

Court of Justice EU, 13 October 2011, Airfield & Canal Digitaal v Sabam



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Indirect and direct transmission of TV programs: a single, indivisible communication to the public, which may require authorisation

- In light of the foregoing, it must be held, subject to verification by the national court, that both the indirect transmission of television programs and their direct transmission fulfill all the cumulative conditions laid down in Article 1(2)(a) and (c) of Directive 93/83 and that each of them must therefore be regarded as constituting a single communication to the public by satellite and thus as indivisible.
- That said, the indivisibility of such a communication, within the meaning of Article 1(2)(a) and (c) of Directive 93/83, does not however signify that the intervention of the satellite package provider in that communication can occur without the authorisation of the right holders concerned.

Authorisation for satellite package provider required – new public

- that Article 2 of Directive 93/83 must be interpreted as requiring a satellite package provider to obtain authorisation from the right holders concerned for its intervention in the direct or indirect transmission of television programmes, such as the transmission at issue in the main proceedings, unless the right holders have agreed with the broadcasting organisation concerned that the protected works will also be communicated to the public through that provider, on condition, in the latter situation, that the provider's intervention does not make those works accessible to a new public.

Accordingly, it must be found that the satellite package provider expands the circle of persons having access to the television programmes and enables a new public to have access to the works and other protected subject-matter.

83 That satellite package provider is therefore required to obtain authorisation, from the right holders concerned, for its intervention in the communication by satellite, unless the right holders have agreed with the broadcasting organisation concerned that the protected works will also be communicated to the public through

that provider, on condition, in the latter situation, that the provider's intervention does not make those works accessible to a new public.

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Court of Justice EU, 13 October 2011

(K. Lenaerts, J. Malenovský, R. Silva de Lapuerta, E. Juhász en D. Šváby)

JUDGMENT OF THE COURT (Third Chamber)

13 October 2011 (*)

(Copyright – Satellite broadcasting – Directive 93/83/EEC – Articles 1(2)(a) and 2 – Communication to the public by satellite – Satellite package provider – Single communication to the public by satellite – Persons to whom that communication may be attributed – Authorisation from copyright holders for the communication)

In Joined Cases C-431/09 and C-432/09,

REFERENCES for a preliminary ruling under Article 234 EC from the hof van beroep te Brussel (Belgium), made by decisions of 27 October 2009, received at the Court on 2 November 2009, in the proceedings

Airfield NV,
Canal Digitaal BV

v

Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) (C-431/09),

and

Airfield NV

v

Agicoa Belgium BVBA (C-432/09),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), R. Silva de Lapuerta, E. Juhász and D. Šváby, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 November 2010,

after considering the observations submitted on behalf of:

– Airfield NV and Canal Digitaal BV, by T. Heremans and A. Hallems, advocaten,

– Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam), by E. Marissens, advocaat,

– Agicoa Belgium BVBA, by J. Windey and H. Gilliams, advocaten,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the European Commission, by H. Krämer and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2011,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 1(2)(a) to (c) 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 references have been made in proceedings between Airfield NV ('Airfield') and Canal Digitaal BV ('Canal Digitaal'), of the one part, and the Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) (Belgian Society of Authors, Composers and Publishers; 'Sabam'), of the other part (Case C-431/09), and between Airfield and Agicoa Belgium BVBA ('Agicoa') (Case C-432/09), concerning the obligation, for Airfield and Canal Digitaal, to obtain authorisation to communicate works to the public.

Legal context

European Union law

3 Recitals 5, 14, 15 and 17 in the preamble to Directive 93/83 state:

(5) ... the achievement of [the objectives of the European Union] in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty; ... this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; ... the legal uncertainty in particular constitutes a direct obstacle in the free circulation of programmes within the [European Union];

...

(14) ... the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at a [European Union] level; ... this definition should at the same time specify where the act of communication takes place; ... such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; ... communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organisation into an uninterrupted chain of communication leading to the satellite and down towards the earth; ... normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting;

(15) ... the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs;

...

