Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 16 May 2019[1]

Case C-484/18

Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam)
PG
GF
v
Institut national de l'audiovisuel
joined parties:
Syndicat indépendant des artistes-interprètes (SIA-UNSA),
Syndicat français des artistes-interprètes (CGT)

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Articles 2(b) and 3(2) — Exclusive rights of the performers — National legislation providing for the benefit of the French National Audiovisual Institute (INA), a special regime in favour of the exploitation of audiovisual archives not provided by Article 5(2) and (3) of Directive 2001/29 — Benefit from the rights of exploitation of audiovisual archives without the need to prove the authorisation given by the performer — Legal presumption of the performers' consent)

I. Introduction

1. Is it permissible for a Member State to provide in its copyright legislation for a presumption whereby it is presumed that the performer of a particular work would have permitted a public body which has been given the task of preserving audiovisual recordings to publish and, if necessary, exploit that work by means of an imputed transfer of the performer's rights? That essentially is the principal issue which arises in this request for a preliminary ruling.

2. The present request, lodged on 20 July 2018 at the Court Registry by the Cour de cassation (Court of Cassation, France), obviously concerns the interpretation of Articles 2(b), 3(2)(a), and 5 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]

3. The request was made in proceedings between, on the one hand, the Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse ('Spedidam'), PG and GF, the sons and successors in title of a world famous jazz drummer, ZV, and, on the other hand, the Institut national de l'audiovisuel (French National Audiovisual Institute, 'INA') concerning a claim for damages for the alleged infringement by the INA of the performers' rights held by PG and GF.

1 Original language: English.

2 OJ 2001 L 167, p. 10.

4. ZV died in 1985. In 2009 his sons discovered that the INA had made certain video recordings and a separate phonogram of concert performances of their father between 1959 and 1978 available on its internet site. In the wake of this discovery they then commenced the main proceedings, claiming damages as holders of the copyright and related rights in respect of what they contended amounted to unauthorised communication by the INA of these performances by their late father. It is accepted that the sons had never given permission for the communication by the INA in this fashion of their father's performances. As we shall presently see, French law provides for a transfer of related rights in favour of the INA. The essential question presented by this preliminary reference is whether this French legislation is in conformity with the requirements of Directive 2001/29.

5. Before considering any of these legal issues, it is, however, first necessary to set out the relevant legal provisions.

II. Legal context

A. EU law

6. Recitals 15, 25, 26, 30 and 32 of Directive 2001/29 state:

'(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the "digital agenda" and improve the means to fight piracy worldwide. [The European Union] and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the [Union] and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

…

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.

...

(30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.

…

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.'

7. Article 2 of Directive 2001/29, entitled '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;

…'

8. Article 3 of Directive 2001/29, headed 'Right of communication to the public of works and right of making available to the public other subject matter', provides:

'1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

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:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

…'

9. Article 5 of that directive, entitled 'Exceptions and limitations', states, in paragraph 2, that:

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

…

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

…'

10. Article 10 of Directive 2001/29, entitled 'Application over time', provides:

'1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.'

B. French law

11. Article L. 212-3, first paragraph, of the code de la propriété intellectuelle (Intellectual Property Code), provides:

'The fixing of its performance, its reproduction and communication to the public, as well as any separate use of the sound and image of the performance when it has been fixed for both sound and image, shall be subject to the written authorisation of the performer.'

12. Article L. 212-4 of the Intellectual Property Code, provides:

'The signature of the contract concluded between a performer and a producer for the production of an audiovisual work constitutes authorisation to fix, reproduce and communicate to the public the performer's performance.

This contract sets a separate remuneration for each mode of exploitation of the work.'

13. Article 49 of loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Law No 86-1067 of 30 September 1986 on freedom of communication) (as amended by Article 44 of Law No 2006/961 of 1 August 2006) ('Law on freedom of communication') provides:

'The [INA], a public establishment of the State with an industrial and commercial character, is responsible for conserving and enhancing the national audiovisual heritage.

...

II. The [INA] shall exploit extracts from the audiovisual archives of national broadcasting companies under the conditions laid down in the specifications. As such, it benefits from the exploitation rights of these extracts at the end of a period of one year from their first broadcasting.

