Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 6 June 2018 [1]

Case C-149/17

Bastei Lübbe GmbH & Co. KG
v
Michael Strotzer

(Request for a preliminary ruling
from the Landgericht München I (Regional Court, Munich I, Germany))

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Enforcement of intellectual property rights — Directive 2004/48/EC — Compensation in the event of file-sharing in breach of copyright — Internet connection accessible by members of the owner's family — Exemption from liability of the owner without the need to specify the nature of the use of the connection by the family member)

Introduction

1. Although substantive intellectual property law is partially harmonised in European Union law, the procedures for punishing infringements of intellectual property law and making good the ensuing harm generally come within the domestic law of the Member States. However, EU law lays down certain requirements that go beyond the simple effectiveness test normally applied in the context of the procedural autonomy of the Member States.

2. The present case raises the question of the extent of those requirements and the way in which they relate to fundamental rights. That problem has already been submitted to the Court but the present case will give it the opportunity to develop and further refine its case-law in that regard.

1 Original language: French.

Legal framework

European Union law

3. Article 3(1) and 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 [2] 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.

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:

…

(b) for phonogram producers, of their phonograms;

…'

4. According to Article 8(1) and (2) of that directive:

'1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages. …'

5. Article 2(1) and (2) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [3] provides:

'1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.

2. This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found … in Directive 2001/29/EC and, in particular, Articles 2 to 6 and Article 8 thereof.'

2 OJ 2001 L 167, p. 10.

3 OJ 2004 L 157, p. 45.

6. Under Article 3 of that directive:

‘1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.’

7. According to the first sentence of Article 6(1) of that directive:

‘Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information’.

8. Last, in the words of the first subparagraph of Article 13(1) of Directive 2004/48:

‘Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him as a result of the infringement.’

German law

9. Paragraph 97 of the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 provides:

‘1. Any person who unlawfully infringes copyright or any other right protected under this Law may be the subject of an action by the injured party for an injunction ordering the removal of the infringement or, where there is a risk of recurrence, for an injunction prohibiting any further commission of the infringement. The right to seek a prohibitory injunction shall exist even when the risk of infringement arises for the first time.

2. Any person who intentionally or negligently performs such an act shall be obliged to make good the damage arising from it. In the determination of damages, any profit obtained by the infringer as a result of the infringement of the right may also be taken into account. Entitlement to damages may also be assessed on the basis of the amount the infringer would have had to pay in equitable remuneration if the infringer had requested authorisation to use the right infringed. Authors, writers of scientific editions (Paragraph 70), photographers (Paragraph 72) and performing artists (Paragraph 73) may also seek monetary compensation for damage which is non-pecuniary in nature, provided and to the extent that this is equitable.’

Factual background, procedure and questions for a preliminary ruling

10. Bastei Lübbe AG, a company governed by German law, is the holder, as a phonogram producer, of the copyright and related rights in the audio version of a book.

11. Mr Strotzer is the owner of an internet connection through which, on 8 May 2010, that phonogram was shared, for the purpose of downloading, by an unlimited number of users of a peer-to-peer internet exchange. An expert correctly attributed the IP address to Mr Strotzer.

12. By letter of 28 October 2010, Bastei Lübbe warned Mr Strotzer to cease and desist the infringement of copyright. That warning notice was unsuccessful and Bastei Lübbe brought an action before the Amtsgericht München (Local Court, Munich, Germany) against Mr Strotzer as the owner of the IP address in question, seeking damages.

13. However, Mr Strotzer denies having himself infringed the copyright and maintains that his internet connection was sufficiently secure. In addition, he asserts that his parents, who live in the same household, also had access to that connection but that to his knowledge they did not have the work in question on their computer, were not aware of the existence of the work and did not use the online exchange software. In addition, the computer was switched off at the time when the infringement in question was committed.

14. The Amtsgericht München (Local Court, Munich) dismissed Bastei Lübbe's action for damages on the ground that Mr Strotzer could not be deemed to have committed the alleged infringement of copyright, because he had stated that his parents were also capable of having committed the infringement in question. Bastei Lübbe then appealed to the Landgericht München I (Regional Court, Munich I, Germany), the referring court in the present case.