(17) ... 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'.

4 Article 1(1) of Directive 93/83 states:

'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.'

5 Article 1(2)(a) to (c) of Directive 93/83 provides:

(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.'*

(c) *'If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent.'*

6 Article 2 of Directive 93/83 states:

'Member States shall provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.'

7 Under Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10):

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

8 Recital 27 in the preamble to Directive 2001/29 specifies in this regard that 'the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive'.

National law

9 The fourth subparagraph of Article 1(1) of the Law of 30 June 1994 on copyright and related rights (Wet betreffende het auteursrecht en de naburige rechten, Moniteur belge of 27 July 1994, p. 19297), as amended, provides:

'The author of a literary or artistic work shall alone have the right to communicate it to the public by any process whatever, including by making it available to the public in such a way that members of the public

may access it from a place and at a time individually chosen by them.'

10 Articles 49 and 50 of that Law essentially reproduce the wording of Article 1(2)(a) to (c) of Directive 93/83.

The facts and the questions referred for a preliminary ruling

11 Airfield, a Belgian company operating under the trading name TV Vlaanderen, is a satellite television provider which offers the public a package of channels transmitted by satellite that can be heard and viewed together by its subscribers by means of a satellite decoder ('satellite package provider').

12 The package of channels offered by Airfield includes two types of television channel. Apart from the channels which can be received free of charge, the package includes encrypted channels which can be viewed only after decoding. In order to be able to view these channels, customers must therefore enter into a subscription agreement with Airfield, which provides them, in return for payment, with a card that enables decoding ('decoder card').

13 In order to offer its package of channels, Airfield has recourse to the technical services of Canal Digitaal, a Netherlands company which belongs to the same group as Airfield.

14 Canal Digitaal concluded an agreement with the company that operates the Astra satellite system, under which the latter leases to Canal Digitaal capacity for digital radio and television on the Astra satellite.

15 Subsequently, Canal Digitaal concluded with Airfield a services agreement by which it undertook to sublease to Airfield from 1 January 2006 capacity leased on the Astra satellite for the broadcasting of television and radio programmes in Belgium and Luxembourg. For the broadcasting of the television programmes, Canal Digitaal undertook to provide technical services, including uplinking, multiplexing, compressing, scrambling and data transmission, which are required in order to enable Airfield to broadcast digital television services in Belgium and Luxembourg.

16 Airfield also concluded a series of agreements with broadcasting organisations whose channels are included in its satellite package. The manner in which Airfield and those organisations cooperate differs according to the method of transmission of the television programmes concerned, those programmes being broadcast, as part of Airfield's satellite package, either by indirect transmission ('indirect transmission of television programmes') or by direct transmission ('direct transmission of television programmes').

Indirect transmission of television programmes

17 The indirect transmission of television programmes is carried out in accordance with two methods.

18 Under the first of those methods, the broadcasting organisations send the signals carrying their programmes, via a fixed link, to Canal Digitaal's equipment installed in Vilvorde (Belgium). Canal Digitaal compresses the signals and scrambles them in order to send them by broadband to its station in the Nether-

lands, from which they are beamed up to the Astra satellite. The signals are encrypted before being beamed up from the station to the satellite. The key enabling the public to decode those signals is incorporated in a decoder card that is made available to Airfield by Canal Digitaal. When consumers take out a subscription with Airfield they receive that card.

19 Under the second of those methods, the broadcasting organisations transmit the signals carrying their programmes via a satellite. Canal Digitaal receives those satellite signals, which are encrypted and inaccessible to the public, in Luxembourg or the Netherlands. It decodes them possibly, rescrambles them and beams them up to the Astra satellite. Airfield's subscribers can decode those signals by means of a decoder card supplied by Canal Digitaal to Airfield.

