Court of Justice EU, 24 November 2011, UCMR – ADA v Circus Globus

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Communication to a public: a public which is not present: no direct physical contact

- **In the light of the foregoing, the answer to Questions 1 and 2 is that Directive 2001/29 and, more specifically, Article 3(1) thereof, must be interpreted as referring only to communication to a public which is not present at the place where the communication originates, to the exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work**

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Court of Justice EU, 24 November 2011

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

JUDGMENT OF THE COURT (Third Chamber)

24 November 2011 (*)

(Approximation of laws – Copyright and related rights – Directive 2001/29/EC – Article 3 – Concept of 'communication of a work to a public present at the place where the communication originates'– Dissemination of musical works in the presence of an audience without paying the collective management organisation the appropriate copyright fee – Entry into contracts, with the authors of the works, for copyright waiver – Scope of Directive 2001/29)

In Case C‑283/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from Înalta Curte de Casaţie şi Justiţie (Romania), made by decision of 14 May 2010, received at the Court on 7 June 2010, in the proceedings

Circul Globus Bucureşti (Circ & Variete Globus Bucureşti)

v

Uniunea Compozitorilor şi Muzicologilor din România – Asociaţia pentru Drepturi de Autor (UCMR – ADA)

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: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Uniunea Compozitorilor şi Muzicologilor din România – Asociaţia pentru Drepturi de Autor (UCMR – ADA), by A. Roată‑Palade, avocat,

– the Romanian Government, by A. Popescu, acting as Agent, and by A. Wellman and A. Borobeică, counsellors,

– the Spanish Government, by N. Díaz Abad, acting as Agent,

– the European Commission, by J. Samnadda and I.V. Rogalski, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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).

2 The reference has been made in proceedings between Uniunea Compozitorilor şi Muzicologilor din România – Asociaţia pentru Drepturi de Autor (UCMR – ADA) ('UCMR – ADA') and Circul Globus Bucureşti, now Circ & Variete Globus Bucureşti ('Globus Circus') concerning the alleged infringement, by Globus Circus, of intellectual property rights managed by UCMR – ADA.

Legal context

International law

3 Article 11 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention'), states:

'1. Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

2. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.'

European Union ('EU') law

4 Recitals 2 and 5 in the preamble to Directive 2001/29 state:

'(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products

and services and the creation and exploitation of their creative content.

...

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.'

5 Recital 18 to Directive 2001/29 is worded as follows:

'This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.'

6 Recitals 23 and 24 to that directive state:

'(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

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

7 Under Article 3(1) of Directive 2001/29:

'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.'

National law

8 Article 15(1) of Law No 8/1996 on copyright and related rights (legea nr 8/1996 privind drepturile de autor şi drepturile conexe), as amended by Law No 285/2004, ('the Copyright Law') provides:

'Communication to the public means any communication of a work, made directly or by technical means, carried out in a place open to the public or in any place in which the persons present are outside the circle of family and acquaintances, including stage or film presentation, acting or recitation, or any other public means of directly performing or presenting a work, the public exhibition of works of the plastic arts, the applied arts, photographic or architectonic works, the public showing of cinematographic works and other audio-visual works, including digital artworks, the presentation of works in a public place by means of sound or audio-visual recordings, as well as the presentation of works in a public place by any means of radio or television broadcasting. Communication to the public also means any communication, wireless or not, by which works are made available to the public, including via the internet or other information networks, so that every member of the public can have access to such works from a place and at a time individually chosen by them ... '

9 Article 123(1) of the Copyright Law states:

'Holders of copyright and related rights may exercise the rights granted to them under this Law either individually or, on the basis of an authorisation, through collective management organisations, subject to the conditions laid down in this Law.'

10 Paragraphs 1(e) and 2 of Article 123a of the Copyright Law provide:

'1. Collective management shall be compulsory in order to exercise the following rights:

...

(e) right of communication of musical works to the public, with the exception of the public showing of cinematographic works;

...

2. In respect of the categories of rights referred to in paragraph 1, the collective management organisations shall also represent the holders of rights who have not commissioned them to do so.

... '

11 Under Article 130(1) of the Copyright Law, collective management organisations have an obligation:

'(a) to grant, in exchange for a fee, authorisations in the form of non-exclusive licences to users who apply for them in writing before any use of the protected repertoire;

(b) to draw up methodologies for their fields of business, including the appropriate copyright fees, which must be negotiated with users with a view to the payment of those fees, in the event of works whose method of use makes it impossible for the copyright holders to grant individual authorisation;

...

(e) to collect the sums due from users and to distribute them among the copyright holders, in accordance with this Law;

...

(h) to ask users – or their intermediaries – to communicate the data and documents necessary for calculating the total fees to be collected, together with data concerning the works used, with a note of the names of the copyright holders, with a view to the distribution of those fees; ... '

12 Paragraphs 1(e) and 4 of Article 131a of the Copyright Law provide:

'1. The methodology shall be negotiated by the collective management organisations and the representatives referred to in Article 131(2)(b) on the basis of the following main criteria:

...

(e) the proportion of uses for which the user has fulfilled its payment obligations by means of direct contracts with the copyright holders;

...

4. Where collective management is compulsory under Article 123a, negotiations relating to methodologies shall not take into account the criteria referred to

in paragraph 1(c) and (e), the repertoires being considered extended repertoires.'

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

13 UCMR – ADA is a collective management organisation which handles music copyright.

14 Between May 2004 and September 2007, Globus Circus, in its capacity as organiser of circus and cabaret performances, publicly disseminated musical works for commercial purposes without obtaining a 'non‑exclusive' licence from UCMR – ADA and without paying UCMR – ADA the appropriate copyright fees.

15 On the view that Globus Circus had infringed its rights, UCMR – ADA brought proceedings before Tribunalul Bucureşti (District Court of Bucharest). In support of its action, it argued that, under the Copyright Law, exercise of the right to communicate musical works to the public is subject to compulsory collective management.

16 Globus Circus responded that it had entered into contracts with the authors of the musical works used in the performances which it had organised, under which copyright had been waived, and that it had paid those authors an appropriate fee in return for using their works. As the copyright holders had opted for individual management of their rights in accordance with Article 123(1) of the Copyright Law, there was no legal basis for the claim for payment made by the collective management organisation.

17 Civil Section IV of Tribunalul Bucureşti upheld the action in part, ordering Globus Circus to pay the sums due for the communication of musical works to the public for commercial purposes between May 2004 and September 2007, together with the corresponding late payment penalties. Globus Circus' appeal against that decision was dismissed by Curtea de Apel Bucureşti (Court of Appeal of Bucharest).

18 Both at first instance and on appeal, it was held that Article 123a(1)(e) of the Copyright Law expressly provides that the exercise of the right to communicate musical works to the public must be managed collectively. Accordingly, Globus Circus was required to pay UCMR – ADA the fee calculated according to the methodology negotiated by the collective management organisation, no account being taken of the contracts which Globus Circus had entered into with the authors for the various performances organised between 2004 and 2007.

19 Globus Circus then brought an appeal against the decision of Curtea de Apel Bucureşti before Înalta Curte de Casaţie şi Justiţie (the Supreme Court of Cassation and Justice) in the context of which it argued, inter alia, that Directive 2001/29 had been incorrectly transposed into Romanian national law. According to Globus Circus, even though the right of communication to the public was clearly defined in recitals 23 and 24 to Directive 2001/29 in the broad sense of covering all communication to the public not present at the place where the communication originates, Article 123a of the Copyright Law had not been amended and continued to require collective management of the right of communication to the public of musical works, without making any distinction between direct communication and indirect communication.

20 In that way, a limitation additional to those provided for under Directive 2001/29 had been placed on the exercise of the right of communication to the public. The collective management organisation was placing itself between the authors of musical works and the organisers of performances, with the result that the author was paying the commission charged by that collective management organisation and the user was making a double payment since, even if it paid the copyright fees, it was obliged to pay them again through the collective management organisation.

21 In response to those assertions, UCMR – ADA contends that there is no discrepancy between national law and Directive 2001/29, because the scope of that directive covers only acts whereby specific musical works are communicated to the public through the information society. As regards the right of direct communication to the public at issue in the case before the referring court, recital 18 to Directive 2001/29 left the Member States free to legislate and the Romanian legislature has opted for a compulsory collective management system.

22 In its order for reference, the national court points out that, even if the author of the musical works used is not a member of the collective management organisation, the user is obliged to obtain a non-exclusive licence and to pay the collective management organisation a fee, in accordance with Article 123a(2) of the Copyright Law, which provides that, in respect of the categories of rights listed in Article 123a(1), collective management organisations also represent copyright holders who have not commissioned them to do so.

23 Moreover, there is no provision in that Law enabling those copyright holders to exclude their works from collective management, whereas express provision is made to that effect in, for example, Article 3(2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), in the case of the right of communication to the public via satellite.

24 The national court concludes from this that such legislation seems to impose too harsh a limitation on contractual freedom and is not consistent with the dual objective pursued by means of the compulsory collective management of the right of communicating musical works to the public, which is both to enable works to be used and to ensure that the authors receive payment in return.

25 In that context, the national court asks in particular whether such collective management is consistent not only with the aim of protecting copyright, but also with the aim of Directive 2001/29, which seeks to maintain a fair balance between the rights of copyright holders and those of users.

26 In those circumstances, Înalta Curte de Casaţie şi Justiţie decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 3(1) of Directive 2001/29 ... to be interpreted to the effect that "communication to the public" means:

(a) exclusively communication to the public where the public is not present at the place where the communication originates; or

(b) also any other communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work?

2. In the event that, in answer to Question 1, point (a) represents the correct meaning, does that mean that the acts, referred to in point (b), by which works are communicated directly to the public do not fall within the scope of that directive or that they do not constitute communication of a work to the public, but rather the public performance of a work, within the meaning of Article 11(1)(i) of the Berne Convention?

