European Court of Justice, 14 July 2005, Europe 1 v SPRE and GVL

v

Société pour la Perception de la Rémunération Equitable de la Communication au Public des Phonogrammes du Commerce

Gesellschaft zur Verwertung von Leistungsschutzrechten

NEIGHBOURING RIGHTS

Which national legislation governs equitable remuneration

- **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.**

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. 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. 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.

- **The broadcasting company is not entitled unilaterally to deduct from the amount payable in the Member State in which it is established the amount paid in the Member State in whose territory the terrestrial transmitter is located.**

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.

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European Court of Justice, 14 July 2005
(A. Rosas, A. Borg Barthet, S. von Bahr, J. Malenovský and U. Lõhmus)
JUDGMENT OF THE COURT (Third Chamber)
14 July 2005 (*)
(Copyright and neighbouring rights – Broadcasting of phonograms –Equitable remuneration)
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),
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 com-

mercial 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-0000, 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 98/83.

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, La-

gardère, 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 subsystem 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.

OPINION OF ADVOCATE GENERAL
TIZZANO
delivered on 21 April 2005 (1)
Case C-192/04
Lagardère Active Broadcast
v
Société pour la Perception de la Rémunération Équitable (SPRE)
and
Gesellschaft zur Verwertung von Leisungsschutzrechten mbH
(Directive 93/83/EEC – Communication to the public by satellite – Definition – Directive 92/100/EEC – Rights related to copyright – Radio broadcasts in more than one Member State – Applicable law)

I – Introduction

1. By a judgment of 17 February 2004, the Cour de cassation (Court of Cassation, France) referred to the Court for a preliminary ruling under Article 234 EC two questions concerning 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 (hereinafter 'Directive 92/100') (2) and 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 (hereinafter 'Directive 93/83'). (3)

2. The national court seeks primarily to establish which Member State is competent to regulate the remuneration payable to the performers of a phonogram where the signal used to broadcast that phonogram is transmitted from one Member State to a satellite which directs it to a terrestrial repeater station located in another Member State, from which it is retransmitted to the first State. If the legislation of more than one Member State is applicable, it further asks whether under Community law it is possible to deduct in one Member State the amount paid in the other.

II – Legal background

The relevant Community law

3. The purpose of Directive 92/100 is to create a harmonised framework of national legislation on rental right and lending right with regard to copyright and certain rights related to copyright, to the extent necessary to ensure the proper functioning of the common market.

4. This is, however, only minimum harmonisation, as is evident from the 20th recital in the preamble to the directive, which explicitly recognises that the Member States may provide for more far-reaching protection for owners of rights related to copyright than that laid down in the directive.

5. That protection is dealt with in particular in Article 8(2) of the directive, which provides as follows:

'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.'

6. In turn, Directive 93/83 is intended to coordinate certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission in order 'to avoid the cumulative application of several national laws to one single act of [satellite] broadcasting' (14th recital).

7. Having stated in that recital that 'normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting', the directive defines the concepts it employs.

8. In particular, Article 1(1) defines 'satellite' as '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. The second paragraph of that article provides, in so far as is relevant to the present case, that:

'(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. With regard to the rights of performers, phonogram producers and broadcasting organisations, Article 4(1) lays down that 'for the purposes of communication to the public by satellite, [they] shall be protected in accordance with the provisions of Articles 6, 7, 8 and 10 of Directive [92/100]'.

National law

11. Turning now to the French legislation, mention need merely be made of Article L. 214□1 of the Code de la propriété intellectuelle (Intellectual Property Code), under which:

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

…

2. broadcast thereof or the 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 those persons who use the phonograms published for commercial purposes under the conditions indicated 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 …' (4)

III – Facts and procedure

12. The company Europe 1 communication, to whose rights the company Lagardère Active Broadcast has succeeded (hereinafter 'Europe 1' and 'Lagardère' respectively), is a broadcasting company established in France. Its radio programmes are produced in Paris and transmitted initially to a satellite. The signal then returns to earth to repeater stations situated on French territory, which broadcast it in France in frequency modulation (FM).

