JUDGMENT OF THE COURT (Sixth Chamber)

6 February 2003 *

In Case C-245/00,

REFERENCE to the Court under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Stichting ter Exploitatie van Naburige Rechten (SENA)

and

Nederlandse Omroep Stichting (NOS),

on the interpretation of Article 8(2) of 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),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, C. Gulmann, V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Administrator,

after considering the written observations submitted on behalf of:

— Stichting ter Exploitatie van Naburige Rechten (SENA), by J.L.R.A. Huydecoper and H.G. Sevenster, advocaten,

— Nederlandse Omroep Stichting (NOS), by W. VerLoren van Themaat and R.S. Meijer, advocaten,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the German Government, by A. Dittrich and W.-D. Plessing, acting as Agents,

— the Portuguese Government, by L.I. Fernandes and J.C. de Almeida e Paiva, acting as Agents,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the United Kingdom Government, by G. Amodeo, acting as Agent, assisted by J. Stratford, Barrister,

— the Commission of the European Communities, by K. Banks and H.M.H. Speyart, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Stichting ter Exploitatie van Naburige Rechten (SENA), represented by E. Pijnacker Hordijk and T. Cohen Jehoram, advocaten, of the Nederlandse Omroep Stichting (NOS), represented by W. VerLoren van Themaat, of the Netherlands Government, represented by J. van Bakel, acting as Agent, and the Commission, represented by H.M.H. Speyart, at the hearing on 2 May 2002,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1 By judgment of 9 June 2000, received at the Court on 19 June 2000, the Hoge Raad der Nederlanden referred for a preliminary ruling under Article 234 EC

three questions on the interpretation of Article 8(2) of 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).

2 Those questions were referred in the context of proceedings between the Stichting ter Exploitatie van Naburige Rechten (Association for the Exploitation of Related Rights, hereinafter 'SENA') and the Nederlandse Omroep Stichting (Netherlands Broadcasting Association, hereinafter 'NOS') relating to the determination of the equitable remuneration to be paid to performing artists and phonogram producers for the broadcasting of phonograms by radio and television.

Community legislation

3 The object of Directive 92/100 is to establish harmonised legal protection for the rental and lending right and certain rights related to copyright in the field of intellectual property.

4 It is clear from the first recital of the preamble to Directive 92/100 that harmonisation is intended to remove differences between national laws where they 'are sources of barriers to trade and distortions of competition which impede the proper functioning of the internal market'.

5 The 7th, 11th, 15th and 17th recitals in the preamble to that Directive state as follows:

'Whereas the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky; whereas the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned;

...

Whereas the Community's legal framework on the rental right and lending right and on certain rights related to copyright can be limited to establishing that Member States provide rights with respect to rental and lending for certain groups of rightholders and further to establishing the rights of fixation, reproduction, distribution, broadcasting and communication to the public for certain groups of rightholders in the field of related rights protection;

...

Whereas it is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must retain the possibility to entrust the administration of this right to collecting societies representing them;

...

Whereas the equitable remuneration must take account of the importance of the contribution of the authors and performers concerned to the phonogram or film;

... .'

6 Article 8(1) and (2) of Directive 92/100 provides as follows:

'1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.'

7 The concept of equitable remuneration is not defined in Directive 92/100.

National legislation

8 Article 7 of the Wet op de naburige rechten (Netherlands Law on related rights) of 1 July 1993, as amended by the Law of 21 December 1995 (*Staatsblad* 1995, p. 653, hereinafter 'the WNR'), provides as follows:

'1. A phonogram produced for commercial purposes, or a reproduction thereof, may be broadcast without the permission of the producer of the phonogram and the performing artist or their successors in title or otherwise made public, provided equitable remuneration is paid therefor.

2. Failing an agreement concerning the amount of equitable remuneration, the Arrondissementsrechtbank te 's-Gravenhage [District Court, The Hague] shall have exclusive jurisdiction at first instance to determine the amount of remuneration at the suit of the first party to make application in that regard.

3. The remuneration shall be payable both to the performing artist and the producer, or to the persons entitled under them, and shall be shared equally between them.'

9 Article 15 of the WNR provides that payment of the equitable remuneration referred to in Article 7 is to be made to a legal person acting as representative, to be appointed by the Minister of Justice, which is to be solely responsible for collecting and distributing the remuneration, and that that legal person is to represent in all respects the persons entitled for the purposes of determination of the amount of the remuneration, collection thereof, and the exercise of the exclusive right.

