

Court of Justice EU, 26 March 2015, C More Entertainment v Sandberg



COPYRIGHT

The exclusive rights of broadcasting organizations as referred to in Article 3(2)(d) of the Copyright Directive can be expanded to live sports events on the internet, if it does not affect the protection of copyright

• Having regard to all the foregoing considerations, the answer to the question referred is that Article 3(2) of Directive 2001/29 must be interpreted as not precluding national legislation extending the exclusive right of the broadcasting organisations referred to in Article 3(2)(d) as regards acts of communication to the public which broadcasts of sporting fixtures made live on internet, such as those at issue in the main proceedings, may constitute, provided that such an extension does not undermine the protection of copyright.

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Court of Justice EU, 26 March 2015

(J. Malenovský (Rapporteur), K. Jürimäe, A. Prechal)
JUDGMENT OF THE COURT (Ninth Chamber)

26 March 2015 (*)

(Reference for a preliminary ruling — Approximation of laws — Copyright and related rights — Directive 2001/29/EC — Information society — Harmonisation of certain aspects of copyright and related rights — Article 3(2) — Direct broadcast of a sporting fixture on an internet site)

In Case C-279/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta domstolen (Sweden), made by decision of 15 May 2013, received at the Court on 22 May 2013, in the proceedings

C More Entertainment AB

v

Linus Sandberg,

THE COURT (Ninth Chamber), composed of K. Jürimäe, President of the Chamber, J. Malenovský (Rapporteur) and A. Prechal, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure, after considering the observations submitted on behalf of:

– C More Entertainment AB, by P. Bratt and S. Feinsilber, advokater,

– Mr Sandberg, by L. Häggström, advokat,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by J. Enegren and J. Samnadda, acting as Agents,

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

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(2) 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 request has been made in proceedings between C More Entertainment AB ('C More Entertainment') and Mr Sandberg concerning the placing by him on an internet site of clickable links by means of which internet users can gain access to the live broadcast, on another site, of ice hockey games without having to pay the sum asked by the operator of the other site.

Legal context

Directive 2001/29

3 Recitals 1, 7, 20, 23 and 25 of Directive 2001/29 state:

'(1) The [EC] Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

...

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

...

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular [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), as amended by Council Directive 93/83/EEC of 29 October 1993 (OJ 1993 L 290, p. 9; 'Directive 92/100'). It] develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

...

(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.

...

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.'

4 Article 1 of Directive 2001/29, entitled 'Scope', provides in paragraph 2:

'Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

...

(b) rental right, lending right and certain rights related to copyright in the field of intellectual property;

...

5 Article 3 of that directive, entitled 'Right of communication to the public of works and right of making available to the public other subject-matter', states:

'1. 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.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

...

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.'

Directive 2006/115/EC

6 Directive 92/100, in force at the time of the adoption of Directive 2001/29, was repealed and replaced by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28). Directive 2006/115 codifies and reiterates, in terms analogous to those of Directive 92/100, the provisions of that directive.

7 Under recital 16 in the preamble to Directive 2006/115:

'Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.'

8 Article 8 of that directive, entitled 'Broadcasting and communication to the public', provides in paragraph 3:

'Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.'

9 Article 12 of Directive 2006/115, entitled 'Relation between copyright and related rights', states:

'Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.'

The dispute in the main proceedings and the question referred

10 C More Entertainment is a pay-TV station which, inter alia, broadcasts live on its internet site, for payment of a fee, ice hockey matches.

11 In autumn 2007, C More Entertainment broadcast on that internet site a number of ice hockey matches, to which persons interested could have access by paying the sum of SEK 89 (approximately EUR 9.70) per match.

12 On his internet site, Mr Sandberg created links enabling the paywall put in place by C More Entertainment to be circumvented. Via those links, internet users could thus access the live broadcasts of two ice hockey matches by C More Entertainment on 20 October and 1 November 2007 for free.

13 Before the first of those matches, C More Entertainment had contacted Mr Sandberg by telephone and asked him to remove the link without success. After that match, C More Entertainment warned Mr Sandberg in a letter that it regarded the placing of those links as an infringement of the company's rights.

14 During the second ice hockey match, C More Entertainment equipped the webcast with a technical protection which prevented any access to that broadcast via the links created by Mr Sandberg.