13. The broadcasting system I have just described is not the only one used by Europe 1. The company also has a transmitter located beyond the German border in Felsberg, Saarland, which it has used ever since it commenced operations in order to get around the French legislation then in force, which permitted only public broadcasting bodies to have retransmitting aerials on French territory.

14. The satellite also transmits the signal to that repeater station, which broadcasts it in long wave to France, under a licence granted in Germany to Compagnie européenne de radiodiffusion et de télévision Europe 1 (hereinafter 'CERT'), a German company in which Europe 1 holds 99.7% of the share capital.

15. I would add in this regard that in the event of faults in the satellite system the signal from the Paris studios can still reach the German transmitter via the terrestrial digital audio circuit, which was the normal means of transmission before the change-over to the satellite system.

16. I would further add that, although the programmes broadcast from the booster in Felsberg are intended exclusively for a French-speaking audience, they can also be received in a limited area of German territory.

17. In France, Europe 1 paid Société pour la perception de la rémunération équitable (hereinafter 'SPRE') the remuneration payable to the performers and producers of the phonograms used in its broadcasts. CERT, for its part, paid an annual flat-rate fee in Germany to the Gesellschaft zur Verwertung von Leisungsschutzrechten (hereinafter 'GVL'), the German counterpart of SPRE, for the broadcast of the same phonograms.

18. In order to avoid duplicating the remuneration paid for the use of the same phonograms, an agreement between Europe 1 and SPRE, which was renewed until 31 December 1993, authorised Europe 1 to deduct the amount paid by CERT to GVL from the sum owed to SPRE.

19. Although there was no agreement authorising such a deduction after 1 January 1994, Europe 1 continued with the practice.

20. SPRE, which considered that that deduction was not justified, brought an action before the Tribunal de grande instance (Regional Court) de Paris which ruled in its favour.

21. Faced with that situation, CERT terminated the contract that provided for the payment of the remuneration to GVL, which therefore brought legal proceedings in Germany. Following a ruling by the court of first instance in favour of GVL and a decision by the Saarländisches Oberlandesgericht (Court of Appeal of the Saarland) in favour of CERT, the question was referred to the Bundesgerichtshof (German Federal Court of Justice).

22. That court held that the transmissions at issue were subject to German law because they were broadcast from transmitters located in Germany but that the remuneration payable to GVL should be reduced by the amount paid in France. Without referring questions to the Court for a preliminary ruling, it concluded that Directive 93/83 was not applicable, quashed the judgment of the Oberlandesgericht and referred the case back to that court. The latter decided to stay its proceedings pending the Court of Justice's decision in the present case.

23. In the meantime, at the instigation of Lagardère, to which the rights of Europe 1 had been assigned, the legal proceedings in France had continued, first with an appeal to the Cour d'appel (Court of Appeal) de Paris against the decision of the court of first instance in favour of SPRE and then, when that action had also been dismissed, with a further appeal to the Cour de cassation. Entertaining doubts as to the interpretation of certain provisions of Community law, the latter stayed its proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'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/EEC of 19 November 1992 and Article 4 of Directive 93/83/EEC of 27 September 1993 and 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?'

24. In the proceedings before this Court, Lagardère, CERT, SPRE, GVL, the French and German Governments and the Commission have submitted observations.

25. The same parties attended the hearing on 2 March 2005.

IV – Assessment

The first question

26. By its first question, the national court asks whether the fact that part of the audience receives radio programmes produced in one Member State via a signal transmitted first to a satellite and then to a terrestrial repeater station located in another Member State which broadcasts the programmes towards the first Member State means that it is the legislation of the second Member State that governs the remuneration payable to performers and producers of the phonograms used as far as programmes retransmitted from that State are concerned.