The [INA] shall remain the owner of the media and technical material and shall hold the rights to exploit the audiovisual archives of national broadcasting companies … which were transferred to it before the publication of Law No 2000-719 of 1 August 2000 …

The [INA] shall exercise the exploitation rights to which this paragraph refers having due regard for the personal and economic rights of the holders of copyright or related rights and their successors in title. However, by way of derogation from Articles L. 212-3 and L. 212-4 of the Intellectual Property Code, the terms on which the works of performers in the archives to which this article refers are exploited and the remuneration for that exploitation shall be governed by agreements concluded between the performers themselves or the employee organisations representing performers and the [INA]. Those agreements must specify in particular the scale of remuneration and the arrangements for payment of that remuneration.

…'

III. Facts of the main proceedings

14. The INA is a commercial State body established by law in 1974. It is responsible for conserving and promoting the national audiovisual heritage. It keeps the audiovisual archives of 'national broadcasting companies' (national radio and television stations) and helps with their exploitation.

15. As I have already observed, PG and GF are the two sons and successors in title of ZV, a world-famous jazz drummer. They allege that the INA marketed on its website without their authorisation 26 video recordings and a phonogram reproducing performances by their late father. They brought an action based on Article L. 212-3 of the Intellectual Property Code, under which a written authorisation of the performer is required for the fixation of its performance, its reproduction and its communication to the public.

16. The INA pleads in response that Article 49(II) of the Law on freedom of communication allows it to exploit the archives in return for paying performers royalties set by collective agreements concluded with their representative trade unions. PG and GF counter in turn, inter alia, that these statutory provisions which derogate from the protection of performers conflict with the provisions of Directive 2001/29.

17. By judgment of 24 January 2013, the tribunal de grande instance de Paris (Regional Court, Paris, France) ordered the INA to pay PG and GF the sum of EUR 15 000 in compensation for the damage suffered as a result of the unauthorised exploitation of the interpretations in question. By a judgment of 11 June 2014, the cour d'appel de Paris (Court of Appeal, Paris, France) confirmed in substance the judgment delivered at first instance.

18. In particular, these two courts considered that the application of Article 49(II) of the Law on freedom of communication was subject to the prior authorisation of the performer, whereas proof of such authorisation would not have been provided by the INA.

19. However, by judgment of 14 October 2015, the Cour de Cassation (Court of Cassation) overturned the judgment of the cour d'appel (Court of Appeal). It ruled that the cour d'appel (Court of Appeal) erred in holding that the application of the derogating regime was subject to proof that the performer had authorised the first exploitation of his performance, thus adding to the law a condition that it did not include. Following this judgment, the cour d'appel de Versailles (Court of Appeal, Versailles, France), at the request of the INA, dismissed the claims for compensation which had been brought against it.

20. Having heard the appeal brought by the successors in title against the latter judgment, the Cour de Cassation (Court of Cassation) entertained doubts about the compatibility with EU Law of the French legislation and the interpretation of various provisions of Directive 2001/29.

21. According to the Cour de Cassation (Court of Cassation), the special regime enjoyed by the INA does not fall within any of the exceptions and limitations to the rights referred to in Articles 2 and 3 of Directive 2001/29, provided for in Article 5 of the directive. The Cour de Cassation (Court of Cassation) is also of the opinion that the solution adopted by the Court in *Soulier and Doke*[3] is not applicable to the present case. That latter case concerned the reproduction of out of print books. While it is true that the legislation on out of print books at issue in *Soulier and Doke* had derogated from the protection guaranteed to authors by Directive 2001/29, the scheme introduced for the benefit of the INA in the general interest is intended to reconcile the rights of performers with those of producers as being of equal value within the system of that directive.

IV. The request for a preliminary ruling and the procedure before the Court

22. In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must Article 2(b), Article 3(2)(a) and Article 5 of Directive 2001/29 … be interpreted as not precluding national rules, such as those laid down in Article 49(II) of [the Law on freedom of communication], as amended by Article 44 of Law No 2006-961 of 1 August 2006, from establishing, for the benefit of the [INA], the beneficiary of the exploitation rights of national broadcasting companies in the audiovisual archives, derogating provisions under which the terms on which performers' works can be exploited and the remuneration for that exploitation are governed by agreements concluded between the performers themselves or the employee organisations representing performers and that institute, which must specify, inter alia, the scale of remuneration and the arrangements for payment of that remuneration?'

23. Written observations were submitted by Spedidam, the INA, the French Government and by the European Commission. In addition, they presented oral arguments at the hearing on 21 March 2019.

V. Analysis

A. Preliminary remark on the temporal application of Directive 2001/29

24. The first thing to note is that Article 10(1) of Directive 2001/29 provides that the provisions of that directive shall apply in respect of all works and other subject-matter referred to in that directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights.