15 Mr Sandberg was prosecuted before the Hudiksvalls tingsrätt (District Court, Hudiksvall) for offences against the Law (1960:729) on Copyright in Literary and Artistic Works (lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk ('upphovsrättslagen')). On 10 November 2010, the accused was found guilty of an infringement of the copyright of which, in the view of that court, C More Entertainment was the holder and was fined and ordered to pay damages and interest to that company.

16 Both Mr Sandberg and C More Entertainment appealed against that judgment before the Hovrätten för Nedre Norrland (Court of Appeal of Nedre Norrland).

17 By a decision of 20 June 2011, that court found that no part of the commentators', cameramen's or picture producers' work on the broadcasts of the ice hockey

matches, taken on its own merits or some or all of those parts taken together, reached the level of originality required for copyright protection under the upphovsrättslagen. Next, it held that, as regards the broadcasts at issue in the main proceedings, C More Entertainment was not the holder of a copyright, but of related rights, which had been infringed. Consequently, that court ordered Mr Sandberg to pay fines higher than those imposed at first instance, but slightly reduced the compensation awarded to C More Entertainment.

18 C More Entertainment brought an appeal against that judgment before the Högsta domstolen (Supreme Court), seeking a declaration that it is the holder of copyright and to have the amount of damages due to it reviewed and increased.

19 That court took the view that it does not follow from either the wording of Directive 2001/29 or the case-law of the Court that the insertion of a hypertext link on an internet site constitutes an act of communication to the public. In addition, that court noted that the relevant national legislation provides for wider related rights than those set out in Article 3 (2) of Directive 2001/29 since, unlike that provision, the protection conferred by Swedish law is not restricted to acts of making works available ‘on demand’. In those circumstances, the Högsta domstolen decided to stay the proceedings and to refer five questions to the Court for a preliminary ruling.

20 By a letter of 26 March 2014, the Registry of the Court sent to the Högsta domstolen a copy of the judgment in *Svensson and Others* (C-466/12, EU:C:2014:76), in which a number of questions concerning whether the placing, on an internet site, of a clickable link may be classified as an act of communication to the public were examined, requesting that court to inform it whether, having regard to that judgment, it wished to maintain its request for a preliminary ruling.

21 By a decision of 20 October 2014, the Högsta domstolen decided to withdraw the first four questions referred for a preliminary ruling and to maintain only the fifth question, which reads as follows:

‘May the Member States give wider protection to the exclusive right of authors by enabling “communication to the public” to cover a greater range of acts than provided for in Article 3 (2) of [Directive 2001/29]?’

The question referred for a preliminary ruling

22 It is apparent from the file that the main proceedings concern the provision, on an internet site, of links enabling internet users to access, on the site of a broadcasting organisation, live broadcasts of ice hockey matches, without having to pay the fee required by that organisation for that access. In those circumstances, the question referred by the referring court must be understood as relating, in essence, to whether Article 3(2) of Directive 2001/29 must be interpreted as precluding national legislation extending the exclusive right of the broadcasting organisations referred to in Article 3(2)(d) as regards acts of communication to the public which broadcasts of

sporting fixtures made live on internet, such as those at issue in the main proceedings, may constitute.

23 As a preliminary point, it must be noted that, in accordance with Article 3(2)(d) of Directive 2001/29, Member States are to provide for the exclusive right for broadcasting organisations to authorise or prohibit the making available of fixations of their broadcasts to the public, in such a way that members of the public may access them from a place and at a time individually chosen by them.

24 Firstly, as follows from the wording of Article 3(1) of Directive 2001/29, and in particular from the terms ‘any communication to the public of their works, ... including the making available to the public’, the concept of ‘making available to the public’, also used in Article 3(2) of that directive, forms part of the wider ‘communication to the public’.

25 Secondly, it is apparent from Article 3(2) of that directive that, in order to be classified as an act of ‘making available to the public’ within the meaning of that article, an act must meet, cumulatively, both conditions set out in that provision, namely that members of the public may access the protected work from a place and at a time individually chosen by them.

