

COURT OF FIRST INSTANCE, BRUSSELS
--

<p>Matter: 06/4993/A (register of summary proceedings)</p>

<p>Appendices: 1 writ of summons 2 briefs</p>
--

Action for cessation – Article 55 of the Belgian Law of 30 June 1994 on copyright and neighbouring rights – concept of intra-Community purchaser – article 1 and 3 of the Royal Decree of 28 March 1996 relating to the right to receive compensation for copying for private purposes for authors, performing artists and producers of phonograms and of audiovisual works

in the case of:

The civil company in the form of a cooperative company with limited liability **Auvibel**, having its registered offices at 1000 Brussels (Belgium), Vilain XIIIstraat 53-55, with company number 0453.673.453;

Plaintiff,

represented by Meester Goossens substituting Meester Gilliams, practising at 1000 Brussels (Belgium), Goedheidsstraat 5-7;

versus:

1. having its registered offices at 46342 Velen-Ramsdorf, ;
2. having its registered offices at 8279 Holzem, ;
3. , having its registered offices at Isle of Man IM 992, ;

Defendants,

represented by Meester ; practising at 3500 Hasselt (Belgium),

In these proceedings, briefs are exchanged and the case is argued in Dutch at the public hearing on 20 July 2006;

After consideration, the chairman of the Court of First Instance of Brussels pronounces the following order:

Whereas:

- the writ of summons was served on 24 February 2006;
- the final briefs by the plaintiff were submitted at the hearing of 4 July 2006;
- the final briefs by the defendants were submitted at the hearing of 18 July 2006;

After hearing the pleadings of counsel to the parties;

1. The claims

The claim which the plaintiff has brought against the defendants in application of Article 87, § 1 of the Belgian Law of 30 June 1994 on copyright and neighbouring rights, aims to:

- (1) establish that the defendants breach Article 55 of the Belgian Copyright Law by offering and/or selling carriers which may be used for reproducing audio and audiovisual works to consumers resident in Belgium (private persons and companies which are end-users), without submitting any declaration to the plaintiff and without paying the compensation for copying for private purposes, and consequently,
- (2) order the cessation of the breach under imposition of a penalty payment of 5,000 EUR per breach or, if the amount of the compensation payable with regard to the transactions in respect of which no timely and correct declaration was submitted would be higher, twice the amount of the payable compensation, in the former or in the latter case per day the breach persists,
- (3) in accordance with Article 87 § 1, limb 6 of the aforementioned Law of 30 June 1994, order the publication of the judgment at the expense of the defendants in two magazines, at the choice of the plaintiff,
- (4) declare the judgment provisionally enforceable, notwithstanding any appeal and with the exclusion of the possibility of provisional payment or security,
- (5) convict the defendants to bear the costs of the proceedings, including the procedural indemnity.

2. The facts

2.1. - The plaintiff is a collective management company, established pursuant to Article 55, paragraph 5 of the Belgian Law of 30 June 1994 on copyright and neighbouring rights, and entrusted with the collection and distribution of the compensation for the reproduction for private

purposes which is payable in the event of a sale of carriers which may be used for the reproduction of audio and audiovisual works.

The first, second and third defendants sell, through their respective web sites http://www.____.info, http://www.____.com and http://www.____.com, carriers for the reproduction of audio and audiovisual works (among which CDs and DVDs), amongst others to customers resident in Belgium. The purchased goods are delivered in Belgium.

None of the defendants submits any declaration of the blank carriers which are sold and delivered to Belgian customers from the registered offices of the three defendants, in Germany, Luxembourg and the United Kingdom respectively, and none of the three defendants pays any compensation, the collection of which is to be effected by the plaintiff pursuant to Article 55 of the aforementioned Law of 30 June 1994.

2.2. - On 1 August 2005, the plaintiff served a notice upon the three defendants, formally requesting them to declare the blank carriers which are sold in Belgium.

Each of the three defendants refuses to submit any declaration and refuses to pay any compensation.

2.3. On 24 February 2006, the plaintiff summoned the three defendants with the claim as described above.

All three defendants conclude that the claim is admissible but unfounded. They request that the plaintiff be convicted to bear the costs of the proceedings.

3. In law

3.1. – Point of view of the plaintiff

The plaintiff brought its claim on the basis of Article 55 of the Belgian Law of 30 June 1994 and of Article 1, 8° of the Royal Decree of 28 March 1996 relating to the right to receive compensation for copying for private purposes for authors, performing artists and producers of phonograms and of audiovisual works, in order to claim that the defendants which are engaged in the intra-Community purchase of carriers which are used for the reproduction of audio and audiovisual works, are obliged to pay compensations to the plaintiff. It requests the court to establish that the refusal by the defendants to pay the compensation constitutes a breach of Article 55 of the aforementioned Law of 30 June 1994, to order that such breach will be ceased under imposition of a penalty payment and to order the defendants to publish this judgment at their expense.

3.2. – Point of view of the defendant

The defendants argue that they cannot be considered as intra-Community purchaser or importer within the meaning of the aforementioned Royal Decree of 28 March 1996. In support of that position, they submit that the Report to the King, attached to the Royal Decree, does not contain

any mandatory rules of law and allegedly breaches the European rules of interpretation in tax matters and the free movement of goods. Finally, they argue that the aforementioned Royal Decree of 28 March 1996 allegedly breaches the principle of equal treatment.

3.3. – As regards the breaches of Article 55 of the Belgian Law of 30 June 1994 on copyright and neighbouring rights

Article 55 of the aforementioned Law stipulates that authors, performing artists and producers of phonograms and of audiovisual works are entitled to receive a compensation for the reproduction for private purposes of their works and performances.

