

JUDGMENT OF THE COURT (Ninth Chamber)

19 November 2015 (*)

(Reference for a preliminary ruling — Directive 2001/29/EC — Article 3(1) — Communication to the public — Definition of ‘communication’ and ‘public’ — Distribution of television programmes — Process known as ‘direct injection’)

In Case C-325/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the hof van beroep te Brussel (Brussels Court of Appeal, Belgium), made by decision of 17 June 2014, received at the Court on 7 July 2014, in the proceedings

SBS Belgium NV

v

Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM),

THE COURT (Ninth Chamber),

composed of J. Malenovský (Rapporteur), acting as President of the Chamber, M. Safjan and K. Jürimäe, Judges,

Advocate General: N. Wahl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 June 2015,

after considering the observations submitted on behalf of:

- SBS Belgium NV, by P. Maeyaert and A. De Bleeckere, advocaten,
- la Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM), by E. Marissens, avocat,
- the French Government, by D. Segoin and F.-X. Bréchet, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by J. Samnadda and F. Wilman, 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 This application has been presented in proceedings between SBS Belgium NV ('SBS') and the Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) (Belgian society for authors, composers and editors) regarding the obligation to pay a fair amount for the transmission of programmes via the technique of direct injection.

Legal context

- 3 Recitals 23 and 27 in the preamble to Directive 2001/29 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.

...

(27) 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.’
- 4 Article 3 of that directive, headed ‘Right of communication to the public of works and right of making available to the public other subject-matter’, provides:

‘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.

...

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.’

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

- 5 SABAM, a copyright administration society, represents authors in relation to the grant of permission for third party use of their copyright-protected works and in the collection of the fees for such use.
- 6 SBS is a Dutch-language commercial broadcasting organisation which produces and markets television programmes. In the context of its broadcasting activities, SBS operates several private commercial transmitters in Belgium. Its programme schedule includes both programmes which it has produced itself and programmes purchased from domestic and foreign production companies and programme suppliers.
- 7 SBS broadcasts its programmes exclusively by a technique named direct injection. This is a two-step process by which SBS transmits its programme-carrying signals ‘point to point’ via

a private line to its distributors such as Belgacom, Telenet and TV Vlaanderen. At that stage, those signals cannot be received by the general public. The distributors then send the signals, which may or may not be in encrypted form, to their subscribers so that the latter can view the programmes on their television sets, whether or not with the help of a decoder made available by the distributor. Depending on the distributor, those signals are transmitted by satellite, in the case of TV Vlaanderen, by cable, in the case of Telenet, or by xDSL line, in the case of Belgacom.

- 8 SABAM takes the view that SBS, as a broadcasting organisation, makes a communication to the public within the meaning of Article 3 of Directive 2001/29 by transmitting via the direct injection method. Therefore, the authorisation of the copyright holders is required. It requests, as compensation, the payment of a sum of money.
- 9 SBS opposes that request. According to SBS, only distributors and other organisations of the same type make a communication to the relevant public in relation to copyright. It considers, therefore, that no remuneration is owed.
- 10 The rechtbank van koophandel te Brussel (Commercial Court, Brussels) allowed SABAM's application and ordered SBS to pay close to a million euros in copyright fees for 2009.
- 11 SBS appealed against the judgment of that court to the referring court.
- 12 In those circumstances, the Hof van beroep te Brussel (Court of Appeal, Brussels) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does a broadcasting organisation which transmits its programmes exclusively via the technique of direct injection — that is to say, a two-step process in which it transmits its programme-carrying signals in an encrypted form via satellite, a fibre-optic connection or another means of transmission to distributors (satellite, cable or xDSL-line), without the signals being accessible to the public during, or as a result of, that transmission, and in which the distributors then send the signals to their subscribers so that the latter may view the programmes — make a communication to the public within the meaning of Article 3 of Directive 2001/29?’

The question referred for a preliminary ruling

- 13 By its question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that a broadcasting organisation makes an act of communication to the public, within the meaning of that provision, when it transmits its programme-carrying signals only to signal distributors, without those signals being accessible to the public during, and as a result of that transmission, those distributors then sending those signals to their respective subscribers so that they may watch those programmes.
- 14 In that regard, first of all, it is to be noted that the principal objective of Directive 2001/29 is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that ‘communication to the public’, appearing in Article 3(1) of that directive, must be interpreted broadly, as recital 23 in the preamble to the directive indeed expressly states (judgment in *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 20 and the case-law cited).