20 Airfield concluded 'carriage' agreements with those broadcasting organisations.

21 Under those agreements, Airfield leases satellite transponder capacity to the broadcasting organisations with a view to the broadcasting of the television programmes to viewers residing, in particular, in Belgium and Luxembourg. Airfield guarantees that it has received authorisation from the company operating the Astra satellite to sublease that capacity to the broadcasting organisations.

22 Airfield also undertakes to receive the television programme signal of the broadcasting organisations concerned at a central uplink site, to compress, multiplex and scramble the signal and to beam it up to the satellite for broadcasting and reception.

23 Those organisations pay Airfield a fee for the abovementioned leasing and provision of services.

24 The broadcasting organisations grant Airfield authorisation for simultaneous viewing by its subscribers, including in Belgium and Luxembourg, of their programmes broadcast by means of the Astra satellite.

25 In return for the rights conferred on Airfield by those broadcasting organisations and for Airfield's power to include the television programmes in the package offered by it, Airfield is required to pay the broadcasting organisations a fee which takes account of the number of its subscribers and of the programmes broadcast in the territory concerned.

Direct transmission of television programmes

26 In the case of direct transmission of television programmes in Airfield's satellite package, the broadcasting organisations scramble the signals themselves and send them from the country of origin directly to the satellite. The intervention of Airfield and Canal Digitaal is confined to supply of the access keys to the broadcasting organisations concerned, so that the correct codes are applied and Airfield's subscribers are thereby enabled to decode the programmes subsequently by using the decoder card.

27 With such organisations, Airfield concluded contracts called 'heads of agreement' laying down inter alia the broadcasting organisations' and Airfield's rights and obligations, which are analogous to the rights and obligations referred to in paragraphs 24 and 25 of the present judgment.

The dispute in the main proceedings

28 Sabam is a Belgian cooperative society which, in its capacity as a management society, represents authors in authorising the use of their copyright-protected works by third parties and in collecting the royalties payable for that use.

29 Agicoa is a collective management society which represents Belgian and international producers of audiovisual works with a view to managing copyright and related rights in films and other audiovisual works, with the exception of video clips. Within this framework, it collects royalties.

30 Sabam and Agicoa took the view that Airfield rebroadcasts television programmes already transmitted by the broadcasting organisations, in accordance with the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, and that Airfield must therefore obtain authorisation for use of the catalogue of the authors whose rights they administer.

31 In response to a letter before action, Airfield and Canal Digitaal contended that they do not carry out rebroadcasting, but offer the public solely television programmes by satellite on behalf of the broadcasting organisations. In their submission, there is a first and single satellite broadcast by the broadcasting organisations themselves, which have recourse to them so far as its technical aspect is concerned. The broadcasting organisations alone carry out an operation which is relevant to copyright for the purposes of Articles 49 and 50 of the Law of 30 June 1994 on copyright and related rights, as amended.

32 Since no agreement could be reached between the parties concerned, Sabam issued a writ of summons against Airfield and Canal Digitaal, and Agicoa issued a writ of summons against Airfield, to appear before the President of the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels). The latter held that Airfield and Canal Digitaal had infringed the copyright which Sabam and Agicoa administer.

33 Airfield and Canal Digitaal brought an appeal against those decisions before the hof van beroep te Brussel (Court of Appeal, Brussels).

34 In those circumstances, the hof van beroep te Brussel decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions, which are couched in identical terms in Cases C-431/09 and C-432/09:

'(1) Does Directive 93/83 preclude the requirement that the supplier of digital satellite television must obtain the consent of the right holders in the case where a broadcasting organisation transmits its programme-carrying signals, either by a fixed link or by an encrypted satellite signal, to a supplier of digital satellite television which is independent of the broadcasting organisation, and that supplier has those signals encrypted and beamed to a satellite by a company associated with it, after which those signals are beamed down, with the consent of the broadcasting organisation, as part of a package of television channels and therefore bundled, to the satellite television supplier's subscribers, who are able to view the programmes sim-

ultaneously and unaltered by means of a decoder card or smart card provided by the satellite television supplier?'