27. As the Commission and GVL point out, the reply to that question depends on the definition of the transmission at issue. If it were considered a 'communication to the public by satellite' within the meaning of Directive 93/83, the remuneration payable to the performers and producers of the phonograms used should, in accordance with Article 1(2)(b) of that directive, be governed solely by the law of the State from which the signal is transmitted and hence, in the present case, by French law. If not, they maintain, it would undoubtedly fall outside the scope of Directive 93/83, with the consequence that it could not be precluded that German law applied to the remuneration payable for the use of the phonograms broadcast from the Felsberg transmitter.

28. Clearly, however, it may be found that the directive is not applicable to the present case by virtue of the answer to be given to another question that is linked to the first and is in a way preliminary to it, a question which the parties have also discussed in the course of the case. Since the directive does not relate to every type of satellite but only to those meeting certain conditions, it is legitimate to enquire whether the satellite under discussion is in fact a 'satellite' within the meaning of the relevant directive. If not, there is all the more reason why the directive is not applicable to the present case.

29. On that premiss, I would point out in that connection that, in accordance with Article 1(1) of the directive, 'satellites' are only those operating 'on frequency bands which, under telecommunications law, are reserved': (i) 'for the broadcast of signals for reception by the public', or (ii) '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'.

30. In this instance, it is evident from the replies given in response to a specific question asked by the Court that the signal transmitted by the satellite to the repeater station in Felsberg cannot be received directly by the public. It is therefore beyond question that the first case envisaged in Article 1(1) of the directive does not apply.

31. It is more difficult to determine whether the second case applies, particularly as it is not clear what 'comparable circumstances' should mean. Without a doubt, in fact, this expression implies that the programmes coming from the satellite must reach the public; however, the parties in the present case come to diametrically opposed conclusions when assessing in concrete terms whether that condition is met.

32. The French Government, Lagardère and SPRE maintain that in the present case the condition is fulfilled because the public can in any case receive the programmes, thanks to terrestrial retransmission of the signal from the satellite. The German Government and GVL take the opposite view, namely that since the public can receive the programmes only by means of a different signal from that coming from the satellite, the circumstances are not 'comparable'; according to them, the directive is therefore not applicable. The Commission, which had not expressed an opinion in that regard in its written submissions, essentially endorsed that view at the hearing.

33. An inquiry as to whether a 'satellite' within the meaning of the directive exists in the present case must therefore concentrate on the consequences of the fact that the public can receive the signal from the satellite only if it is retransmitted in Hertzian waves.

34. However, the reply to that question is also decisive for resolving the doubt mentioned above (in point 27) about the classification of the transmission under discussion in the present case as a 'communication to the public by satellite'.

35. Under Article 1(2)(a) of the directive, such a 'communication' 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', (5) subject to the qualification stated in the 14th recital of the directive that normal technical procedures should not be considered as interruptions to the chain of broadcasting.

36. Hence, in one way or another the central issue in the present case remains essentially the same. Either way, it has to be established whether and in what manner it is relevant that, in the circumstances of this case, the public can receive the signal from the satellite only thanks to the retransmission of that signal in Hertzian waves.

37. In order to answer that question it is necessary to examine both aspects, that is to say to establish whether in the present case it is possible to speak of a transmission: (i) that takes place in 'circumstances … comparable' to those in which the satellite broadcasts signals that can be received by the public, and (ii) that constitutes a 'communication to the public by satellite' in that it consists of an 'uninterrupted chain of communication'.

38. (i) As to the first aspect, I would observe first that, as indicated in its sixth recital, Directive 93/83 deals with two different types of satellite: direct broadcast satellites and telecommunications satellites. After noting that 'individual reception is possible and affordable nowadays with both types' but that in the Member States 'a distinction is … drawn for copyright purposes' between communication to the public by one or other type of satellite, (6) the directive states that it aims to lay down common rules applicable no matter which of the two types of satellite is used. (7)

39. In my opinion, it is precisely in the light of that premiss that the two cases referred to in point 29 above should be viewed. In the past, only direct broadcasting satellites transmitted signals that could be received by the public, using frequency bands expressly intended for that purpose. Telecommunications satellites, by contrast, used (and still use) bands not reserved for reception by the public. However, thanks to technological advances, it has since become possible to transmit higher-power signals on the latter bands than in the past, so that affordable non-professional satellite dishes can also receive programmes transmitted from satellites in this way. As a result, although the bands used are not reserved for communication to the public, the public can nevertheless receive programmes directly from the satellite.

40. It seems to me that these, and only these, are the 'comparable circumstances' referred to in the final sentence of Article 1(1) of the directive. In the case that concerns us here, by contrast, the satellite does not transmit in circumstances such as to allow individual reception of the signal it broadcasts, no matter what bands are used; on the contrary, for the signal to reach

the audience, it must in any case be retransmitted in Hertzian waves.

41. I therefore consider, along with the German Government, the Commission and GVL, that in the present case the circumstances are not 'comparable' and that it is therefore not even possible to speak of a 'satellite' within the meaning of the directive.

42. (ii) Similarly, turning to the other aspect mentioned, I agree with the German Government, the Commission and GVL that in the present case there is not even a 'communication to the public by satellite', in that the chain of communication is not uninterrupted, as required by the directive.

43. In the situation I have just described, the public does not receive the signal direct from the satellite using a satellite dish; instead, it captures it using a simple aerial, as the signal has been converted and retransmitted by repeater stations situated in France and Germany, in FM and long wave respectively.

44. Moreover, as GVL pointed out at the hearing, the role of the satellite in the present case is merely to replace the previous terrestrial digital audio circuit, which carried the signal from the Paris studios to the Felsberg facility from the inception of operations by Europe 1 and which continues to be used if the satellite malfunctions (see points 13 to 15 above). The only innovation brought about by the switch to the satellite system is therefore in the method of feeding the repeater station, without entailing any change from the point of view of the public receiving the signal from Felsberg. As the repeater station located there continues to transmit on long wave – as in the past, when the signal arrived by cable and not by satellite – listeners have not had to make any modification to the equipment they have always used to receive the programmes of Europe 1.

45. Directive 93/83 introduced special rules for a 'communication to the public by satellite' specifically to take account of the fact that 'individual reception [of the satellite signal] is possible and affordable nowadays', as stated in the sixth recital. (8) From this I deduce, as does GVL, that the rules laid down for that type of communication relate to the new means by which the public can receive the signal, which have been made possible by technological advances, and not to those that have long been available, as in the case of Hertzian waves.

46. Nor is it possible, to my mind, to get around the obstacle represented by the interruption of the chain of communication by proposing a broad interpretation of 'normal technical procedures', as do the French Government, Lagardère and SPRE.

47. In particular, the French Government maintained at the hearing that the fact that the signal is retransmitted in Hertzian waves does not preclude referring in this regard to an 'uninterrupted chain' of communication, because in its opinion satellites that do not transmit signals directly receivable by the public are also covered by the directive. In the view of that government, therefore, to deny that the insertion of a terrestrial stage between the satellite and the public is 'a normal technical procedure', and hence not to hold that there is communication to the public by satellite in the present case, would render meaningless the part of Article 1(1) of Directive 93/83 that also defines as satellites those satellites which, while not using frequency bands reserved for transmission to the public, carry signals that can be received individually in 'circumstances … comparable' to those encountered when such frequency bands are used.

48. It seems to me, however, that the end result of that objection is to readmit through the window (of the concept of an 'uninterrupted chain') what has been ejected through the door (of the concept of 'comparable circumstances'). In any case, I feel bound to reply that accepting a concept of 'normal technical procedures' covering only technical modifications to the signal that do not alter its status as a satellite transmission, (9) which I consider correct and which the Commission also suggests, will not render the directive meaningless. On the contrary, it appears to me that this would provide a more consistent interpretation of the concepts of 'satellite' and 'communication to the public by satellite'.

49. As I have pointed out above, the fact that listeners cannot receive the satellite signal direct means that it cannot be claimed that the individual reception of the signal takes place in 'circumstances … comparable' to those in which the signal is received direct by the public, with the consequence that it is not possible to speak here of a 'satellite' within the meaning of the directive (see points 39 to 41 above).

50. Similarly, the essential conversion of the satellite signal into Hertzian waves before it can be received by the public cannot be described as a 'normal technical procedure', with the consequence that in the present case there is no 'uninterrupted chain' and hence no communication to the public by satellite.

51. I therefore believe that it follows that a broadcast such as that at issue here does not fall within the concept of a 'communication to the public by satellite' within the meaning of Directive 93/83.

52. As I have stated several times, it is only if this type of communication takes place that, within the meaning of the directive, the remuneration payable to the performers and producers of the phonograms used is governed solely by the law of the State from which the signal is broadcast. It follows that in the present case it will not be possible to apply that rule.

53. I would add, finally, that I consider this conclusion to be further supported by a systematic interpretation of Directive 93/83.

54. In the part of the directive dealing with retransmission to the public by cable of programmes from other Member States that were originally broadcast by satellite, the directive does not in fact require the exclusive application of the law of the country of origin of the signal, as is the case where there is a 'communication to the public by satellite'. On the contrary, according to Article 8(1), the Member States in which retransmission takes place must ensure that 'the applicable copyright and related rights are observed',

obviously applying their own legislation in this regard and not that of the country of origin of the initial (satellite) broadcast of the signal.

55. If the rule that only the law of the State from which the satellite signal originates applies is inoperative where the programme is received by the public by means of a cable retransmission, there is no reason, as the Commission observes, to preclude the same solution from applying where the retransmission is effected not via cable but via Hertzian waves, as in the present case.

56. On the basis of the foregoing, I therefore propose that the answer to be given to the first question from the Cour de cassation should be that, where part of the public receives radio programmes produced in a Member State via a signal sent first to a satellite and then from the satellite to a terrestrial transmitter located in another Member State, which in turn broadcasts the said programmes in long wave towards the first State, a 'communication to the public by satellite' within the meaning of Directive 93/83 does not occur, so that, as regards the phonograms broadcast from the Member State in which the terrestrial transmitter is located, Community law does not prevent the single equitable remuneration provided for in Directive 92/100 for the performers and producers of the phonograms from being determined on the basis of the law of the said State.

The second question

57. If the reply to the first question is in the affirmative, the national court asks a second question, by which it seeks to establish in particular whether a company broadcasting the original signal from a Member State may deduct from the fee claimed from it in respect of all the transmissions carried out in the national territory the sums paid by its subsidiary in the Member State where a terrestrial transmitter is located which, although broadcasting the signal mainly towards the first Member State, enables it to be received as well in areas of the other Member State close to the transmitter.

58. According to the German Government, there are no provisions of Community law of which the interpretation could be of use in replying to the question under examination. GVL adopts the same line of argument, asserting that if Directive 93/83 is not applicable in the present case, then Directive 92/100 cannot be applicable either.

59. The French Government and SPRE, on the other hand, submit that there is no need to answer this question, the answer to the first having been that no payment may be claimed in Germany. In the alternative, however, SPRE observes that no possibility of a deduction mechanism can be inferred from Directives 93/83 and 92/100; in any event, and in the further alternative, it maintains that it should be permissible to deduct the sum paid in France from the amount payable in Germany.

60. Lastly, the Commission and Lagardère consider that a double payment would not be in compliance with Article 8(2) of Directive 92/100, which provides that the user of a phonogram for any communication to the public is required to pay a 'single equitable' remuneration to the performers and producers of the phonogram. According to Lagardère, it follows that it should be permissible to deduct the sum paid in Germany from the amount payable in France. The Commission reaches the opposite conclusion, arguing instead that the amount paid in France should be deducted in Germany. In the Commission's view, however, such a solution should be applied only in the alternative; in its opinion, in the absence of greater harmonisation in that regard the Court should confine itself to establishing that the total of the amounts claimed as a single equitable remuneration does not exceed a level that permits the broadcasting of phonograms on reasonable terms and takes account of the actual and potential size of the audience, without going so far as to impose a deduction mechanism directly.

61. For my part, I would observe first that Directive 92/100 harmonised certain aspects of various rules applied in the Member States but did not alter the predominant role that the principle of territoriality plays in the field of copyright and related rights, a principle which, moreover, is also recognised by international law in this regard. (10)

62. Community law therefore permits the competent authorities of the two Member States concerned each to require, under their own national law, payment of the remuneration accruing to the performers and producers of the phonograms broadcast to the public from their own territory.

63. As we have just seen, however, Article 8(2) of the directive provides that a 'single equitable' remuneration is to be paid to the performers. From this it can be deduced – the view taken by the Commission and Lagardère – that, when they each demand payment of the remuneration due to the performers under their own national law, the aforesaid national authorities must take account of the requirements I have indicated regarding the remuneration.

64. It is therefore necessary to ascertain whether, and to what extent, those requirements may also play a role in the present case: an examination of them may provide useful guidance for a case such as this, in which the remuneration to be classified is decided by reference to phonograms that fall, so to speak, under the jurisdiction of several national authorities.

65. It appears to me that Article 8(2) describes the remuneration per se in general terms, not as something linked to a single Member State. I therefore believe that the requirements in question can also be relied on for classification of the remuneration in the situation under consideration here.

66. I shall therefore proceed to examine them in that way, but I would state straight away that in reality the debate relates solely to the requirement that the remuneration be 'equitable'. It seems obvious to me that the requirement of a single remuneration cannot provide useful guidance in the present case, given that it means simply that the remuneration paid by the user of the phonogram must take overall account of the rights of the various parties involved (performers and producers)

but without even implicitly suggesting that payment must take place in a single Member State. That is the only reading of the requirement in question that is consistent with the spirit of the provision in question, which provides that 'this remuneration [shall be] shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between [those persons], lay down the conditions as to the sharing of this remuneration between them'.

67. That said, let us see whether on the other hand it is possible to provide an answer to the question under examination by analysing the requirement for the remuneration to be equitable.

68. In that regard I would point out first of all that, as I indicated in my Opinion in the SENA case (11) and as the Court confirmed in its judgment, the concept of 'equitable remuneration' is a Community concept, given that it is used in a directive that contains no – direct or indirect – reference to domestic legislation for its interpretation. Hence in such cases, it must be given 'an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question'. (12)

69. However, not only does the directive not provide a precise definition of the concept in question, it does not even provide direct or indirect indications in that regard. It must therefore be deduced that the intention was to allow a considerable degree of latitude to national systems of law, presumably in the belief that more far-reaching harmonisation in this field was neither necessary nor appropriate. (13) It is therefore for the Member States and national courts to determine the most appropriate criteria for ensuring adherence to that Community concept.

70. The freedom accorded to them in that connection is not unbounded, however, but must be exercised in relation to the application of a Community concept and, consequently, is subject to supervision by the Community institutions, and by the Court of Justice in particular, in accordance with the conditions and limits that flow from the directive, as well as, more generally, the principles and scheme of the Treaty. (14)

71. In particular, as the Court stated in SENA, 'whether the remuneration, which represents the consideration for the use of a commercial phonogram, … is equitable is to be assessed … in the light of the value of that use in trade'. (15) Moreover, the methods of applying the directive chosen by the Member States must be 'such as to enable a proper balance to be achieved between the interests of performing artists 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'. (16)

72. It appears to me that in the circumstances of the present case, in which the legislation of two Member States is applicable and Community law makes no provision for coordination between them in order to avoid double charging, the 'equitable' nature of the remuneration must also be ensured from that standpoint, in other words by making certain that, for the broadcast of a phonogram, an undertaking does not pay in total more than the value of the use of the phonogram in trade. Otherwise, as the Commission observes, the broadcast would not take place 'on terms that are reasonable'.