The main proceedings and the questions referred for a preliminary ruling

10 Before the entry into force of the WNR, an agreement had been entered into on 16 December 1986 by NOS and Stichting Radio Nederland Wereldomroep (Radio Netherlands World Broadcasting Association), of the one part, and the Nederlandse Vereniging van Producenten en Importeurs van Beeld en Geluidsdragers (Netherlands Association of Producers and Importers of Image and Sound Media, hereinafter 'NVPI'), of the other part. Under that agreement, NOS was liable to pay NVPI, on an annual basis as from 1984, (indexed) remuneration in consideration of the use of the rights of performing artists and phonogram producers. The remuneration paid by NOS to NVPI under that agreement amounted in 1984 to NLG 605 000 and, in 1994, to NLG 700 000.

11 SENA was, pursuant to Article 15 of the WNR, designated to collect and distribute the equitable remuneration in respect of fees in place of NVPI, whereupon NVPI, by a letter of 23 December 1993, terminated the agreement between itself and NOS.

12 SENA and NOS sought to agree the amount of equitable remuneration to be fixed under the WNR, pursuant to Article 7(1) thereof. They failed to do so and SENA consequently brought an action before the Arrondissementsrechtbank te 's-Gravenhage pursuant to Article 7(2) of the WNR, seeking an order that the equitable remuneration be fixed at NLG 3 500 per hour of television broadcast and NLG 350 per hour of radio broadcast, giving an annual amount claimed of approximately NLG 7 500 000.

13 Based on the agreement of 16 December 1986 and the amounts paid thereunder to NVPI, NOS counterclaimed for an order that the annual amount of equitable remuneration be fixed at NLG 700 000.

14 By two interim judgments of 7 August 1996 and 16 April 1997, the Arrondissementsrechtbank ruled that the remuneration due for 1995 was NLG 2 000 000. It declared that determination of the remuneration due for the following years depended on further information, which it requested be submitted to it.

15 On appeal the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) found, in an interim judgment of 6 May 1999, that the principal issue was how to determine the equitable remuneration referred to in Article 7(1) of the WNR, having regard to the fact that neither that law nor Directive 92/100 gives any specific indication at all as to how to calculate it.

16 The Gerechtshof pointed out, first of all, that Directive 92/100 does not harmonise the method for calculating the equitable remuneration, even though the practice followed in other Member States may have an influence on the one that will be adopted in the Netherlands.

17 Second, it found that it is clear from the WNR's legislative history that the equitable remuneration must correspond approximately to what was payable previously under the agreement between NOS and NVPI, and that a calculation model must be devised which is propitious for ensuring that the level of remuneration is equitable and for enabling such remuneration to be calculated and reviewed; it is for the parties to endeavour to produce such a model in the first instance, using variable and fixed factors.

18 The Gerechtshof proposed the following factors:

— the number of hours of phonograms broadcast;

— the viewing and listening densities achieved by the radio and television broadcasters represented by NOS;

— the tariffs fixed by agreement in the area of performance rights and broadcast rights in respect of musical works protected by copyright;

— the tariffs applied by public broadcasters in Member States adjacent to the Netherlands;

— the amounts paid by commercial stations.

19 SENA brought an appeal in cassation, arguing that the Gerechtshof had used legal reasoning that was incompatible with Directive 92/100, in so far as, with regard to the concept of equitable remuneration, that directive seeks to introduce an autonomous concept of Community law, which is to be interpreted uniformly in the Member States. It contended that the Gerechtshof's analysis leads to identical situations being treated differently.

20 Since SENA's arguments raise questions of interpretation of Directive 92/100, the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the term "equitable remuneration" used in Article 8(2) of the directive a Community concept which must be interpreted and applied in the same way in all the Member States of the European Community?

(2) If so:

(a) What are the criteria for determining the amount of such equitable remuneration?

(b) Should guidance be sought from the levels of remuneration which were agreed or were customary as between the organisations concerned prior to entry into force of the directive in the relevant Member State?

(c) Must or may regard be had to the expectations of the persons concerned at the time of enactment of the national legislation implementing the directive in regard to the amount of remuneration?

(d) Should guidance be sought from the levels of remuneration for broadcasts paid under music copyright by broadcasters?

(e) Must the remuneration be related to the potential numbers of listeners or viewers, or to actual numbers, or partly to the former and partly to the latter and, if so, in what proportion?

(3) If the answer to the first question is in the negative, does that mean that the Member States are entirely free to lay down the criteria for determining equitable remuneration? Or is that freedom subject to certain limits and, if so, what are those limits?'

The first question

21 By its first question the national court is asking, essentially, whether the concept of equitable remuneration within the meaning of Article 8(2) of Directive 92/100 must, firstly, be interpreted in the same way in all Member States, and secondly, be applied using the same criteria in all Member States.

22 With regard, first of all, to the question of the uniform interpretation of the concept of equitable remuneration, the parties to the main proceedings, all the governments which submitted observations, with the exception of the Finnish Government, and the Commission concur in their acknowledgement that that

term, appearing as it does in a Council directive and making no reference to national laws, must be regarded as an autonomous provision of Community law and be interpreted uniformly throughout the Community.