(2) Does Directive 93/83 preclude the requirement that the supplier of digital satellite television must obtain the consent of the right holders in the case where a broadcasting organisation transmits its programme-carrying signals to a satellite in accordance with the instructions of a digital satellite television supplier which is independent of the broadcasting organisation, after which those signals are beamed down, with the consent of the broadcasting organisation, as part of a package of television channels and therefore bundled, to the satellite television supplier's subscribers, who are able to view the programmes simultaneously and unaltered by means of a decoder card or smart card provided by the satellite television supplier?'

35 By order of the President of the Court of 6 January 2010, Cases C-431/09 and C-432/09 were joined for the purposes of the written and oral procedure and the judgment.

Applicability of Directive 93/83

36 In Case C-432/09, Agicoa contends that Directive 93/83 is not applicable to the dispute in the main proceedings and that the questions referred for a preliminary ruling must be examined in the light of Directive 2001/29.

37 In this regard, Agicoa submits, first of all, that a satellite package provider must be distinguished from a broadcasting organisation, since its activity consists in the putting together of a package of broadcasting services and not in broadcasting television programmes. Accordingly, it is misplaced to rely on Article 1(2)(a) of Directive 93/83 in order to examine its activities, as that provision refers to the broadcasting organisation alone.

38 Second, the dispute in the main proceedings does not, in Agicoa's submission, fall within the scope of Directive 93/83, because it concerns communications which do not involve recourse to a satellite within the meaning of Article 1(1) of that directive. Finally, the cross-border aspect envisaged by that directive is missing from the dispute.

39 It must be pointed out that the first argument concerns the very essence of the substance of the present case and will therefore be examined when the questions referred for a preliminary ruling are answered.

40 As to the second argument, there is nothing in the documents before the Court indicating that the communications at issue in the main proceedings are not carried out by means of a satellite within the meaning of Article 1(1) of Directive 93/83.

41 Finally, so far as concerns the third argument, it is apparent from Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR I-0000, paragraphs 76 to 145, that communications to the public by satellite must be capable of being received in all the Member States and that they therefore by definition have a cross-border nature. Furthermore, the communications at issue in the main pro-

ceedings display such a nature since they involve Belgian and Netherlands companies, Airfield and Canal Digitaal, and the programme-carrying signals are intended in particular for television viewers residing in Belgium and Luxembourg.

42 Accordingly, Agicoa's line of argument must be rejected and the questions referred for a preliminary ruling must be examined in the light of Directive 93/83.

Consideration of the questions referred

43 By its questions, which it is appropriate to examine together, the national court asks, in essence, whether Directive 93/83 must be interpreted as requiring a satellite package provider to obtain authorisation from the right holders concerned for a communication to the public of works that is effected in the course of the direct or indirect transmission of television programmes, such as the transmission at issue in the main proceedings.

Introductory remarks

44 First of all, it should be borne in mind that Directive 93/83 is not the only European Union instrument in the field of intellectual property and that, in view of the requirements deriving from the unity and coherence of the legal order of the European Union, the terms used by that directive must be interpreted in the light of the rules and principles established by other directives relating to intellectual property, such as, in particular, Directive 2001/29 (see, by analogy, Case C-271/10 VEWA [2011] ECR I-0000, paragraph 27).

45 Second, so far as concerns the factual context of the questions referred for a preliminary ruling, it should be made clear at the outset that the direct and the indirect transmission of television programmes are not the only means of transmitting programmes included in the satellite package concerned.

46 Those programmes are also broadcast by the broadcasting organisations outside that package, by means which enable them to reach television viewers directly, such as terrestrial broadcasting.

47 The direct and the indirect transmission are therefore an addition to those means of broadcasting, with a view to expanding the circle of television viewers receiving the broadcasts concerned, and they are parallel and simultaneous, the satellite package provider's intervention not affecting the content of such broadcasts or their scheduling.

