



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 April 2016 *

(Reference for a preliminary ruling — Regulation (EC) No 44/2001— Jurisdiction in civil and commercial matters — Article 5(3) — Concept of ‘tort, delict or quasi-delict’ — Directive 2001/29/EC — Harmonisation of certain aspects of copyright and related rights in the information society — Article 5(2)(b) — Reproduction right — Exceptions and limitations — Reproduction for private use — Fair compensation — Non-payment — Whether included in the scope of Article 5(3) of Regulation (EC) No 44/2001)

In Case C-572/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 18 November 2014, received at the Court on 11 December 2014, in the proceedings

Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH

v

Amazon EU Sàrl,

Amazon Services Europe Sàrl,

Amazon.de GmbH,

Amazon Logistik GmbH,

Amazon Media Sàrl,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, A. Arabadjiev, C.G. Fernlund, S. Rodin and E. Regan, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 26 November 2015,

* Language of the case: German.

after considering the observations submitted on behalf of:

- Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH, by A. Feitsch and M. Walter, Rechtsanwälte,
- Amazon EU Sàrl, Amazon Services Europe Sàrl, Amazon.de GmbH, Amazon Logistik GmbH and Amazon Media Sàrl, by U. Börger and M. Kianfar, Rechtsanwälte,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the French Government, by D. Segoin and D. Colas, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,
- the Finnish Government, by H. Leppo, acting as Agent,
- the European Commission, by T. Scharf and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 February 2016,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) and Article 5(2)(b) 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 Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH ('Austro-Mechana') and Amazon EU Sàrl, Amazon Services Europe Sàrl, Amazon.de GmbH, Amazon Logistik GmbH and Amazon Media Sàrl ('Amazon') concerning the jurisdiction of the Austrian courts to entertain legal proceedings concerning the payment of remuneration due by reason of the placing on the market of recording materials in accordance with Austrian law.

Legal context

EU law

Regulation No 44/2001

- 3 Article 2(1) of Regulation No 44/2001, in Section 1, entitled 'General provisions', of Chapter II thereof, states:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

- 4 Article 5(1) and (3) of that regulation, in Section 2, entitled ‘Special jurisdiction’, of Chapter II thereof, is worded as follows:

‘A person domiciled in a Member State may, in another Member State, be sued:

- (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

...

...

- (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur’.

Directive 2001/29

- 5 Article 2 of Directive 2001/29, headed ‘Reproduction right’, provides:

‘Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.’

- 6 Article 5(2) of that directive, entitled ‘Exceptions and limitations’, provides:

‘Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

...

- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;

...’

Austrian law

- 7 Paragraph 42 of the Urheberrechtsgesetz (Law on copyright) of 9 April 1936 (BGBl. 111/1936), in the version applicable to the dispute in the main proceedings (‘the UrhG’), provides:

‘1. Any person may make single copies, on paper or a similar medium, of a work for personal use.

2. Any person may make single copies, on media other than those stipulated in subparagraph 1, for personal use and for the purposes of research, in so far as this is justified for the pursuit of non-commercial purposes. ...

...'

8 Paragraph 42b of the UrhG provides:

'1. Where it is to be anticipated that, by reason of its nature, a work which has been broadcast, made available to the public or captured on an image- or sound-recording medium manufactured for commercial purposes will be reproduced for personal or private use by being recorded on an image- or sound-recording medium pursuant to Paragraph 42(2) to (7), the author shall be entitled to fair remuneration (blank-cassette levy) in respect of recording material placed on the domestic market on a commercial basis and for consideration; blank-image or sound-recording media suitable for such reproduction or other sound- or image-recording media intended for that purpose shall be deemed to constitute recording material.

...

3. The following persons shall be required to pay [fair] remuneration:

(1) as regards remuneration for blank cassettes and equipment, persons who, acting on a commercial basis and for consideration, are first to place the recording material or equipment on the market in national territory; ...

...

5. Copyright-collecting societies alone can exercise the right to remuneration laid down in subparagraphs 1 and 2.

...'

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

9 Austro-Mechana is a copyright-collecting society whose objects include collecting the 'fair remuneration' provided for in Paragraph 42b(1) of the UrhG.

10 Amazon, which has its headquarters in Luxembourg and Germany, belongs to an international group which sells goods through the internet, including the recording materials mentioned in that provision. According to Austro-Mechana, Amazon is first to place recording materials on the market in Austria, and as a result is liable to pay that remuneration.

11 The dispute between the parties concerns whether the Austrian courts have international jurisdiction under Article 5(3) of Regulation No 44/2001 to entertain the legal proceedings brought by Austro-Mechana seeking payment of that remuneration from Amazon.

12 Austro-Mechana's action was dismissed by the court of first instance on the ground that it lacked international jurisdiction.