23 As the United Kingdom points out, the Court has already held that the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (see, for example, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; and Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26).

24 That applies to the concept of equitable remuneration in Article 8(2) of Directive 92/100. Pursuant to the principle of the autonomy of Community law, it is a concept that must be interpreted uniformly in all Member States.

25 As regards, secondly, the question whether the same criteria are to apply in all Member States, the parties to the main proceedings, every government which submitted observations and the Commission are all agreed that Directive 92/100 does not give a definition of the concept of equitable remuneration. Furthermore, they are unanimous in their contention that, whilst that directive leaves it to the Member States to distribute the equitable remuneration among performing artists and producers of phonograms in certain circumstances, it does not assign to them the task of laying down common criteria for determining what constitutes equitable remuneration.

26 By way of converse inference from the latter part of that contention, SENA argues that the Community legislature has denied the Member States the right unilaterally to lay down the criteria for determining what constitutes equitable remuneration and thus the amount thereof. It bases that argument on the judgment in Case C-293/98 *Egeda* [2000] ECR I-629, in which the Court held that 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) does not harmonise copyright provisions fully but only on a minimal basis. SENA infers from this, by analogy, that Directive 92/100, the specific purpose of which is to introduce and guarantee a right, enshrined in Article 8(2), to equitable remuneration for the use of commercial phonograms harmonises the existence and the scope of that right.

27 It further contends that, if there is to be consistency with that harmonising objective, the amount of equitable remuneration must be determined by reference to the commercial value of the rental or lending service alone.

28 In support of its contention, it notes that Directive 92/100 is based on Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100a of the EC Treaty (now, after amendment, Article 95 EC), and argues that those articles were chosen as legal bases in order to reflect the goal of creating the internal market, and thus an intention to harmonise the laws of the Member States.

29 According to SENA, the pursuit of that goal makes it possible *inter alia* to remove the unjustified barriers and inequalities that affect the position of performing artists and producers of phonograms on the market to be eliminated and any economic disadvantages which may result from the broadcasting of such phonograms.

30 It argues that the Court's interpretation of Directive 92/100 in similar areas has confirmed that directive's objectives, which are to reduce, by harmonisation of laws, existing differences in the legal protection afforded by the Member States, to ensure that performing artists are paid an appropriate fee and to enable producers of phonograms to recoup their investment. The Court emphasised those points and the importance of the cultural development of the Community, based on Article 128 of the EC Treaty (now, after amendment, Article 151 EC), in its judgments in Case C-200/96 *Metronome Musik* [1998] ECR I-1953 and Case C-61/97 *FDV* [1998] ECR I-5171.

31 All the governments which submitted observations and the Commission ask the Court to find that SENA's arguments do not show that, by its silence in Article 8(2) of Directive 92/100, the Community legislature impliedly intended to lay down uniform criteria for determining whether remuneration is equitable or not.

32 On the contrary, they contend that Directive 92/100 deliberately omitted to lay down a detailed and universally applicable method for calculating the level of such remuneration.

33 It must be recalled that the directive requires the Member States to lay down rules ensuring that users pay an equitable remuneration when a phonogram is broadcast. It also states that the manner in which that remuneration is shared between performing artists and producers of phonograms is normally to be determined by agreement between them. It is only if their negotiations do not produce agreement as to how to distribute the remuneration that the Member State must intervene to lay down the conditions.

34 In the absence of any Community definition of equitable remuneration, there is no objective reason to justify the laying down by the Community judicature of specific methods for determining what constitutes uniform equitable remuneration, which would necessarily entail its acting in the place of the Member States, which are not bound by any particular criteria under Directive 92/100 (see, to that effect, Case C-131/97 *Carbonari* [1999] ECR I-1103, paragraph 45). It is therefore for the Member States alone to determine, in their own territory, what are the most relevant criteria for ensuring, within the limits imposed by Community law, and particularly Directive 92/100, adherence to that Community concept.

35 In that connection, it is apparent that the source of inspiration for Article 8(2) of Directive 92/100 is Article 12 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations signed in Rome on 26 October 1961. That convention provides that the payment of equitable remuneration, and the conditions for sharing that remuneration are, in the absence of agreement between the various parties concerned, to be established by domestic law and simply lists a number of factors, which it states to be non-exhaustive, non-binding and potentially relevant, for the purposes of deciding what is equitable in each case.

36 In those circumstances, the Court's role, in the context of a dispute brought before it, can only be to call upon the Member States to ensure the greatest possible adherence throughout the territory of the Community to the concept of equitable remuneration, a concept which must, in the light of the objectives of Directive 92/100, as specified in particular in the preamble thereto, be viewed as enabling a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable.