25. In the present case, it is not disputed that the last event at issue was established on 15 December 2009 and that it relates to performances which were already protected under national law on 22 December 2002. In these circumstances, Directive 2001/29 is therefore applicable to those acts,[4] without prejudice, as specified in Article 10(2) of Directive 2001/29, to any acts concluded and rights acquired before 22 December 2002.

3 Judgment of 16 November 2016 (C-301/15, EU:C:2016:878).

4 See, to that effect, Opinion of Advocate General Szpunar in *Pelham and Haas* (C-476/17, EU:C:2018:1002, points 21 to 24).

B. The role and the functioning of the INA

26. As I have already noted, the INA is responsible for safeguarding, conserving and promoting broadcasts by French public television and radio stations since 1949. It thus fulfils an important public interest function, namely, to safeguard and enhance the French audiovisual heritage.

27. In that respect, under Article 49 of the Law on freedom of communication, the INA enjoys rights to exploit extracts from the audiovisual archives of national broadcasting companies. It exercises those rights having due regard for the personal and economic rights of the holders of copyright or related rights and their successors in title.

28. The INA initially found itself unable to exploit some archives because it found that the production dossiers of the broadcasts in question quite often did not contain the contracts of employment which had been concluded with the performers concerned. In many instances any consent to the transmission of the broadcast which might have been given had either been lost or could not easily be located or was otherwise simply unavailable. In such instances the INA found itself obliged to obtain the written authorisation of the performers or their successors in title who could often prove difficult or even impossible to identify and locate.

29. The referring court points out that in order to enable the INA to fulfil its public service mandate, Article 49(II) of the Law on freedom of communication was amended on 1 August 2006 in order to make the exploitation of performers' works from the archives subject to agreements concluded by the INA with the performers or with the performers' representative organisations.

C. The validity of a mechanism such as that established in favour of the INA in the light of Directive 2001/29

1. The applicability of Articles 2(b), 3(2)(a) and 5 of Directive 2001/29

30. It is not disputed that the acts alleged against the INA in the present case constitute acts of reproduction and communication to the public under Articles 2(b) and 3(2)(a) of Directive 2001/29 respectively, in so far as it made the videograms and phonogram containing the performances of the performer concerned accessible on its website. As the Court already ruled, 'an act of making protected subject-matter available to the public on a website without the rightholders' consent infringes copyright and related rights' as protected by Directive 2001/29.[5]

31. As the referring court also points out, Article 49(II) of the Law on freedom of communication does not fall within any of the exceptions and limitations that the Member States are entitled to establish under Article 5 of Directive 2001/29.[6] This is accepted by all the parties who have submitted written observations.

5 Judgment of 27 March 2014, *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 25).

6 As a reminder, recital 32 of Directive 2001/29 indicates that this list of exceptions and limitations to the reproduction right and the right of communication to the public is exhaustive. The exhaustiveness of this provision is confirmed by the Court (see, to that effect, judgments of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 26, and of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 16).

2. The interpretation of Articles 2(b) and 3(2)(a) of Directive 2001/29

32. Article 2(b) and Article 3(2)(a) of Directive 2001/29 provide, respectively, that the Member States shall grant performers the exclusive right to authorise or prohibit direct or indirect reproduction of fixations of their performances by any means and in any form and the exclusive right to authorise or prohibit any communication to the public of fixations of their performances.

33. In *Soulier and Doke* the Court held that the similar protection granted to authors for the reproduction of their works and the communication to the public of their works must be understood 'as not being limited to the enjoyment of the rights guaranteed by Articles 2(a) and Article 3(1) of Directive 2001/29, but as also extending to the exercise of those rights'.[7] The Court added that 'the rights guaranteed to authors by Article 2(a) and Article 3(1) of Directive 2001/29 are preventive in nature, in the sense that any reproduction or communication to the public of a work by a third party requires the prior consent of its author'.[8] Nevertheless, the Court ruled — contrary to the interpretation put forward by the Advocate General[9] — that 'Article 2(a) and Article 3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly. It must be held, on the contrary, that those provisions also allow that consent to be expressed implicitly',[10] subject to compliance with strict conditions. Indeed, according to the Court, the national legislation was required to provide a mechanism for ensuring performers are actually and individually informed and the enjoyment and the exercise of the rights of reproduction and communication to the public given to performers may not be subject to any formality.[11]

34. It is clear that this interpretation of Articles 2(a) and 3(1) of Directive 2001/29 should also apply at least by analogy to Articles 2(b) and 3(2)(a) of the same directive in respect of performers.