26 As is clear from the explanatory memorandum to the Commission Proposal of 10 December 1997 (COM(97) 628), which led to the adoption of Directive 2001/29, confirmed by recital 25 in the preamble to that directive, ‘making available to the public’, for the purposes of Article 3 of the directive, is intended to refer to ‘interactive on-demand transmissions’ characterised by the fact that members of the public may access them from a place and at a time individually chosen by them (see, to that effect, [judgment in SCF, C-135/10, EU:C:2012:140, paragraph 59](#)).

27 That is not the case of transmissions broadcast live on internet, such as those at issue in the main proceedings.

28 The referring court asks none the less whether Article 3(2) of Directive 2001/29 is to be understood as precluding the Member States also granting the broadcasting organisations referred to in Article 3(2)(d) an exclusive right as regards acts which, such as those at issue in the main proceedings, could be classified as acts of communication to the public but which do not constitute acts of making available to the public the fixations of their broadcasts in such a way that members of the public may access them from a place and at a time individually chosen by them.

29 In that regard, first of all, as is apparent from recital 7 in the preamble to Directive 2001/29, the objective of that directive is to harmonise copyright and related rights as far as is necessary for the smooth functioning of the internal market. It follows from that recital that the objective of that directive is not to remove or prevent differences between the national legislations which do not adversely affect the functioning of the internal market. Thus, and as is also clear from the heading of that directive, the EU legislature has harmonised copyright and related rights only in part.

30 It follows from recitals 23 and 25 in the preamble to that directive that the EU legislature sought, firstly, to harmonise further the author's right of communication to the public and, secondly, to overcome the legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission by providing for harmonised protection at Community level for that type of act.

31 However, neither Article 3(2) of Directive 2001/29 nor any other provision thereof states that the EU legislature sought to harmonise and, in consequence, prevent or remove any differences between the national legislations as regards the extent of the protection which the Member States may grant to the holders of the rights referred to in Article 3(2)(d) with regard to certain acts, such as those at issue in the main proceedings, which are not expressly referred to in that provision.

32 Furthermore, in accordance with recital 20 in the preamble to Directive 2001/29, that directive is based on principles and rules already laid down in the directives in force in the area of intellectual property, including Directive 92/100 (see [judgment in Football Association Premier League and Others, C-403/08](#) and C-429/08, EU:C:2011:631, paragraph 187).

33 It is apparent from recital 16 in the preamble to Directive 2006/115, which replaced Directive 92/100, that the Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in that directive in respect of broadcasting and communication to the public.

34 Article 8 of that directive, entitled 'Broadcasting and communication to the public', states in paragraph 3, in particular, that Member States are to provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

35 Thus, it must be held that Directive 2006/115 gives the Member States the option of providing for more protective provisions with regard to the broadcasting and communication to the public of transmissions made by broadcasting organisations than those which must be instituted in accordance with Article 8(3) of that directive. Such an option implies that the Member States may grant broadcasting organisations an exclusive right to authorise or prohibit acts of communication to the public of their transmissions on conditions different from those laid down in Article 8(3) and in particular transmissions to which members of the public may obtain access from a place individually chosen by them, it still being understood that, as provided for in Article 12 of Directive 2006/115, such a right must not affect the protection of copyright in any way.

36 It follows that Article 3(2) of Directive 2001/29 must be interpreted as not affecting the option open to the Member States, set out in Article 8(3) of Directive

2006/115, read in conjunction with recital 16 to that directive to grant broadcasting organisations the exclusive right to authorise or prohibit acts of communication to the public of their transmissions provided that such protection does not undermine that of copyright.

37 Having regard to all the foregoing considerations, the answer to the question referred is that Article 3(2) of Directive 2001/29 must be interpreted as not precluding national legislation extending the exclusive right of the broadcasting organisations referred to in Article 3(2)(d) as regards acts of communication to the public which broadcasts of sporting fixtures made live on internet, such as those at issue in the main proceedings, may constitute, provided that such an extension does not undermine the protection of copyright.

Costs

38 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 hereby rules: Article 3(2) 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 must be interpreted as not precluding national legislation extending the exclusive right of the broadcasting organisations referred to in Article 3 (2)(d) as regards acts of communication to the public which broadcasts of sporting fixtures made live on internet, such as those at issue in the main proceedings, may constitute, provided that such an extension does not undermine the protection of copyright.

* Language of the case: Swedish.