73. Although it is therefore true that it is for the Member States concerned to lay down the rules applicable in the circumstances under discussion here, it is also true that they must ensure that the total amount paid as 'equitable' remuneration takes due account of the real commercial value of the use of the phonogram in the respective territories, and in particular, in so far as concerns us here, of the size of the actual and potential audience in each of them.

74. The application of that criterion may therefore also mean that, where necessary, each Member State may require payment only of the amounts due for the transmission of the phonogram in its own territory. However, since the directive does not go so far as to impose mechanisms for dividing the remuneration, I consider that this consequence cannot be expected to come about automatically but might possibly be arrived at on the basis of the general assessment referred to above.

75. On the basis of the foregoing, I therefore propose that the answer to the second question from the national court should be that where the relevant legislation of two Member States applies to the broadcast of a phonogram, the remuneration payable to the performers and producers of the phonogram is 'equitable' within the meaning of Article 8(2) of Directive 92/100 if its total amount takes due account of the real commercial value of the use of the phonogram in the Member States concerned and, in particular, of the size of the actual and potential audience in each of them.

V – Conclusion

76. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions submitted to it for a preliminary ruling by the French Cour de cassation:

1) Since in cases where part of the public receives radio programmes produced in a Member State via a signal sent first to a satellite and then from the satellite to a terrestrial transmitter located in another Member State, which in turn broadcasts the said programmes in long wave towards the first State, a 'communication to the public by satellite' within the meaning 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 does not occur, as regards the phonograms broadcast from the Member State in which the terrestrial transmitter is located, Community law does not prevent the single equitable remuneration provided for in 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 for the performers and producers of the phonograms used from being determined on the basis of the law of the said State.

2) Where the relevant legislation of two Member States applies to the broadcast of a phonogram, the remuneration payable to the performers and producers of the phonogram is 'equitable' within the meaning of Article 8(2) of the aforementioned Council Directive 92/100/EEC of 19 November 1992 if its total amount takes due account of the real commercial value of the use of the phonogram in the Member States concerned and, in particular, of the size of the actual and potential audience in each of them.

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1 – Original language: Italian.
2 – OJ 1992 L 346, p. 61.
3 – OJ 1993 L 248, p. 15.
4 – Unofficial translation.
5 – Emphasis added.
6 – Sixth recital.
7 – Thirteenth recital.
8 – Emphasis added.
9 – As in the case of procedures that allow the signal to be transmitted from the studios to the satellite (such as the use of a cable from the studios to the station transmitting to the satellite) and to be received by the public upon its return to earth (such as the connection to a satellite dish and the cabling of a house).
10 – See Article 11bis of the Convention for the Protection of Literary and Artistic Works signed in Berne on 9 September 1886 (last revised in Paris on 24 July 1971), which states that 'it shall be a matter for legislation in the countries of the Union [established by the Convention] to determine the conditions under which the rights [in question] may be exercised, but these conditions shall apply only in the countries where they have been prescribed'.
11 – Case C□245/00 [2003] ECR I□1251.
12 – See SENA, paragraph 23, and my Opinion in that case, point 32.
13 – Opinion in SENA, points 34 and 37.
14 – See the Opinion in SENA, points 38 and 40, and the SENA judgment, paragraph 38.
15 – The SENA judgment, paragraph 37.
16 – The SENA judgment, paragraph 46 (my italics).