35. First, the rights protected by these different provisions are drafted in identical and unconditional terms. Second, in the same way that the interpretation of Articles 2(a) and 3(1) of Directive 2001/29 is supported by Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works[12] — under which the enjoyment and the exercise of the rights of reproduction and communication to the public shall not be subject to any formality — an identical interpretation of Articles 2(b) and 3(2)(a) of Directive 2001/29 is supported by Article 20 of the WIPO Performances and Phonograms Treaty ('WPPT'), adopted in Geneva on 20 December 1996, which includes a similar prohibition.[13] Third, there is no hierarchy as between author's rights and performer's rights.[14]

36. In parallel with this interpretation of Articles 2 and 3 of Directive 2001/29, it must be noted that the Court also ruled in *Luksan* that 'European Union law must be interpreted as allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of rights to exploit the cinematographic work such as those at issue in the

7 Judgment of 16 November 2016, *Soulier and Doke* (C-301/15, EU:C:2016:878, paragraph 31).

8 Judgment of 16 November 2016, *Soulier and Doke* (C-301/15, EU:C:2016:878, paragraph 33).

9 See Opinion of Advocate General Wathelet in *Soulier and Doke* (C-301/15, EU:C:2016:536, points 38 and 39).

10 Judgment of 16 November 2016, *Soulier and Doke* (C-301/15, EU:C:2016:878, paragraph 35).

11 See, to that effect, judgment of 16 November 2016, *Soulier and Doke* (C-301/15, EU:C:2016:878, paragraphs 43 and 50).

12 Paris Act of 24 July 1971, as amended on 28 September 1979 ('the Berne Convention').

13 The WPPT was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6). According to Article 20 of WPPT, 'the enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality'. It is pointless to recall that 'it is common ground that, as recital 15 in the preamble to Directive 2001/29 makes clear, that directive is intended to implement at [Union] level the [Union]'s obligations under … the [W]PPT. In those circumstances, … that directive must be interpreted, as far as is possible, in the light of the definitions given in [that] Treat[y]' (judgment of 15 March 2012, *SCF Consorzio Fonografici*, C-135/10, EU:C:2012:140, paragraph 52). A similar provision (Article 17) exists in the Beijing Treaty on Audiovisual Performances, adopted by the World Intellectual Property Organisation (WIPO) in Beijing, on 24 June 2012. That treaty has been signed by the European Union but has not yet entered into force.

14 Subject to the exception of moral rights. See, to that effect, de Visscher, F., and Michaud, B., *Précis du droit d'auteur et des droits voisins*, Brussels, Bruylant, 2000, No 304.

main proceedings (satellite broadcasting right, reproduction right *and any other right of communication to the public through the making available to the public*), provided that such a presumption is not an irrebuttable one precluding the principal director of that work from agreeing otherwise'.[15] In this context it is also important to stress, as the Court did in *Soulier and Doke*, that the 'circumstances in which the implicit consent can be admitted must be strictly defined in order not to deprive of effect the very principle of the author's prior consent'.[16]

37. If the answer in *Luksan* is limited to the producer of a cinematographic work, it is only because of the particular facts of that case. Furthermore, if it is true that the Court mainly based its reasoning in that judgment on Article 3(4) and (5) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property which provided for a presumption of transfer of the rental right to the producer of a film,[17] the scope of the Court's interpretation of this principle of a presumption of transfer in certain circumstances is nonetheless broader. It must also be capable of application to the rights guaranteed by Directive 2001/29, whatever the type of work concerned. Indeed, as the Court pointed out in that case, the investment required to produce products such as films or multimedia products is, in both cases, considerable.[18] That is why, as the Court held in general terms, 'when adopting Directive 2001/29, the European Union legislature … did not intend to disapply a concept such as that of presumption of transfer, as regards the exploitation rights governed by that directive'.[19]

38. In the light of the forgoing considerations, I therefore think that a presumption of consent mechanism must in principle also be capable of being applied as regards rights to exploit an audiovisual work such as reproduction rights and any other right of communication to the public by means of making available, as established by Directive 2001/29.[20]

39. That is especially true in the context of (relatively) old audiovisual footage — such as in the present case — where it might be difficult now at this remove to identify the relevant documentary material (assuming it existed in the first place) providing for the consent on the part of the performer to the exploitation of this work by another party. It is also relevant that, just as in *Soulier and Doke*, the legislation in question pursues an objective of what amounts to a form of presumptive copyright licensing 'in the cultural interests of consumers and of society as a whole'.[21]

40. At the same time, the Court must also be astute to ensure that any such legislative presumption is not so extensive that it effectively undermines the exclusive nature of the right enjoyed by the rightholders.

