-public frequency bands in order to take account of that technological development and, consequently, it made provision for those communications to be subject to the rules of Directive 93/83 only if the public is able to receive the signals individually and directly from those satellites.

31 Finally, it must be observed that a limited circle of persons who can receive the signals from the satellite only if they use professional equipment cannot be regarded as part of the public, given that the latter must be made up of an indeterminate number of potential listeners (see, regarding the meaning of the term public, Case C-89/04 *Mediakabel* [2005] ECR I-4891, paragraph 30).

32 In the present case, the parties to the main proceedings agree that the signals emanating from the satellite in question are coded and can be received only by equipment available solely to professionals. Conversely, those signals cannot be received using the equipment available to the general public.

33 In such circumstances, individual reception does not take place in circumstances comparable to those that apply to communications on public frequency bands. Consequently, that satellite does not operate, as far as the broadcasting at issue in the main proceedings is concerned, as a satellite within the meaning of Article 1(1) of Directive 93/83.

34 Second, the foregoing considerations, in particular those set out in paragraph 32 of this judgment, also mean that broadcasting of the kind at issue in this case does not satisfy another test laid down in Article 1(2)(a) of that directive, namely the requirement that the programme-carrying signals are intended for reception by the public.

35 A comparison of the wording of the various language versions of that provision, in particular the English version ('programme-carrying signals intended for reception by the public'), the German version ('die programmtragenden Signale, die für den öffentlichen Empfang bestimmt sind'), the Spanish version ('las señales portadoras

de programa, destinadas a la recepción por el público') or the Dutch version ('programmadragende signalen voor ontvangst door het publiek'), shows that it is the signals which must be intended for the public and not the programmes that they carry.

36 That interpretation is, moreover, borne out by the purpose of Directive 93/83, as described in paragraphs 29 and 30 of this judgment.

37 In circumstances like those of the main proceedings, it is the programmes, not the signals transmitted to the satellite and back to earth, that are intended for the public.

38 It must be borne in mind that those signals are coded and can be received only by equipment available only to professionals, such as that used in particular at the Felsberg terrestrial transmitter. Moreover, Lagardère, which is the broadcasting company and has total control of the communication in question, itself recognises that, at the present time, the public is not able to receive those signals. Its intention is not therefore to ensure that the signals that are transmitted to the satellite and back to earth reach the public. Indeed, the public is, for the purposes of such communication, the intended recipient of signals of a different nature, namely those broadcast on long wave, which do not go via a satellite. Lagardère thus sends the signals to the satellite for the sole purpose of sending them on to the abovementioned terrestrial transmitter which re-broadcasts the programmes in real time by non-satellite means. Therefore, the transmitter is the sole target of the signals that make up the satellite communication at issue in this case.

39 Third, Article 1(2)(a) of Directive 93/83 requires that the programme-carrying signals are broadcast to the public by 'an uninterrupted chain of communication

leading to the satellite and down towards the earth'. Thus, that directive is concerned with a closed communications system, of which the satellite forms the central, essential and irreplaceable element, so that, in the event of malfunction of the satellite, the transmission of signals is technically impossible and, as a result, the public receives no broadcast.

40 On the other hand, Directive 93/83 is not in principle concerned with a communication system or sub-system whose basic unit is a terrestrial transmitter and which has operated since being set up by means of a terrestrial digital audio circuit. Although such a system or subsystem may, at any given time, be supplemented by a communication satellite, the satellite does not thereby become the essential, central and irreplaceable element of the system.

41 Fourth, in the event of malfunction of the satellite, at the precise time when the broadcasting company transmitted signals to the terrestrial station via the terrestrial digital audio circuit, there would be no satellite transmission and the application of Directive 93/83 would therefore be excluded by definition. However, if the view advanced by Lagardère and the French Government were accepted, that communication would necessarily be subject to the rules laid down by Directive 93/83 as soon as the satellite became operational again. Thus, the applicability of the directive would be dependent on unforeseeable circumstances linked with the vagaries of satellite operations, with the result that the system of copyright and rights related to them would be fraught with legal uncertainty.

42 Such a situation would not be compatible with the purpose of that directive, which is to provide both broadcasting organisations and the holders of rights with legal certainty regarding the legislation applicable to a chain of communication.

43 It follows from all the foregoing that a broadcast of the kind at issue in this case does not constitute a communication by satellite to the public within the meaning of Article 1(2)(a) of Directive 93/83. Consequently, it does not fall within the scope of Article 1(2)(b).