48 Finally, it is common ground, in the main proceedings, that the broadcasting organisations have authorisation from the right holders concerned to communicate their works by satellite and that, on the other hand, the satellite package provider has no comparable authorisation.

49 In the present cases, Airfield and Canal Digitaal contend that the direct and the indirect transmission of television programmes each constitute a single communication to the public by satellite within the meaning of Article 1(2)(a) of Directive 93/83, that is to say, therefore, an indivisible communication attributable to the relevant broadcasting organisation alone. They infer from this that the satellite package provider cannot be regarded as effecting a communication to the public

within the meaning of that provision, and it cannot therefore be required to obtain authorisation from the right holders concerned as regards that transmission.

50 Accordingly, in order to determine whether the satellite package provider is required to obtain such authorisation, it must be examined, first, whether the direct and the indirect transmission of television programmes each constitute a single communication to the public by satellite or, on the contrary, whether each of them entails two independent communications. Second, it must be established whether indivisibility of such a communication means that the satellite package provider is not required to obtain authorisation from the right holders concerned for its intervention in that communication.

Concept of communication to the public by satellite

51 Both direct transmission and indirect transmission constitute a single communication to the public by satellite when they satisfy each of the conditions laid down in Article 1(2)(a) and (c) of Directive 93/83.

52 Thus, such transmission constitutes a single communication to the public by satellite if:

- it is triggered by an 'act of introducing' programme-carrying signals, carried out 'under the control and responsibility of the broadcasting organisation';
- those signals are introduced 'into an uninterrupted chain of communication leading to the satellite and down towards the earth';
- the signals are 'intended for reception by the public'; and
- since in the main proceedings the signals are encrypted, the means for decrypting the broadcast are 'provided to the public by the broadcasting organisation or with its consent'.

53 So far as concerns the first condition, in the case of the indirect transmission of television programmes the broadcasting organisations themselves introduce the programme-carrying signals into the chain of communication concerned, by supplying those signals to the satellite package provider and authorising the latter to introduce them into the satellite communication uplink.

54 In so doing, the broadcasting organisations have a power of control over the act of introducing the signals in the communication leading to the satellite and they assume responsibility therefor.

55 As regards the direct transmission of television programmes, the broadcasting organisations themselves introduce the programme-carrying signals directly into the satellite communication uplink, which means all the more that they have a power of control over the act of introducing those signals in the communication concerned and assume responsibility for that act.

56 In this context, it should be pointed out that there is nothing to prevent that power of control and that responsibility as regards the indirect or direct transmission of television programmes from being shared, where appropriate, with the satellite package provider. First, it is clear from the very wording of Article 1(2)(a) of Directive 93/83 that control and responsibility for the purposes of that provision relate not to the communication as a whole, but only to the act of intro-

ducing programme-carrying signals. Second, no provision of that directive requires the power of control and responsibility as regards the whole of the communication to be exclusive.

57 Accordingly, both the indirect transmission of television programmes and their direct transmission satisfy the first condition, laid down in Article 1(2)(a) of Directive 93/83.

58 So far as concerns the second condition, first of all it is apparent from the Court's case-law that Directive 93/83 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 unfeasible and, as a result, the public receives no broadcast (see, to this effect, Case C-192/04 Lagardère Active Broadcast [2005] ECR I-7199, paragraph 39).

59 In this instance, it is not in dispute that the satellite forms a central, essential and irreplaceable element both of the direct transmission of television programmes and of their indirect transmission, so that both methods of transmission amount to closed communications systems of that kind.

60 Next, while it is true that, when television programmes are transmitted indirectly, Airfield and Canal Digitaal intervene as regards the programme-carrying signals emitted by the broadcasting organisations, it is to be recalled that such intervention consists, essentially, in receiving those signals from the broadcasting organisations, possibly decoding them, rescrambling them and beaming them up to the satellite concerned.