15 Judgment of 9 February 2012 (C-277/10, EU:C:2012:65, paragraph 87). Emphasis added.

16 Judgment of 16 November 2016 (C-301/15, EU:C:2016:878, paragraph 37).

17 OJ 2006 L 376, p. 28.

18 See, to that effect, judgment of 9 February 2012, *Luksan* (C-277/10, EU:C:2012:65, paragraph 83).

19 Judgment of 9 February 2012, *Luksan* (C-277/10, EU:C:2012:65, paragraph 85).

20 See, to that effect, judgment of 9 February 2012, *Luksan* (C-277/10, EU:C:2012:65, paragraph 86), where the Court held that 'a presumption of transfer mechanism, such as that laid down originally, as regards rental and lending right, in Article 2(5) and (6) of Directive 92/100 and then essentially repeated in Article 3(4) and (5) of Directive 2006/115, must also be capable of being applied as regards rights to exploit a cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public)'.

21 Judgment of 16 November 2016 (C-301/15, EU:C:2016:878, paragraph 45).

41. While the notion of 'presumption' outlined in *Luksan* can in principle also be applied to the present case, there are also important differences between the two cases. One important feature of *Luksan* is that the Court held that Member States were free to have national legislation which provided for a presumption of transfer from a film director of the rental rights of the film to the film producer, as this met one of the objectives to which recital 5 of Directive 2006/115 refers, namely, 'to enable the producer to recoup the investment which he has undertaken for the purpose of making the cinematographic work'. [22]

42. That rationale does not apply to the present case, since there was no prior commercial relationship between ZV and the INA, still less any suggestion that the INA qua third party had funded the filming of the performances in question. The whole basis for the legislative presumption in the present case, therefore, is simply based on a conception of the public interest, namely, that it was desirable that a televisual heritage should nonetheless be capable of exploitation in circumstances where obtaining the actual consent of the performers (or their heirs) might otherwise be excessively difficult or even impossible.

43. Any copyright legislation of this kind which rests on the principle of imputed or presumed consent must not impair the performer's exclusive right save to the extent that it is necessary to attain the legislative objective. It is only in those circumstances that it could be said that the national legislation would respect the principle of proportionality with regard to the protection of intellectual property rights. [23]

44. However, it must be observed, in that regard, that Article 49 of the Law on freedom of communication seems to organise and effect a *transfer* of the performer's rights on the basis of an implicit consent in favour of the INA. I consider that, for the reasons already stated, this would amount in the circumstances to a disproportionate interference with the exclusive nature of the performer's rights. It is, I think, at least implicit in the reasoning of the Court in *Soulier and Doke* [24] that transfer of this kind must operate in a proportionate manner and cannot take from the exclusivity of this right save to the extent that it is clearly necessary for this purpose.

45. That, I suggest, is at the heart of the difficulty with the national law at issue in the main proceedings, because if it had simply created a form of implied copyright licensing arrangement in favour of the INA, such would comply with the requirements of Directive 2001/29. The present law goes much further than this in that it provides not for an implied licence in favour of the INA, but rather for an implicit consent to a transfer of those performers' rights. It is thus the disproportionate manner in which the national law operates which renders it contrary to the requirements of EU law.

VI. Conclusion

46. Accordingly, I propose that the Court should answer the question referred by the Cour de cassation (Court of Cassation, France) as follows:

Article 2(b), Article 3(2)(a) and Article 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as precluding a national rule, such as that laid down in Article 49(II) of loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Law No 86-1067 of 30 September 1986 on freedom of communication), as amended by Article 44 of Law No 2006-961 of 1 August 2006, insofar as it provides for a transfer to the Institut national de l'audiovisuel (French National Audiovisual Institute) of the performers' rights.

22 Judgment of 9 February 2012, (C-277/10, EU:C:2012:65, paragraph 79).

23 See Article 17 and Article 52(1) of the Charter of Fundamental Rights of the European Union.

24 Judgment of 16 November 2016 (C-301/15, EU:C:2016:878).