15. The referring court is inclined to hold Mr Strotzer liable for having committed the alleged infringement of copyright in that it does not follow from his explanations that a third party used the internet connection at the time of the infringement and he is therefore seriously likely to have committed it. However, the referring court is faced with the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), which in its view might preclude the defendant's being held liable. [4]

16. In fact, according to the case-law of the Bundesgerichtshof (Federal Court of Justice), as interpreted by the referring court, it is for the applicant to allege and prove the infringement of copyright. The Bundesgerichtshof (Federal Court of Justice) considers, moreover, that the owner of the internet connection is in fact presumed to have committed such an infringement provided that no other person was able to use that internet connection at the time of the infringement. However, if the internet connection was not sufficiently secure or was knowingly made available to other persons at the time of the infringement, then the owner of that connection is not in fact presumed to have committed the infringement.

17. In such a case, the case-law of the Bundesgerichtshof (Federal Court of Justice) nonetheless places on the owner of the internet connection a secondary burden of proof. The owner discharges that burden to the requisite standard by explaining that other persons, whose identity he discloses, where appropriate, had independent access to his internet connection and are therefore capable of having committed the alleged infringement of copyright. If a family member had access to the internet connection in question, the owner of that connection is not however required to supply additional information relating to the time and the nature of the use of that connection, having regard to the protection of marriage and family guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') and the corresponding provisions of the German Basic Law.

4 The referring court cites, in particular, the judgment of the Bundesgerichtshof of 6 October 2016, I ZR 154/15, *Afterlife*.

18. In those circumstances, the Landgericht München I (Regional Court, Munich I) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 8(1) and (2), in conjunction with Article 3(1), of Directive 2001/29/EC be interpreted as meaning that "effective and dissuasive sanctions" for infringements of the right to make works available to the public are still provided for even when the owner of an internet connection used for copyright infringements through file-sharing is excluded from liability to pay damages if the owner of that internet connection can name at least one family member who, besides him or her, might have had access to that internet connection, without providing further details, established through appropriate investigations, as to when and how the internet was used by that family member?

(2) Should Article 3(2) of Directive 2004/48/EC be interpreted as meaning that "effective" measures for the enforcement of intellectual property rights are still provided for even when the owner of an internet connection used for copyright infringements through file-sharing is excluded from liability to pay damages if the owner of that internet connection can name at least one family member who, besides him or her, might have had access to that internet connection, without providing further details, established through appropriate investigations, as to when and how the internet was used by that family member?'

19. The request for a preliminary ruling was received at the Court on 24 March 2017. Bastei Lübbe, the Austrian Government and the European Commission submitted written observations. Bastei Lübbe and the Commission were represented at the hearing, which was held on 14 March 2018.

Analysis

Preliminary remarks

20. In its written observations, the Commission expresses doubts as to the relevance of the questions for a preliminary ruling for the outcome of the main proceedings. I do not share those doubts.

21. By its questions, the referring court asks in essence whether it is consistent with the requirement of effectiveness of the measures laid down in order to ensure the enforcement of copyright, resulting from Article 8 of Directive 2001/29 and Article 3 of Directive 2004/48 to enable the owner of an internet connection, through which infringements of copyright[5] have been committed, to avoid liability for those infringements on the basis of a presumption, by designating, without further detail, a family member who also has access to that connection. The referring court's doubts result from the case-law of the Bundesgerichtshof (Federal Court of Justice) on the remedies available, in German law, to the affected copyright holders.

22. It is not for the Court, but for the national courts alone, to interpret and apply the domestic case-law of the Member States. However, it follows from the principle of consistent interpretation that the national authorities and courts are required to interpret, as much as possible, the provisions of their domestic law in such a way as to ensure the full effect of EU law. That requirement includes the obligation to change their established national case-law if it is incompatible with EU law.[6] It therefore appears that the requirement of consistent interpretation requires the referring court to interpret and

5 I understand this term to encompass both copyright in the strict sense and related rights, such a phonogram producers' rights.

6 See, most recently, judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraphs 71 and 72).

apply the case-law of the Bundesgerichtshof (Federal Court of Justice), so far as possible, in such a way as to ensure the full effect of the obligations deriving from EU law relating to the effectiveness of the remedies available to copyright holders. It is certainly within the Court's remit to provide the referring court with all the necessary guidance as regards the extent of those obligations.

23. Therefore, if the referring court entertains doubts as regards the conformity with the requirements resulting from EU law of the case-law of the Bundesgerichtshof (Federal Court of Justice), as the referring court interprets it, the Court certainly has jurisdiction to define the extent of those requirements. It is therefore necessary to examine two aspects of that problem: the scope of the relevant provisions of EU law and respect for fundamental rights when applying those provisions.

The relevant provisions of Directives 2001/29 and 2004/48

24. Directive 2001/29 is rather laconic as regards the measures intended to ensure the enforcement of the rights which it harmonises. Article 8 of that directive merely requires the Member States, generally, to provide for effective, proportionate and dissuasive sanctions to punish infringements of those rights. Member States must also provide, in favour of the owners affected, the possibility of bringing actions for damages. The specific measures to be taken in order to fulfil those obligations are left to the entire discretion of the Member States.

25. However, given the importance of intellectual property rights for the achievement of the internal market, the EU legislature considered it necessary to lay down more detailed harmonised rules in order to ensure a homogeneous protection of those rights throughout the European Union.[7] Directive 2004/48 is thus wholly dedicated to measures to ensure the enforcement of intellectual property rights.

26. It is true that, according to Article 2(2) of Directive 2004/48, that directive is to apply without prejudice to the specific provisions on copyright, in particular Article 8 of Directive 2001/29. That provision therefore gives priority to the rules of Directive 2001/29 by comparison with the provisions of Directive 2004/48. It does not follow, however, that copyright as a whole must be excluded from the scope of Directive 2004/48. Article 2(1) of Directive 2004/48 states very clearly that its provisions are to apply 'to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member States concerned'. As copyright indisputably forms part of intellectual property, Directive 2004/48 applies to it, subject to the particular provisions contained in the measures of EU law relating to copyright. That directive contains, moreover, provisions specific to copyright, notably in Article 5, which establishes a presumption of authorship or ownership of a right related to copyright.

27. Article 8 of Directive 2001/29 must therefore be regarded not as an isolated provision of a very general nature but rather as an element of the harmonised system of protection of intellectual property organised by Directive 2004/48. That system goes further than the mere procedural autonomy of Member States by placing specific obligations on them, observance of which, including in their procedural aspect, is amenable to review by the Court, which goes beyond the classic review of the principles of equivalence and effectiveness. A different interpretation would deprive Directive 2004/48 of its *raison d'être*, as it would add nothing by comparison with the obligation, already borne by the Member States under the principle of effectiveness, to ensure the practical effect of the substantive provisions of EU law in the sphere of intellectual property. In fact, it would be illogical to consider that the EU legislature envisaged a directive consisting of obligations that might be rendered otiose by the effect of the procedural rules of the Member States. In addition, Directive 2004/48 has an autonomous scope, since according to Article 2(1) it is to apply not only to the protection of intellectual property rights harmonised at the level of EU law, but also to the rights as provided for by

7 See recitals 1, 8 and 9 of Directive 2004/48.

the domestic laws of the Member States. That directive cannot therefore be reduced to merely giving specific form to the general principle of effectiveness of the protection of the rights conferred by EU law, which applies, in the context of the procedural autonomy of the Member States, in the absence of specific provisions of EU law.

28. Therefore, while Article 8(2) of Directive 2001/29, supplemented and clarified in that regard by Article 13(1) of Directive 2004/48, establishes the right for the affected rightholder to bring an action for damages, that in my view entails the obligation to make provision for and apply, in the domestic legal system, mechanisms that actually enable rightholders to obtain damages. While the actual procedural mechanisms designed to implement those directives come within the competence of the Member States, their effectiveness is amenable to review by the Court. Contrary to the Commission's suggestion in its observations, that review is not limited to ascertaining whether it is impossible or excessively difficult in practice to obtain damages, since that assessment is normally carried out in the context of review of observance of the principle of effectiveness. Review of compliance with the obligations resulting from those directives requires an interpretation of their specific provisions in the light of their practical effect.

29. The main proceedings concern infringements of the right to make the work in question available to the public, committed with the help of the internet. It is difficult for rightholders who are victims of infringements of that type to identify the infringers and prove that they were involved in the infringements. Infringements committed by means of the internet leave no physical traces [8] and, to a certain extent, allow the offenders to remain anonymous. The only evidence that it is normally possible to find is the IP address from which the infringement was committed. That identification of the owner of the IP address, even if it is correct, does not constitute proof of the liability of a specific person, especially if the internet connection in question was accessible by several persons.

30. It is for that reason that national laws often provide for measures that alleviate the burden of proof borne by the affected copyright holders. Such a measure may take the form, in particular, of a presumption that the owner of the internet connection is guilty of the infringement committed from his IP address. Those measures make it possible to ensure the effectiveness of the rightholders' right to claim damages in the case of infringements committed by means of the internet. According to the information contained in the request for a preliminary ruling, such a presumption has been introduced in the German legal system through the case-law.

31. The obligation to introduce such a presumption is not expressly laid down either in the provisions of Directive 2001/29 or in those of Directive 2004/48. However, if that measure is the principal means provided for in national law in order to ensure the effectiveness of the right to claim compensation for the harm sustained that is mentioned in Article 8(2) of Directive 2001/29, it must be applied consistently and effectively. That measure could not achieve its objective if it were too easy to avoid the presumption of guilt, leaving the affected rightholder without any other possibility of relying on his right to have the damage sustained made good. That right would then become illusory.

32. Thus, although Article 8(2) of Directive 2001/29 does not lay down any specific means of ensuring the effectiveness of the right to claim damages, to my mind it follows from that provision that the measures that exist must be applied consistently and effectively. In that regard, the national courts have a fundamental role of assessing the evidence and weighing up the different interests involved.

33. Consequently, if the referring court has doubts as to the interpretation and application of the case-law of the Bundesgerichtshof (Federal Court of Justice) relating to the liability and the obligations of owners of internet connections, it must give priority to the interpretation that best ensures the effectiveness of the protection of intellectual property rights.

8 Unlike, for example, the sale of counterfeit goods.

The protection of fundamental rights

34. It seems that the problem encountered by the referring court when applying the case-law of the Bundesgerichtshof (Federal Court of Justice) lies in the recourse to the principle of protection of family life in order to limit the obligation of the owner of the internet connection to provide information about the person who may have committed the infringement of copyright. Thus, when the owner of the connection states that persons other than he may have had access to that connection, he is not required either to disclose their identity or to provide any other information about them, because such an obligation would constitute an unjustified interference with his family circle.

35. It should be emphasised in that regard that, when applying of the provisions transposing Directives 2001/29 and 2004/48, the Member States are naturally bound by the provisions of the Charter. The right to respect for private and family life is protected by Article 7 of the Charter. However, in disputes relating to copyright, the right to respect for private and family life may find itself in competition with the fundamental right to property enshrined in Article 17 of the Charter. Intellectual property is expressly mentioned in paragraph 2 of that article.

36. Furthermore, the Court has already had occasion to emphasise that the applicant's right to information in the context of proceedings relating to the protection of intellectual property rights is covered by the right to an effective remedy guaranteed in Article 47 of the Charter and thereby ensures the effective protection of the intellectual property right.[9]

37. In such a situation, where different fundamental rights are in competition, it is for the national authorities or courts concerned to ensure that a fair balance is struck between those rights.[10] It may thus be that the necessary reconciliation of the requirements of the protection of different fundamental rights must be achieved at the level of EU law, notably by the Court when it interprets EU law.[11]

38. In the context of the exercise of that reconciliation, it is necessary to ensure that the essential content of the fundamental rights in question is observed. Thus, the Court has held that it is contrary to both the fundamental right to property and the right to an effective remedy to enable a banking institution to invoke bank secrecy, in the name of the right to protection of personal data enshrined in Article 8 of the Charter, in order to refuse to supply the data of an account holder that would have allowed an action relating to the protection of intellectual property rights to be brought against him.[12]

39. It would be possible to follow similar reasoning concerning the interdependence between the right to intellectual property and the right to an effective remedy, on the one hand, and the right to respect for family life, on the other hand.

40. If the right, recognised to the owner of the internet connection in the name of protection of his family life, to refuse to provide details relating to the persons capable of having committed the infringement of copyright were in practice to prevent the holder of those rights from obtaining compensation for the damage sustained, that would undermine the essential content of that rightholder's intellectual property right. In such a case, the right to property would have to prevail over the right to respect for family life. If, on the other hand, such an interference with family life were to be deemed unacceptable by the national court, it is the owner of the internet connection who would have to be held liable for the infringement of copyright. Such secondary liability is apparently

9 Judgment of 16 July 2015, *Coty Germany* (C-580/13, EU:C:2015:485, paragraph 29).

10 Judgment of 15 September 2016, *McFadden* (C-484/14, EU:C:2016:689, paragraph 84).

11 Judgment of 16 July 2015, *Coty Germany* (C-580/13, EU:C:2015:485, paragraph 33).

12 Judgment of 16 July 2015, *Coty Germany* (C-580/13, EU:C:2015:485, paragraphs 37 to 41).

possible in German law.[13] Before finding the owner of the internet connection liable, the national court would still be required to determine whether there are other procedures that would allow the affected copyright holder to identify the persons who have committed the infringement, in order to secure compensation.[14]

41. In addition, it seems to me that two other provisions of the Charter may still to be taken into account when weighing up the fundamental rights.

42. In the first place, there is Article 20 of the Charter, which enshrines equality before the law. In fact, according to the information supplied by Bastei Lübbe in its observations, around 70% of internet connections in Germany are 'family connections', that is to say, connections used in a family context. There thus remains 30% of connections that are not used in such a context, some of which are probably owned by persons living alone. If the use of an internet connection in a family context allowed liability for infringements of copyright to be easily avoided, that would result in the unfavourable treatment of persons who, because they live alone, do not allow other members of the family to access their internet connection. Although persons living as part of a family are not in the same situation as those living alone from the aspect of the right to respect for family life, such a difference in situation does not exist as regards liability for infringements of copyright. Thus, the mere fact of living with other family members cannot automatically entail exclusion from that liability.

43. In the second place, Article 54 of the Charter prohibits abuse of the rights recognised therein. It is true that that article is directed mainly against acts which, under cover of the rights recognised by the Charter, seek in reality to combat fundamental rights and to destroy them.[15] Clearly, infringement of an intellectual property right does not constitute an act of that type.

44. That being said, the prohibition of the abuse of rights has long formed part of the general principles of EU law.[16] In accordance with that principle, individuals cannot rely on the rights conferred by EU rules for abusive ends in order to obtain advantages resulting from those rights without the objective of those rules being achieved.

45. In the main proceedings, Mr Strotzer maintains that he cannot be held liable for the infringement of copyright committed by means of his internet connection because other persons, namely his parents, also have access to that connection. Moreover, he asserts that his parents have no knowledge of the software used in order to commit that infringement and do not have on their computer the work unlawfully made available to the public.

46. It is therefore for the referring court to determine whether Mr Strotzer is abusing the right to protection of family life by invoking that right, not in order to protect the members of his family against liability for the infringement of copyright with which they clearly have no connection, but solely in order to escape his own liability for that infringement. If that were the case, the right to protection of family life should not constitute a barrier to the protection of the intellectual property of the holders of that copyright.

13 See judgment of the Bundesgerichtshof (Federal Court of Justice) of 30 March 2017, I ZR 19/16 *Loud*, delivered after the submission of the request for a preliminary ruling in the present case.

14 See, to that effect, judgment of 16 July 2015, *Coty Germany* (C-580/13, EU:C:2015:485, paragraph 42).

15 See Woods, L., 'Article 54 – Abuse of Rights', in Peers, S., Hervey T.K., Kenner J. et al. (ed.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford-Portland (Oregon), 2014, pp. 1539 to 1559.

16 See, for a recent application, judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 48 et seq.).

Conclusion

47. In the light of the foregoing, I propose that the Court should answer the questions for a preliminary ruling referred by the Landgericht München I (Regional Court, Munich I, Germany) as follows:

Article 8(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 and Article 13(1) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as meaning that they do not require the introduction into the domestic laws of the Member States of a presumption that the holders of an internet connection are liable for infringements of copyright committed by means of that connection. However, if domestic law provides for such a presumption in order to ensure the protection of those rights, that presumption must be applied consistently in order to ensure the effectiveness of that protection. The right to respect for family life, recognised in Article 7 of the Charter of Fundamental Rights of the European Union, cannot be interpreted in such a way as to deprive rightholders of any real possibility of protecting their right to intellectual property enshrined in Article 17(2) of the Charter of Fundamental Rights.