13 The dismissal of Austro-Mechana's action was confirmed on appeal on the ground that the dispute between it and Amazon did not fall within Article 5(3) of Regulation No 44/2001.

14 Austro-Mechana brought an appeal by way of Review before the Oberster Gerichtshof (Supreme Court, Austria) by which it asks that court to apply that provision.

15 In those circumstances the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings before it and to refer the following question to the Court for a preliminary ruling:

‘Does a claim for payment of “fair compensation” under Article 5(2)(b) of [Directive 2001/29] which, in accordance with Austrian law, is directed against undertakings that are first to place recording material on the domestic market on a commercial basis and for consideration constitute a claim arising from “tort, delict or quasi-delict” within the meaning of Article 5(3) of [Regulation No 44/2001]?’

Consideration of the question referred for a preliminary ruling

16 By its question, the referring court asks essentially whether Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that a claim for payment of remuneration, such as that at issue in the main proceedings, due by virtue of a national law implementing Article 5(2)(b) of Directive 2001/29, falls within ‘tort, delict or quasi-delict’ within the meaning of Article 5(3) of that regulation.

17 As a preliminary point it must be recalled that, according to settled case-law, where Member States decide to introduce the exception, provided for in Article 5(2)(b) of Directive 2001/29, to the right of reproduction for copying for private use (‘the private copying exception’) into their national law, they are required, in particular, to provide, pursuant to that provision, for the payment of fair compensation to holders of the exclusive right of reproduction (see judgment of 5 March 2015 in *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 19 and the case-law cited).

18 Since the provisions of that directive do not provide any further details concerning the various elements of the fair compensation system, the Member States enjoy broad discretion in that regard. It is for the Member States to determine, inter alia, who must pay that compensation and to establish the form, detailed arrangements for collection and the level of compensation (see judgment of 5 March in *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 20 and the case-law cited).

19 The system on which fair compensation is based and the notion and level of that compensation are linked to the harm resulting for the author from the reproduction for private use of his protected work, without his authorisation. From that perspective, fair compensation must be regarded as recompense to rightholders for the harm suffered by them (see, to that effect, judgments of 21 October 2010 in *Padawan*, C-467/08, EU:C:2010:620, paragraph 40; 16 June 2011 in *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paragraph 24; 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 47; 10 April 2014 in *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 50; and 5 March 2015 in *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 21).

20 The Court also held that Article 5(2)(b) of Directive 2001/29 imposes on a Member State which has introduced the private copying exception into its national law an obligation to achieve a certain result, in the sense that that State must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the holders of the exclusive right of reproduction on the territory of that State (see, to that effect, judgments of 16 June 2011 in *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paragraphs 34 to 36, 39 and 41, and 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraphs 32 and 57 to 59).

21 Although the Court has interpreted that provision as meaning that, in principle, it is for the person who has caused the harm to the holder of the exclusive right of reproduction, that is the person who, for his private use, reproduces a protected work without seeking prior authorisation from that rightholder, to make good the harm related to that copying by financing the compensation which will

be paid to that rightholder (see judgments of 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 23, and 10 April 2014 in *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 51), it has however accepted that, given the practical difficulties in identifying private users and obliging them to compensate the holders of the exclusive right of reproduction for the harm caused to them, it is open to the Member States to establish a ‘private copying levy’ for the purposes of financing fair compensation, chargeable not to the private persons concerned but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Under such a system, it is the persons having that equipment who must discharge the private copying levy (see, in particular, judgments of 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 24, and 5 March 2015 in *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 23).