44 Therefore, the answer to the first question must be that, in the case of a broadcast of the kind at issue in this case, Directive 93/83 does not preclude the fee for phonogram use being governed not only by the law of the Member State in whose territory the broadcasting company is established but also by the legislation of the Member State in which, for technical reasons, the terrestrial transmitter broadcasting to the first State is located.

The second question

45 By its second question, the national court seeks essentially to ascertain whether Article 8(2) of Directive and 92/100 must be interpreted as meaning that, for determination of the equitable remuneration mentioned in that provision, the broadcasting company is entitled unilaterally to deduct from the amount of the royalty for phonogram use payable in the Member State where it is established the amount of the royalty paid or claimed in the Member State in whose territory the terrestrial transmitter broadcasting to the first State is situated.

46 At the outset, it must be emphasised that it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.

47 Furthermore, it must be borne in mind that in this case the programmes containing the protected phonograms are broadcast using terrestrial transmitters in French territory and from a terrestrial transmitter in German territory. In so far as the broadcasting operations are thus carried out in the territory of two Member States, those rights are based on the legislation of two States.

48 In that context, it should be noted that the Court has already held that there is no objective reason to justify the laying down by the Community judicature of specific methods for determining what constitutes uniform equitable remuneration, which would necessarily entail its acting in the place of the Member States, which are not bound by any particular criteria under Directive 92/100. It is therefore for the Member States alone to determine, in their own territory, what are the most relevant criteria for ensuring adherence to the Community concept of equitable remuneration (Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 34).

49 However, the Member States must exercise their powers in this area within the limits laid down by Community law and, in particular, by Article 8(2) of Directive 92/100, which requires that such remuneration be equitable. More specifically, they must lay down rules for equitable remuneration that enable a proper balance to be achieved between the interests of performers and producers in obtaining remuneration for the broadcast of a particular phonogram and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable (*SENA*, paragraph 36).

50 Thus, whether the remuneration, which represents the consideration for the use of a commercial phonogram, in particular for broadcasting purposes, is equitable is to be assessed, in particular, in the light of the value of that use in trade (*SENA*, paragraph 37).

51 In order to determine that value, it is necessary to obtain guidance on this specific point from the criteria referred to in the 17th recital in the preamble to Directive 93/83 and therefore to take account of all the parameters of the broadcast, such as, in particular, the actual audience, the potential audience and the language version of the broadcast.

52 The use of phonograms for a broadcasting operation in the Member State where that terrestrial transmitter is located does not in any way reduce the actual or potential audience in the State where the broadcasting company is established or, consequently, the value of that use in trade within the territory of the latter State.

53 Moreover, it is clear from the file that the broadcasting of phonograms constitutes actual commercial exploitation only within French territory since the advertising slots are marketed only to French undertakings. Similarly, almost the entire audience is in France since, first, the broadcast at issue in this case can only be received by the public in a small area of German territory and, second, the broadcast is in the French language.

54 However, in so far as an actual or potential audience for broadcasts in the Member State where the abovementioned terrestrial transmitter is situated is not entirely absent, a certain economic value attaches to the use of protected phonograms in that State, even though it is low. Consequently, the latter State may, in the light of the principle of territoriality referred to in paragraph 46 of this judgment, require payment of equitable remuneration for the broadcast of those phonograms within its own territory. The circumstances mentioned in the foregoing paragraph, which limit the economic value of such use, are relevant only as regards the rate of that royalty and it will be for the courts of that Member State to take them into account when determining the royalty. On the other hand, they do not detract from the fact that the royalty thus determined constitutes payment for the use of phonograms in that State and that that payment cannot be taken into account in order to calculate equitable remuneration in another Member State.

55 In view of the foregoing considerations, the answer to the second question must be that Article 8(2) of Directive 92/100 must be interpreted as meaning that, for determination of the equitable remuneration mentioned in that provision, the broadcasting company is not entitled unilaterally to deduct from the amount of the royalty for phonogram use payable in the Member State in which it is established the amount of the royalty paid or claimed in the Member State in whose territory the terrestrial transmitter broadcasting to the first State is located.

Costs

56 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:

1. **In the case of a broadcast of the kind at issue in this case, 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 does not preclude the fee for phonogram use being governed not only by the law of the Member State in whose territory the broadcasting company is established but also by the legislation of the Member State in which, for technical reasons, the terrestrial transmitter broadcasting to the first State is located.**

2. **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 must be interpreted as meaning that, for determination of the equitable remuneration mentioned in that provision, the broadcasting company is not entitled unilaterally to deduct from the amount of the royalty for phonogram use payable in the Member State in which it is established the amount of the royalty paid or claimed in the Member State in whose territory the terrestrial transmitter broadcasting to the first State is located.**

[Signatures]