Court of Justice of the European Communities: Judgment in Lagardère Active Broadcast V. SPRE & GVL

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On 14 July 2005, the Court of Justice of the European Communities delivered a judgment further to the request for a preliminary ruling made by the French *Cour de Cassation* (Supreme Court).The French Court was in need of clarification on the interpretation of Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property and of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

The context of the reference was a dispute between Lagardère Active Broadcast which made use of phonograms protected by intellectual property law for its broadcasts and two bodies collecting royalties on behalf of performers and producers of the phonograms: *the French Société pour la Perception de la Rémunération Equitable* (SPRE) and the *German Gesellschaft zur Verwertung von Leistungsschutzrechten* (GVL). As a broadcasting company established in France, Lagardère created programmes in its Paris studios which were then transmitted to a satellite. In order to reach the entire French territory, the satellite subsequently not only sent signals to repeater stations in France but also to a transmitter at Felsberg in Germany which was technically equipped to broadcast to France on long wave; the latter broadcasting was carried out by Lagardère's subsidiary Europe 1 (Lagardère also possessed a digital audio terrestrial circuit which was used to transmit signals to the Felsberg transmitter before the satellite system was adopted; it is still operational in the event of malfunction of the satellite). As a result of this technicality, the programmes transmitted could also be received in a limited area of Germany even though these programmes were not meant for commercial exploitation there. The point of contention arose when Lagardère's subsidiary Europe 1 continued to apply the terms of an agreement which had been signed with SPRE even after this agreement had expired. Under this agreement, in order to avoid double payment of the royalty for phonogram use, it was able to deduct the royalty paid to GVL from the amount owed to SPRE and it continued to do so unilaterally even as the agreement ceased to be valid after 31 December 1993.

Thus, the French Cour de Cassation was faced with the question as to whether the provisions of Directives 92/100/EEC and 93/83/EEC were to be interpreted as

preventing the remuneration for phonogram use from being governed “not only by the law of the Member State in whose territory the broadcasting company is established but also by the legislation of the Member State in which, for technical reasons, the terrestrial transmitter to the first State is located”. Lagardère (the successor in title to Europe 1), SPRE and the French Government considered only one law to be applicable to the royalty for phonogram use. They based their arguments on Article 1(2)(b) of Directive 93/83/EEC according to which communication to the public by satellite occurs solely in the Member State where the programme-carrying signals are introduced into the chain of communication. In their view, only French law was applicable. On the other hand, GVL, the German Government and the Commission of the European Communities rejected that the kind of communication at issue was covered by Directive 93/83/EEC and therefore concluded that the simultaneous application of the legislation of two Member States was not to be excluded.

The European Court of Justice starts with the definition of “communication to the public by satellite” in order to ascertain whether the broadcasting at hand constitutes a communication within the meaning of Article 1(2)(a) of Directive 93/83/EEC. It recalls this Article defines communication to the public by satellite as “the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for the reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth”. It then builds its judgment based on four points.

First, it states that Directive 93/83/EEC covers satellites which operate on public frequency bands or non-public frequency bands when the latter allow for individual reception to take place in circumstances comparable to those that apply to the former. However, the manner in which Lagardère operates its satellite is such that individual reception does not take place in circumstances comparable to those that apply to communications on public frequency bands: the signals emanating from the satellite in question are coded and can be received only by equipment available solely to professionals who cannot be regarded as part of the public. Second, the Court finds that Lagardère’s transmission technique fails another test laid down in Article 1(2)(a) of Directive 93/83/EEC, namely the requirement that the programme-carrying signals are intended for reception by the public. “It is the signals which must be intended for the public and not the programmes that they carry” the Court explains. However, in this case: “it is the programmes, not the signals transmitted to the satellite and back to earth, that are intended for the public”. In reality, the sole target of the satellite communication by Lagardère is the Felsberg terrestrial transmitter. Third, the Court considers that the existence of a sub-system whose basic unit is a terrestrial transmitter makes it impossible for the satellite to be “the essential, central and irreplaceable element of the system” as is required by Directive 93/83/EEC which speaks of an “uninterrupted chain of communication leading to

the satellite and down towards the earth". Fourth, the Court points to the legal uncertainty involved in the system at hand: the applicability of Directive 93/83/EEC "would be dependent on unforeseeable circumstances linked with the vagaries of satellite operations" since the Felsberg transmitter can be serviced either by the satellite or by the digital audio terrestrial circuit in the event of malfunction of the satellite. All these reasons lead the Court to conclude that: "a broadcast of the kind at issue in this case does not constitute a communication by satellite to the public within the meaning of Article 1(2)(a) of Directive 93/83" as a result the Directive does not preclude the fee for phonogram use being governed, in this case, by the legislation of the two Member States involved.

The second question, referred to the European Court of Justice, related to the determination of an equitable remuneration. As summed up by the French Court, the broadcasting company had been unilaterally deducting "the amount of the royalty paid in the Member State in whose territory the terrestrial transmitter broadcasting to the first State is situated from the amount of the royalty for phonogram use payable in the Member State where it is established", the question was whether it was entitled to do so. The European Court of Justice recalls that the principle of the territoriality of rights relating to copyright is enshrined in the EC Treaty and the relevant Directive (92/100/EEC) merely provides for minimal harmonisation regarding such rights. It asserts that in this case: "in so far as the broadcasting operations are carried out in the territory of two Member States, those rights are based on the legislation of two States". Though it is for Member States to determine what constitutes an equitable remuneration certain criteria such as those contained in the preamble to Directive 93/83/EEC can provide guidance (the cited criteria being: the actual audience, the potential audience and the language version of the broadcast). The Court concludes that though the broadcasts at issue constitute commercial exploitation only within French territory, they can be received in a limited area of German territory. This means an actual or potential audience is not entirely absent and this entails a certain economic value to the use of protected phonograms in the State where the terrestrial transmitter is located. "Consequently, the latter State may, in the light of the principle of territoriality [...] require payment of equitable remuneration for the broadcast of those phonograms within its own territory". The broadcasting company was not entitled to proceed as it did to the unilateral deduction of the amounts owed.

Lagardère Active Broadcast, Jugement de la Cour de justice des Communnautés européennes, 14 Juillet 2005, C-192/04

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004CJ0192:fr:PDF

Lagardère Active Broadcast, Judgment of the ECJ, 14 July 2005, C-192/04

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004CJ0192:EN:PDF