- 22 In that connection, the Court has explained that, since that system enables the persons responsible for payment to pass on the amount of the private copying levy in the price charged for making the reproduction equipment, devices and media available, or in the price for the copying service supplied, the burden of the levy will ultimately be borne by the private user who pays that price, in a way consistent with the ‘fair balance’ between the interests of the holders of the exclusive right of reproduction and those of the users of the protected subject matter (see judgments of 16 June 2011 in *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paragraph 28, and 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 25).
- 23 That is the case with regard to the system put in place by the Republic of Austria, which chose to implement the exception of private copying laid down in Article 5(2)(b) of Directive 2001/29, which the Court has already had the opportunity to examine in its judgment of 11 July 2013 in *Amazon.com International Sales and Others* (C-521/11, EU:C:2013:515).
- 24 Under the system established by Paragraph 42b of the UrhG for the financing of fair compensation referred to in Article 5(2)(b) of Directive 2001/29, the private copying levy is payable by those who make available, for commercial purposes and for consideration, recording media suitable for reproduction (see judgment of 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 26).
- 25 In principle, such a system, as already stated in paragraph 22 of the present judgment, enables the persons responsible for payment to pass on the amount of that levy in the sale price of those media, so that the burden of the levy is ultimately borne, in accordance with the requirement of a ‘fair balance’, by the private user who pays that price, if such a user is the final recipient (see judgment of 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 27).
- 26 Furthermore, under Paragraph 42b(5) of the UrhG, the person to whom that levy is owed is not the holder of the exclusive reproduction right, but a copyright-collecting society, in this case Austro-Mechana.
- 27 As regards the jurisdiction of the Austrian courts to entertain Austro-Mechana’s claim for payment of the remuneration provided for under Paragraph 42b of the UrhG, it must be recalled that it is only by way of derogation from that fundamental principle laid down in Article 2(1) of Regulation No 44/2001, attributing jurisdiction to the courts of the defendant’s domicile, that Section 2 of Chapter II thereof makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of that regulation (see judgments of 16 May 2013 in *Melzer*, C-228/11, EU:C:2013:305, paragraph 23; 3 October 2013 in *Pinckney*, C-170/12, EU:C:2013:635, paragraph 24; 5 June 2014 in *Coty Germany*, C-360/12, EU:C:2014:1318, paragraph 44; and 22 January 2015 in *Hejduk*, C-441/13, EU:C:2015:28, paragraph 17).

- 28 Thus, Article 5(3) of Regulation No 44/2001 lays down a rule of special jurisdiction under which ‘in matters relating to tort, delict or quasi-delict’, ‘a person domiciled in a Member State may, in another Member State, be sued ... in the courts for the place where the harmful event occurred or may occur’.
- 29 The rule of special jurisdiction laid down by that provision must be interpreted independently and strictly (see judgments of 28 January 2015 in *Kolassa*, C-375/13, EU:C:2015:37, paragraph 43, and 21 May 2015 in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 37).
- 30 In that connection, it must be recalled that, according to settled case-law, the rule of jurisdiction laid down in Article 5(3) of Regulation No 44/2001 is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see judgments of 16 May 2013 in *Melzer*, C-228/11, EU:C:2013:305, paragraph 26; 3 October 2013 in *Pinckney*, C-170/12, EU:C:2013:635, paragraph 27; 5 June 2014 in *Coty Germany*, C-360/12, EU:C:2014:1318, paragraph 47; 22 January 2015 in *Hejduk*, C-441/13, EU:C:2015:28, paragraph 19; and 28 January 2015 in *Kolassa*, C-375/13, EU:C:2015:37, paragraph 46).
- 31 In matters relating to tort, delict and quasi-delict, the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence (see judgments of 25 October 2012 in *Folien Fischer and Fofitec*, C-133/11, EU:C:2012:664, paragraph 38; 16 May 2013 in *Melzer*, C-228/11, EU:C:2013:305, paragraph 27; 18 July 2013 in *ÖFAB*, C-147/12, EU:C:2013:490, paragraph 50; and 21 May 2015 in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 40).
- 32 According to settled case-law, the concept of ‘matters relating to tort, delict or quasi-delict’ covers all actions which seek to establish the liability of a defendant and do not concern ‘matters relating to a contract’ within the meaning of Article 5(1)(a) of Regulation No 44/2001 (see judgments of 27 September 1988 in *Kalfelis*, 189/87, EU:C:1988:459, paragraphs 17 and 18; 13 March 2014 in *Brogstetter*, C-548/12, EU:C:2014:148, paragraph 20; and 28 January 2015 in *Kolassa*, C-375/13, EU:C:2015:37, paragraph 44).
- 33 Therefore, it is appropriate to determine, first of all, whether Austro-Mechana’s claim for payment of the remuneration provided for in Article 42b of the UrhG concerns a ‘matter relating to contract’ within the meaning of that provision.
- 34 In that connection, the Court has held that the conclusion of a contract is not a condition for the application of Article 5(1) of Regulation No 44/2001 (see judgment in of 28 January 2015 in *Kolassa*, C-375/13, EU:C:2015:37, paragraph 38).
- 35 Although Article 5(1)(a) of Regulation No 44/2001 does not require the conclusion of a contract, it is nevertheless essential, for that provision to apply, to identify an obligation, since the jurisdiction of the national court under that provision is determined by the place of performance of the obligation in question. Thus, the concept of ‘matters relating to contract’ within the meaning of that provision is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (see judgment of 14 March 2013 in *Česká spořitelna*, C-419/11, EU:C:2013:165, paragraph 46).
- 36 Consequently, the application of the rule of special jurisdiction providing for matters relating to a contract in Article 5(1)(a) of Regulation No 44/2001 presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant’s action is based (see judgments of 14 March 2013 in *Česká spořitelna*, C-419/11, EU:C:2013:165, paragraph 47, and 28 January 2015 in *Kolassa*, C-375/13, EU:C:2015:37, paragraph 39).

- 37 In the case in the main proceedings, the obligation to pay Austro-Mechana the remuneration provided for in Paragraph 42b of the UrhG, which is intended to implement Article 5(2)(b) of Directive 2001/29 was not freely consented to by Amazon. It was imposed on that company by Austrian law by reason of the making available, for commercial purposes and for consideration, of recording media suitable for reproduction of protected works.
- 38 It follows that Austro-Mechana's claim for payment of that remuneration does not concern a 'matter relating to contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001.
- 39 Second, it must be determined whether a claim such as that at issue in the main proceedings aims to establish the liability of the defendant, within the meaning of the case-law cited in paragraph 32 of the present judgment.
- 40 Such is the case where a 'harmful event', within the meaning of Article 5(3) of Regulation No 44/2001, may be imputed to the defendant.
- 41 Liability in tort, delict or quasi-delict can only arise provided that a causal connection can be established between the damage and the event in which that damage originates (see judgments of 30 November 1976 in *Bier*, 21/76, EU:C:1976:166, paragraph 16, and 5 February 2004 in *DFDS Torline*, C-18/02, EU:C:2004:74, paragraph 32).
- 42 In the present case, the action brought by Austro-Mechana seeks to obtain compensation for the harm arising from non-payment by Amazon of the remuneration provided for in Paragraph 42b of the UrhG.
- 43 In that connection, it must be recalled that the 'fair compensation' referred to in Article 5(2)(b) of Directive 2001/29, according to the case-law of the Court mentioned in paragraph 19 of the present judgment, intends to compensate authors for the private copy made without their authorisation of their protected works, so that it must be regarded as compensation for the harm suffered by the authors resulting from such unauthorised copy by the latter.
- 44 Therefore, the failure by Austro-Mechana to collect the remuneration provided for in Paragraph 42b of the UrhG constitutes a harmful event within the meaning of Article 5(3) of Regulation No 44/2001.
- 45 The fact that, under the Austrian system relating to the financing of that 'fair compensation', the latter must be paid not to the holders of an exclusive reproduction right that it aims to compensate, but to a copyright-collecting society is irrelevant in that respect.
- 46 As is clear from paragraph 26 of the present judgment, according to Paragraph 42b of the UrhG, only copyright-collecting societies may rely on the right to remuneration referred to in Paragraph 42b. Therefore, as the Austrian copyright-collecting society, only Austro-Mechana may rely on that right under that system.
- 47 Similarly, taking account, in particular, of the case-law cited in paragraph 21 of the present judgment, the fact that Amazon is not a final user who has made, for his private use, copies of protected works does not prevent the remuneration provided for in Paragraph 42b of the UrhG from being charged to Amazon under the system provided for by Austrian law.
- 48 Furthermore, although it is true, as Amazon argues, that the making available of recording media does not in itself constitute an unlawful act and that as the Republic of Austria has decided to implement the private copying exception provided for in Article 5(2)(b) of Directive 2001/29, the making of copies for private use by means of such media is an act authorised by Austrian law, the fact remains that under that provision Austrian law subjects the making of those private copies to the condition that rightholders are to receive 'fair compensation', that is, in the present case, the remuneration provided for in Paragraph 42b(1) of the UrhG.

- 49 By its claim, Austro-Mechana does not criticise Amazon for making available recording media in Austria, but for failing to comply with the obligation to pay the remuneration it is required to pay under the UrhG.
- 50 Thus, Austro-Mechana's claim seeks to establish the liability of the defendant, since that claim is based on an infringement by Amazon of the provisions of the UrhG imposing that obligation on it, and that that infringement is an unlawful act causing harm to Austro-Mechana.
- 51 Accordingly, such a claim falls within Article 5(3) of Regulation No 44/2001.
- 52 It follows that, if the harmful event at issue in the main proceedings occurred or may occur in Austria, which is for the national court to ascertain, the courts of that Member state have jurisdiction to entertain Austro-Mechana's claim.
- 53 In those circumstances, the answer to the question referred is that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that a claim seeking to obtain payment of remuneration due by virtue of a national law, such as that at issue in the main proceedings, implementing the 'fair compensation' system provided for in Article 5(2)(b) of Directive 2001/29, falls within 'matters relating to tort, delict or quasi-delict', within the meaning of Article 5(3) of that regulation.

Costs

- 54 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 (First Chamber) hereby rules:

Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a claim seeking to obtain payment of remuneration due by virtue of a national law, such as that at issue in the main proceedings, implementing the 'fair compensation' system provided for in Article 5(2)(b) 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, falls within 'matters relating to tort, delict or quasi-delict', within the meaning of Article 5(3) of that regulation.

[Signatures]