61 This single intervention falls within the customary technical activities to prepare the signals for their introduction into the satellite communication uplink. It is frequently necessary in order to make the satellite communication feasible or to facilitate it. Consequently, it must be classified as a normal technical procedure relating to the programme-carrying signals and, in accordance with recital 14 in the preamble to Directive 93/83, cannot therefore be regarded as resulting in interruptions to the chain of communication concerned.

62 Finally, as regards the direct transmission of television programmes, it is to be recalled that the intervention of Airfield and Canal Digitaal is confined to supply of the access keys to the broadcasting organisations concerned so as to enable Airfield's subscribers to decode the programmes subsequently by using the decoder card.

63 Given that it is undisputed that Airfield and Canal Digitaal supply those access keys to the broadcasting organisations before the latter introduce the programme-carrying signals into the chain of communication concerned, such intervention by Airfield and Canal Digitaal is not capable of interrupting the chain of communication.

64 Accordingly, the indirect and the direct transmission of television programmes satisfy the second condition, laid down in Article 1(2)(a) of Directive 93/83.

65 As regards the third condition, it is not in dispute that, from the moment when those signals are beamed

up to the satellite, they are addressed to a public, namely the public in possession of a decoder card, supplied by Airfield.

66 Also, although the signals forming part of the indirect transmission of television programmes undergo certain technical adaptations, those adaptations precede their introduction into the satellite communication uplink and constitute – as has been determined in paragraph 61 of the present judgment – normal technical procedures. In those circumstances, the adaptations cannot be regarded as affecting who those signals are intended for.

67 Consequently, the programme-carrying signals emitted in the course of the direct and the indirect transmission of television programmes are intended for reception by the public and such transmission thus satisfies the third condition, laid down in Article 1(2)(a) of Directive 93/83.

68 So far as concerns the fourth condition, it is not in dispute that, in the context of the transmissions at issue in the main proceedings, the devices for decrypting the broadcasts are provided to the public not by the broadcasting organisations but by the satellite package provider. That said, the documents before the Court do not show that the satellite package provider supplies those devices to the public without the broadcasting organisations' consent, but this must be verified by the national court.

69 In light of the foregoing, it must be held, subject to verification by the national court, that both the indirect transmission of television programmes and their direct transmission fulfil all the cumulative conditions laid down in Article 1(2)(a) and (c) of Directive 93/83 and that each of them must therefore be regarded as constituting a single communication to the public by satellite and thus as indivisible.

70 That said, the indivisibility of such a communication, within the meaning of Article 1(2)(a) and (c) of Directive 93/83, does not however signify that the intervention of the satellite package provider in that communication can occur without the authorisation of the right holders concerned.

Authorisation of the communication to the public by satellite

71 First of all, it is clear from Article 2 of Directive 93/83 that copyright holders must authorise any communication of the protected works to the public by satellite.

72 Next, it follows from the Court's case-law that such authorisation must be obtained in particular by a person who triggers such a communication or who intervenes when it is carried out, so that, by means of that communication, he makes the protected works accessible to a new public, that is to say, a public which was not taken into account by the authors of the protected works within the framework of an authorisation given to another person (see, by analogy, with regard to communication to the public within the meaning of Article 3 of Directive 2001/29, [Case C-306/05 SGAE \[2006\] ECR I-11519, paragraphs 40 and 42](#), and the order of 18 March 2010 in Case C-136/09 Organismos

Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon, paragraph 38).

73 This is indeed borne out by recital 17 in the preamble to Directive 93/83, according to which the right holders concerned must be ensured an appropriate remuneration for the communication to the public by satellite of their works that takes account of all aspects of the broadcast, such as its actual audience and its potential audience (see, to this effect, *Football Association Premier League and Others*, paragraphs 108 and 110).

74 However, that authorisation does not have to be obtained by the person concerned if his intervention when the communication to the public is carried out is limited, in accordance with recital 27 in the preamble to Directive 2001/29, to the mere provision of physical facilities for enabling or making the communication.