The compensation is payable by the manufacturer, the intra-Community importer or purchaser of carriers which may be used for the reproduction of audio and audiovisual works at the date on which those carriers are introduced on the market in the national territory (article 55, paragraph 2 of the aforementioned Law).

In the aforementioned Royal Decree of 28 March 1996 relating to the right to receive compensation for copying for private purposes for authors, performing artists and producers of phonograms and of audiovisual works, the concept of intra-Community purchaser is, amongst others, further defined. An intra-Community purchaser is a person who has proceeded to an intra-Community purchase. In Article 1, 7° of the aforementioned Royal Decree, an intra-Community purchase is defined as the entry onto the national territory of one or more carriers originating from another Member State of the European Union.

In the report to the King which was published in the Belgian Official Gazette in connection with the aforementioned Royal Decree, on the same day as the Royal Decree, it is stated that each person who performs substantial actions upon implementation of a sale agreement is to be considered as an intra-Community purchaser on the national territory, as described in the Royal Decree.

Pursuant to Article 3 of the aforementioned Royal Decree of 28 March 1996, the compensation for copying for private purposes falls due at the moment when the carrier is placed on the market of the national territory, which takes place when one or more carriers are being made available to the final consumer.

From the documents produced by the plaintiff it appears clearly that all three defendants, from their registered offices in Germany, Luxembourg and the United Kingdom respectively, expressly target, through their web sites, Belgian consumers to whom they offer to sell blank carriers intended for the reproduction for private purposes of their works and performances. Through their web site, they indicate that delivery to Belgium is possible, for which they will appeal to intermediaries, whilst transportation costs to Belgium will be charged.

It is ruled that, in view of the documents produced by the plaintiff, it is clearly demonstrated that all three defendants are engaged in making blank carriers intended for the reproduction for private purposes available to Belgian consumers and in performing substantial actions upon implementation of sale agreements.

All three defendants are therefore considered as intra-Community purchasers within the meaning of both Article 1 of the aforementioned Royal Decree of 28 March 1996 and Article 55 of the aforementioned Law of 30 June 1994.

The refusal by all three defendants to submit any declaration of the sold blank carriers and to pay the compensation which is due for such sales constitutes a breach of Article 55 of the aforementioned Law of 30 June 1994.

The court accepts the defendants' position that the Report to the King attached to the Royal Decree of 28 March 1996 does not contain any mandatory rules of law. In establishing the breach of Article 55 of the aforementioned Law of 30 June 1994 committed by the defendants, the court relies on the Report to the King only for the interpretation of certain concepts, and not in order to be able to deduce any mandatory rules of law.

The court does not follow the defendants when they argue that the Report to the King allegedly breaches the European rules of interpretation in tax matters and the free movement of goods.

In the absence of any harmonisation at European level regarding the right to receive compensation for copying for private purposes, the definitions explained in the Report are to be considered as autonomous vis-à-vis, amongst others, European tax concepts.

With respect to the compatibility of the Belgian Article 55 of the aforementioned Law of 30 June 1994 with the provisions of the EC Treaty regarding the free movement of goods, it is recorded that the provisions of Article 28 of the EC Treaty, which deal with the free movement of goods, do not apply to the on-line sale of goods. The on-line offering and selling of goods constitutes an information society service, to which the provisions on the freedom to provide services apply.

Finally, the court does not follow the defendants when they argue that the provisions of Article 2 § 3, on the one hand, and the provisions of Article 2 § 1, 4°, 5° and 6° of the Royal Decree of 28 March 1996 allegedly breach the principle of equal treatment.

The difference in treatment which is included in the aforementioned provisions is based upon an objective criterion and is reasonably justified.

3.4. – As regards the extent of the cessation order and the requested measures

The plaintiff has succeeded in demonstrating that the defendants breach Article 55 of the aforementioned Law of 30 June 1994.

The claim of the plaintiff under (1) is therefore well-founded.

The cessation of the breach is ordered immediately. The requested penalty payment is only partially awarded, up to an amount of 2,000 EUR per breach.

It is appropriate to order the publication of this judgment in two specialised magazines at the choice of the plaintiff, at the expense of the defendants.

Thus, to that extent, the claims under (2) and (3) are well-founded.

The judgment is provisionally enforceable. The plaintiff does not state any reasons as to why the possibility of security or provisional payment should be excluded. Its request on this point is therefore rejected.

FOR THE REASONS MENTIONED ABOVE,

THE COURT,

Having regard to the Law of 15 June 1935 relating to the use of languages in court proceedings,

Ruling after hearing both parties,

Declares the claim admissible and well-founded insofar as stipulated hereinafter,

Establishes that the defendants breach Article 55 of the Belgian Copyright Law by offering and/or selling carriers which may be used for reproducing audio and audiovisual works to consumers resident in Belgium (private persons and companies which are end-users), without submitting any declaration to the plaintiff and without paying the compensation for copying for private purposes,

[Two lines deleted by the court]

Orders that this breach be ceased under imposition of a penalty payment of 2,000 EUR per breach or, if the amount of the compensation payable with respect to the transactions for which no timely and correct declaration was submitted would be higher, twice the amount of the payable compensation, in the former or in the latter case per day the breach persists,

Allows the plaintiff to publish this judgment in two specialised magazines at the choice of the plaintiff, whereby the costs of publication are to be borne by all three defendants jointly, while the plaintiff may address each of them separately in order to recover the entire costs of publication,

Orders the defendants to jointly bear the costs of the proceedings, including the procedural indemnity set at EUR 242.98 (procedural indemnity), + EUR 2,287.08 EUR (summons) for the plaintiff;

Ruled and pronounced in public at the hearing of the summary proceedings on 27 July 2006.

The deletion of 2 void lines is approved

[signature]

[signature]

KINT

ROBIJNS