- 15 The Court has previously held that the concept of ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29 includes two cumulative criteria, namely, an ‘act of communication’ of a work and the communication of that work to a ‘public’ (see judgment in *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 16).
- 16 In the first place, as regards the ‘act of communication’, that refers to any transmission of the protected works, irrespective of the technical means or process used (judgment in *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 193).
- 17 Moreover, every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question (judgment in *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 24).
- 18 In the circumstances of this case, it is apparent from the request for a preliminary ruling that the broadcasting organisation before the court in the main proceedings transmits programme-carrying signals to several signal distributors by satellite, cable or xDSL line, and, therefore, by different technical means or processes.
- 19 It follows that such transmissions, parallel or otherwise, must be considered to constitute ‘acts of communication’, within the meaning of Article 3(1) of Directive 2001/29.
- 20 In the second place, if the protected works are to fall within the definition of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, they must also, as noted in paragraph 15 of this judgment, actually be communicated to a ‘public’.
- 21 In that regard, it is apparent from the Court’s case-law that the term ‘public’ refers to an indeterminate number of recipients, potential television viewers, and implies, moreover, a fairly large number of persons (see, to that effect, judgments in *SGAE*, C-306/05, EU:C:2006:764, paragraphs 37 and 38, and *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 32).
- 22 However, in a situation such as that before the court in the main proceedings, as is clear from the question referred for a preliminary ruling, the broadcasting organisation in question transmits the programme-carrying signals to specified individual distributors without potential viewers being able to have access to those signals.
- 23 Consequently, the works transmitted by the broadcasting organisation, such as the organisation in the main proceedings, are communicated not to the ‘public’, within the meaning of Article 3(1) of Directive 2001/29, but to specified individual professionals.
- 24 Given the cumulative nature, referred to in paragraph 15 of this judgment, of the two criteria for a communication to the public, where the condition that copyrighted works must be communicated to a public is not satisfied, the transmissions made by a broadcasting organisation, such as that in the main proceedings, does not, in principle, come within the definition of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29.
- 25 Notwithstanding, it cannot be ruled out from the outset, that in some situations, the subscribers of distributors, such as those in the main proceedings, may be considered to be the ‘public’ in relation to the original transmission made by the broadcasting organisation.

- 26 In that regard, it is, first of all, not disputed that distributors, such as those in question, do not in any event make up part of such a public, unlike entities such as the hotels which were the subject of the cases giving rise to the judgments in *SGAE* (C-306/05, EU:C:2006:764) and *Phonographic Performance (Ireland)* (C-162/10, EU:C:2012:141).
- 27 It follows that the subscribers who are the recipients of the broadcasts made by the distributors in question cannot be considered, a priori, to be a ‘new’ public which was not covered by the original act of communication made by the broadcasting organisation (see, *a contrario*, judgment in *SGAE*, C-306/05, EU:C:2006:764, paragraph 40).
- 28 Consequently, in the case before the court in the main proceedings, there is only one ‘public’, namely, that consisting of all the subscribers to each particular distributor.
- 29 In that regard, it is apparent from the wording of the question raised by the national court that it is following the intervention of those distributors that their subscribers are able to watch the television programmes.
- 30 However, the Court has previously held that the distribution of the work broadcast by a professional, such as that in the present case, 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 that professional, and being payable not for any technical services, but for access to the communication in question and, therefore, to the copyright-protected works (see, by analogy, judgment in *Airfield and Canal Digitaal*, C-431/09 and C-432/09, EU:C:2011:648, paragraph 80).
- 31 A transmission made by a professional, in the circumstances set out in the paragraph above, is not just a technical means of ensuring or improving reception of the original broadcast in its catchment area (see, by analogy, judgment in *Airfield and Canal Digitaal*, C-431/09 and C-432/09, EU:C:2011:648, paragraph 79).
- 32 That being so, it is not inconceivable that a distributor might find itself in a position that is not independent in relation to the broadcasting organisation and where its distribution service is purely technical in nature, with the result that its intervention is just a technical means, within the meaning of the Court’s case-law (see, in particular, judgments in *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 194 and *Airfield and Canal Digitaal*, C-431/09 and C-432/09, EU:C:2011:648, paragraphs 74 and 79).
- 33 If that were to be the case, which it is for the national court to ascertain, the subscribers of the distributors in question could be considered to be the public for the purposes of the communication made by the broadcasting organisation, with the result that that organisation would make a ‘communication to the public’.
- 34 In the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that a broadcasting organisation does not carry out an act of communication to the public, within the meaning of that provision, when it transmits its programme-carrying signals exclusively to signal distributors without those signals being accessible to the public during, and as a result of that transmission, those distributors then sending those signals to their respective subscribers so that they may watch those programmes, unless the intervention of the distributors in question is just a technical means, which it is for the national court to ascertain.

Costs

- 35 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 (Ninth Chamber) hereby rules:

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, must be interpreted as meaning that a broadcasting organisation does not carry out an act of communication to the public, within the meaning of that provision, when it transmits its programme-carrying signals exclusively to signal distributors without those signals being accessible to the public during, and as a result of that transmission, those distributors then sending those signals to their respective subscribers so that they may watch those programmes, unless the intervention of the distributors in question is just a technical means, which it is for the national court to ascertain.

[Signatures]

* Language of the case: Dutch.