75 In this context, it is to be observed that, in accordance with Article 1(2)(a) of Directive 93/83, a communication to the public by satellite, such as that at issue in the main proceedings, is triggered by the broadcasting organisation under whose control and responsibility the programme-carrying signals are introduced into the chain of communication leading to the satellite. Nor is it in dispute that, as a general rule, that organisation thereby renders the protected works accessible to a new public. Consequently, it is required to obtain the authorisation provided for in Article 2 of Directive 93/83.

76 Nevertheless, that finding does not preclude intervention by other operators in the course of a communication such as that referred to in the preceding paragraph with the result that they render the protected subject-matter accessible to a public wider than that targeted by the broadcasting organisation concerned, that is to say, a public which was not taken into account by the authors of those works when they authorised the use of the latter by the broadcasting organisation. In such a situation, the intervention of those operators is thus not covered by the authorisation granted to the broadcasting organisation.

77 In circumstances such as those in the main proceedings, that may in particular be the case where an operator expands the circle of persons having access to that communication and thereby renders the protected subject-matter accessible to a new public.

78 In this context, it is to be pointed out that a satellite package provider, first, encrypts the communication concerned or supplies access keys for the communication to the broadcasting organisations so that its subscribers can decode it and, second, provides the corresponding decoding devices to those subscribers, these operations thus enabling the link to be established between the communication introduced by the broadcasting organisation and those subscribers.

79 Such activity is not to be confused with mere provision of physical facilities in order to ensure or improve reception of the original broadcast in its catchment area, which falls within the cases referred to in paragraph 74 of the present judgment, but constitutes an intervention without which those subscribers would not be able to enjoy the works broadcast, although

physically within that area. Thus, those persons form part of the public targeted by the satellite package provider itself, which, by its intervention in the course of the satellite communication in question, makes the protected works accessible to a public which is additional to the public targeted by the broadcasting organisation concerned.

80 Moreover, the satellite package provider's intervention amounts to the supply of an autonomous service performed with the aim of making a profit, the subscription fee being paid by those persons not to the broadcasting organisation but to the satellite package provider. It is undisputed that that fee is payable not for any technical services, but for access to the communication by satellite and therefore to the works or other protected subject-matter.

81 Finally, it is to be noted that the satellite package provider does not enable its subscribers to access the communication of a single broadcasting organisation, but brings together a number of channels from various broadcasting organisations in a new audiovisual product, the satellite package provider deciding upon the composition of the package thereby created.

82 Accordingly, it must be found that the satellite package provider expands the circle of persons having access to the television programmes and enables a new public to have access to the works and other protected subject-matter.

83 That satellite package provider is therefore required to obtain authorisation, from the right holders concerned, for its intervention in the communication by satellite, unless the right holders have agreed with the broadcasting organisation concerned that the protected works will also be communicated to the public through that provider, on condition, in the latter situation, that the provider's intervention does not make those works accessible to a new public.

84 Having regard to the foregoing, the answer to the questions referred is that Article 2 of Directive 93/83 must be interpreted as requiring a satellite package provider to obtain authorisation from the right holders concerned for its intervention in the direct or indirect transmission of television programmes, such as the transmission at issue in the main proceedings, unless the right holders have agreed with the broadcasting organisation concerned that the protected works will also be communicated to the public through that provider, on condition, in the latter situation, that the provider's intervention does not make those works accessible to a new public.

Costs

85 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 2 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules con-

cerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission must be interpreted as requiring a satellite package provider to obtain authorisation from the right holders concerned for its intervention in the direct or indirect transmission of television programmes, such as the transmission at issue in the main proceedings, unless the right holders have agreed with the broadcasting organisation concerned that the protected works will also be communicated to the public through that provider, on condition, in the latter situation, that the provider's intervention does not make those works accessible to a new public.

[Signatures]

* Language of the case: Dutch.