3. In the event that, in answer to Question 1, point (b) represents the correct meaning, does Article 3(1) of [Directive 2001/29] permit Member States to make statutory provision for the compulsory collective management of the right to communicate musical works to the public, irrespective of the means of communication used, even though that right can be and is managed individually by authors, no provision being made for authors to be able to exclude their works from collective management?'

Jurisdiction of the Court

27 As is clear from the order for reference, the dispute in the main proceedings concerns events which took place between May 2004 and September 2007, whereas Romania did not accede to the European Union until 1 January 2007.

28 In that regard, it should be borne in mind that the Court has jurisdiction to interpret the provisions of EU law only as regards their application in a new Member State with effect from the date of that State's accession to the European Union (see, to that effect, Case C‑302/04 Ynos [2006] ECR I‑371, paragraph 36, and Case C‑64/06 Telefónica O2 Czech Republic [2007] ECR I‑4887, paragraph 23).

29 As the events in the main proceedings occurred in part after the date of Romania's accession to the European Union, the Court has jurisdiction to reply to the questions referred (see, to that effect, Case C‑96/08 CIBA [2010] ECR I‑2911, paragraph 15).

Consideration of the questions referred

Questions 1 and 2

30 By Questions 1 and 2, which should be examined together, the national court asks, in essence, whether Directive 2001/29 and, more specifically, Article 3(1) thereof, are to be interpreted as referring only to communication to a public which is not present at the place where the communication originates or also to any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work.

31 It must be pointed out that neither Article 3(1) of Directive 2001/29 nor any other provision of that directive defines the concept of 'communication to the public'.

32 In those circumstances, for the purposes of interpreting a concept of EU law, account should be taken not only of the wording of the provision in which it appears but also of the context in which it is used and of the aims of the legislation of which it is part.

33 First, regarding the context, it should be noted that the second sentence of recital 23 to Directive 2001/29 states that the right of communication to the public 'should be understood in a broad sense covering all communication to the public not present at the place where the communication originates'.

34 In that connection, in **Joined Cases C‑403/08 and C‑429/08 Football Association Premier League and Others [2011] ECR I‑0000**, the Court clarified the scope of recital 23 to Directive 2001/29 and, more specifically, of the second sentence in that recital.

35 Accordingly, the Court pointed out – focusing on the history of Directive 2001/29 and, more specifically, on Common Position (EC) No 48/2000, adopted by the Council on 28 September 2000 with a view to adopting Directive 2001/29 (OJ 2000 C 344, p. 1) – that recital 23 to that directive follows from the proposal of the European Parliament, which wished to specify, in that recital, that communication to the public for the purposes of that directive does not cover 'direct representation or performance', a concept referring to that of 'public performance' which appears in Article 11(1) of the Berne Convention and encompasses interpretation of the works before the public that is in direct physical contact with the actor or performer of those works **(see Football Association Premier League and Others, paragraph 201).**

36 Thus, in order to exclude such direct public representation and performance from the scope of the concept of 'communication to the public' in the context of Directive 2001/29, that recital explained that communication to the public covers all communication to the public not present at the place where the communication originates **(see Football Association Premier League and Others, paragraph 202).**

37 However, in a situation such as that at issue in the case before the referring court, where – as is clear from the order for reference – musical works communicated to the public in the context of circus and cabaret performances are performed live, that element of direct physical contact exists, with the result that, contrary to the requirement referred to in the second sentence of recital 23 to Directive 2001/29, the public is present at the place where the communication originates.

38 Next, regarding the aim of Directive 2001/29, it should be noted that it is clear from recitals 2 and 5 thereto that that directive seeks to create a general and flexible framework at EU level in order to foster the development of the information society and to adapt and supplement the current law on copyright and relat-

ed rights in order to respond to technological development, which has created new ways of performing protected works.

39 It follows that the harmonisation sought by Directive 2001/29, to which the first sentence of recital 23 thereto makes reference, is not intended to cover 'conventional' forms of communication to the public, such as the live presentation or performance of a work.

40 This is borne out, moreover, by the third and fourth sentences of recital 23 to Directive 2001/29, according to which the right of communication to the public should cover any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting, and should not cover any other acts. Accordingly, that right does not cover any activity which does not involve a 'transmission' or a 'retransmission' of a work, such as live presentations or performances of a work.

41 In the light of the foregoing, the answer to Questions 1 and 2 is that Directive 2001/29 and, more specifically, Article 3(1) thereof, must be interpreted as referring only to communication to a public which is not present at the place where the communication originates, to the exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work.

Question 3

42 In the light of the reply given to Questions 1 and 2, it is not necessary to answer Question 3.

Costs

43 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:

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 and, more specifically, Article 3(1) thereof, must be interpreted as referring only to communication to a public which is not present at the place where the communication originates, to the exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work.