37 As the Commission points out, whether the remuneration, which represents the consideration for the use of a commercial phonogram, in particular for broadcasting purposes, is equitable is to be assessed, in particular, in the light of the value of that use in trade.

38 The reply to the first question must therefore be that the concept of equitable remuneration in Article 8(2) of Directive 92/100 must be interpreted uniformly in all the Member States and applied by each Member State; it is for each Member State to determine, in its own territory, the most appropriate criteria for assuring, within the limits imposed by Community law and Directive 92/100 in particular, adherence to that Community concept.

The second and third questions

39 By its second and third questions, the national court is asking, essentially, what criteria are to be used for determining the amount of the equitable remuneration, and what limits are imposed on the Member States in laying down those criteria.

40 As the reply to the first question makes clear, it is not for the Court itself to lay down the criteria for determining what constitutes equitable remuneration, or to set general predetermined limits on the fixing of such criteria; its role is, rather, to provide the national court with the information it needs to assess whether the national criteria used for assessing the remuneration of performing artists and

phonogram producers are such as to ensure that they receive equitable remuneration in a manner that is consistent with Community law.

41 In the absence, in the case in the main proceedings, of any contractual agreement between SENA and NOS on the amount of remuneration, it is for the national court, by virtue of Article 7 of the WNR, to lay down the amount of remuneration. It was in application of that law that the Gerechtshof te 's-Gravenhage held that a calculation model must be devised which is propitious for ensuring that the level of remuneration is equitable and for enabling such remuneration to be calculated and reviewed, using variable and fixed factors: the number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters represented by the broadcasting organisation, the tariffs fixed by agreement in the area of performance rights and broadcasting rights in respect of musical works protected by copyright, the tariffs applied by public broadcasters in Member States bordering on the Netherlands and, finally, the amounts paid by commercial stations.

42 The Gerechtshof furthermore pointed out that the parties may in the first instance endeavour to reach agreement themselves on a method of calculation, which must, in the initial years following the date of entry into force of Directive 92/100, result in a sum that corresponds approximately to what the broadcaster was paying before, under a contract, to the previous collecting agency, if the need to guarantee equitable remuneration does not justify an increase.

43 Finally, it envisaged the possibility of calling on experts to draw up a calculation model if the parties cannot agree.

44 The national court is therefore doing everything to ensure the best possible compliance with the provisions of Article 8(2) of Directive 92/100, that is to say, assuring the equitable remuneration of performing artists and phonogram producers by giving preference to a contractual agreement based on objective criteria. It is for the parties to achieve a balance between those criteria by taking account, in particular, of the methods used in the other Member States and, in the event that negotiations between them fail, by agreeing that the national court may receive technical assistance from an expert to determine the amount of equitable remuneration.

45 The Netherlands legislature has therefore chosen to allow the representatives of performing artists and phonogram producers and of phonogram users to determine by mutual agreement the amount of equitable remuneration and, failing such agreement, to entrust that task to the national court, which has final responsibility for calculating the remuneration. That method, which is very protective of the parties and at the same time consistent with Community law, makes it possible to establish a general framework for the various choices made by the Member States for the purpose of calculating the amount of equitable remuneration.

46 Accordingly, the reply to the second and third questions must be that Article 8(2) of Directive 92/100 does not preclude a model for calculating what constitutes equitable remuneration for performing artists and phonogram producers that operates by reference to variable and fixed factors, such as the number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters represented by the broadcast organisation, the tariffs fixed by agreement in the field of performance rights and broadcast rights in respect of musical works protected by copyright, the tariffs set by the public broadcast organisations in the Member States bordering on the Member State

concerned, and the amounts paid by commercial stations, provided that that model is such as to enable a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable, and that it does not contravene any principle of Community law.

Costs

47 The costs incurred by the Netherlands, German, Portuguese, Finnish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 9 June 2000, hereby rules:

1. **The concept of equitable remuneration in Article 8(2) of 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 must be interpreted uniformly in all the Member States and applied by each Member State; it is for each Member State to determine, in its own territory, the most appropriate criteria for assuring, within the limits imposed by Community law and Directive 92/100 in particular, adherence to that Community concept.

2. Article 8(2) of Directive 92/100 does not preclude a model for calculating what constitutes equitable remuneration for performing artists and phonogram producers that operates by reference to variable and fixed factors, such as the number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters represented by the broadcast organisation, the tariffs fixed by agreement in the field of performance rights and broadcast rights in respect of musical works protected by copyright, the tariffs set by the public broadcast organisations in the Member States bordering on the Member State concerned, and the amounts paid by commercial stations, provided that that model is such as to enable a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable, and that it does not contravene any principle of Community law.

Puissochet Gulmann Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 6 February 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber