OPINION OF ADVOCATE GENERAL

JÄÄSKINEN

delivered on 17 March 2011

Joined Cases C-431/09 and C-432/09

Airfield NV,

Canal Digitaal BV

v

Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)

and

Airfield NV

v

Agicoa Belgium BVBA

(References for a preliminary ruling from the hof van beroep te Brussel (Belgium))

(Approximation of laws – Copyright and related rights – Directive 93/83/EEC – Satellite broadcasting – Exclusive right of the author to authorise communication of his works – Act of communication to the public by satellite – Broadcasting organisation – Provider of packages of satellite television channels)

I – Introduction

1. In the joined cases which have been submitted to the Court, the hof van beroep te Brussel (Court of Appeal, Brussels) (Belgium) has referred for a preliminary ruling two questions concerning the interpretation of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, (2) and in particular the meaning to be given to Article 1(2)(a) and (c) of that directive.

2. The referring court has found that interpretation of the term ‘communication to the public by satellite’, as provided for by the abovementioned directive, is necessary

for a decision in the two cases before it, which are connected. These cases are, first, between Airfield NV ('Airfield') and Canal Digitaal BV ('Canal Digitaal'), of the one part, and the Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Belgian Society of Authors, Composers and Publishers, 'Sabam'), of the other part (C-431/09), and second, between Airfield alone and Agicoa Belgium BVBA ('Agicoa') (C-432/09).

3. The issue in the dispute is whether Airfield, which is a satellite television provider offering the public a subscription service for receiving a package of television channels ('satellite package provider'), must obtain authorisation from the copyright holders in respect of its participation, with the aid of its associated company Canal Digitaal, in the simultaneous broadcasting, without change, of programmes provided by broadcasting organisations, although those organisations have themselves already received authorisation from the holders of the intellectual property rights relating to those programmes. In other words, it is necessary to determine whether and, if so, to what extent a satellite package provider, acting in circumstances such as those in question in the main proceedings, carries out an act of exploitation concerning works protected by copyright or related rights.

4. Behind the relatively complex technical details of the case there is in reality a fairly simple legal question: how should an operator which is independent of any broadcasting organisation be treated, under Directive 93/83, where that operator intervenes, to a greater or lesser extent, in the chain of communication which in typical cases connects the broadcasting organisation with the public which is the final recipient of programme-carrying signals transmitted by satellite.

II – **Legal context**

A – *European Union law*

– *Directive 93/83*

5. Directive 93/83 is designed to fill a gap left in the legal framework for the setting-up of a single audiovisual space by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, (3) which was adopted without including any provisions on copyright. (4)

6. Recitals 14 and 15 in the preamble to Directive 93/83 state as follows:

'(14) … the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at a Community level; … this definition should at the same time specify where the act of communication takes place; … such a

definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; … communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organisation into an uninterrupted chain of communication leading to the satellite and down towards the earth; … normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting;

(15) … the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs'.

7. Article 1(2)(a) to (c) of Directive 93/83, contained in Chapter I entitled 'Definitions', provides as follows:

'(a) For the purpose of this Directive, "communication to the public by satellite" means the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent.'

8. Article 2 of Directive 93/83, relating to the satellite broadcasting right, states:

'Member States shall provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.'

– *Directive 2001/29/EC*

9. Recital 23 in the preamble to 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 (5) states that that directive 'should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such

transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts'. (6)

10. Article 3(1) of the Directive 2001/29 requires Member States to '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'.

B – *National law*

11. The fourth subparagraph of Article 1(1) of the Belgian Law of 30 June 1994 on copyright and related rights (7) ('the Law on copyright'), as amended, provides that 'the author of a literary or artistic work shall alone have the right to communicate it to the public by any process whatever [, including by making it available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them]'. (8)

12. Articles 49 and 50 of the Law on copyright, which relate to 'communication to the public by satellite', repeat in essence the provisions of Article 1(2)(a) to (c) of Directive 93/83, without later amendment.

III – **The factual background**

13. Airfield, a Belgian company operating in Belgium under the trading name TV Vlaanderen, provides digital television and radio by satellite. It offers packages of channels which can be heard and viewed together by its subscribers by satellite.

14. The package offered to the public by Airfield comprises two types of television channel. Some, which are free and unencrypted, usually known as 'free to air', can be received by anyone with a dish aerial and a satellite receiver, with no obligation to subscribe. The others are encrypted and can be viewed only after decryption, necessitating a subscription agreement with Airfield, which provides its customers with a decoder card ('smart card') that enables decryption.

15. In order to provide its own services, Airfield has recourse to the services of Canal Digitaal, a Netherlands company which belongs to the same group as Airfield and offers services equivalent to those of Airfield to consumers resident in the Netherlands.

16. Canal Digitaal concluded an agreement with SES Astra, which operates the Astra satellite system. Under the agreement, SES Astra leases to Canal Digitaal capacity for digital television and radio on that satellite.

17. In addition, Canal Digitaal concluded with Airfield a services agreement by which Canal Digitaal undertook to sublease to it from 1 January 2006 capacity leased

on the Astra satellite for the broadcasting of television and radio programmes in Belgium and Luxembourg. For the broadcasting of the television programmes, Canal Digitaal undertook to provide technical services, including uplinking, multiplexing, compressing, scrambling and data transmission, which are required in order to enable Airfield to broadcast digital television services in Belgium and Luxembourg.

18. In order to offer digital satellite television to its customers in Flanders (Belgium), Airfield also concluded a series of agreements with broadcasting organisations whose channels are included in its satellite package. From a technical point of view, the manner in which it cooperates with those organisations differs according to the method of retransmission of the television channels concerned. The referring court distinguishes three methods of sending programme-carrying signals via satellite to consumers in Belgium, two indirect and one direct, although in all cases the programmes retransmitted remain unchanged.

– *The two methods of indirect retransmission of television channels included in the satellite package*

19. According to the two orders for reference, in the first case of what is called indirect retransmission, designated as 'situation 1', Belgian broadcasting organisations send unencrypted signals carrying their programmes via a fixed link to equipment which Canal Digitaal has installed in Belgium. Canal Digitaal then compresses and scrambles the signals in order to send them by broadband to its station in the Netherlands, which beams them up to the Astra satellite after encryption. The key required by the public for viewing programmes is incorporated in a decoder card which is supplied to Airfield by Canal Digitaal and then to subscribers of Airfield.

20. The second type of indirect retransmission, which is 'situation 3' described by the referring court, consists in broadcasting organisations transmitting signals carrying their programmes to Canal Digitaal via another satellite, for example Eutelsat, and not by a fixed link. Canal Digitaal receives these satellite signals, which are encrypted and not accessible to the public, in the Netherlands or Luxembourg. It decodes them if necessary, rescrambles them and beams them up to the Astra satellite. Airfield's subscribers can decode them by means of a special card supplied to Airfield by Canal Digitaal.

21. Airfield concluded agreements for the supply of television by satellite, known as 'carriage agreements', (9) with the broadcasting organisations concerned by those two methods of sending their signals.

22. Under the agreements, Airfield leases satellite transponder capacity to those organisations with a view to the broadcasting of television programmes to viewers in Belgium, the Netherlands and Luxembourg. Airfield guarantees that it has received authorisation from the company operating the Astra satellite to sublet the transponder capacity.

23. In addition, Airfield undertakes to receive the television programme signal of the broadcasting organisations at a central uplink site and then to compress, multiplex and scramble the signal and beam it up to the satellite for broadcasting and reception.

24. The broadcasting organisations pay a fee to Airfield for that leasing and provision of services. They for their part grant Airfield authorisation for simultaneous viewing, in Belgium, the Netherlands and Luxembourg, by its subscribers of their programmes broadcast by means of the Astra satellite.

25. In return for the rights conferred on Airfield by the broadcasting organisations and for Airfield's power to include the television programmes in its package service, Airfield is required to pay the broadcasting organisations a fee for the television programmes received by its subscribers in the territory concerned.

– *The method of direct retransmission of television channels included in the satellite package*

26. In this case, which is 'situation 2' described by the referring court, retransmission is termed 'direct' because it is carried out without the technical assistance of Airfield and Canal Digitaal. The broadcasting organisations, either themselves or through operators other than Airfield, encrypt the signals carrying their programmes in the country of origin and they beam them up directly to the Astra satellite. The signals are then sent back to earth. Canal Digitaal's contribution is limited to providing the broadcasting organisations with encryption keys so that the correct codes are applied to enable subsequent viewing of the programmes by Airfield subscribers using their decoder cards.

27. With regard to that group of broadcasting organisations, Airfield concluded agreements of another kind, known as 'heads of agreement', under which the organisations give Airfield authorisation for the reception and simultaneous viewing by its subscribers in Belgium and Luxembourg of their television programmes which are broadcast by means of the Astra satellite.

28. In return for the rights conferred on Airfield by the broadcasting organisations and for Airfield's power to include the television programmes in its package service, Airfield is required to pay the broadcasting organisations a fee for the television programmes received by its subscribers in the territory concerned.

IV – **The main proceedings, the questions referred and the procedure before the Court**

29. Sabam is a Belgian cooperative society which, in its capacity as a management society, represents authors in authorising the use of their copyright-protected works by third parties and in collecting the royalties payable for that use.

30. Agicoa (10) is a Belgian collective management society which represents Belgian and international producers of audiovisual works with a view to managing copyright and related rights in films and other audiovisual works, with the exception of video clips. Within this framework, it collects the royalties to which the producers are entitled.

31. Sabam and Agicoa took the view that Airfield, as an entity independent of the broadcasting organisations, was rebroadcasting television programmes which had already been broadcast by those organisations, within the meaning of the Berne Convention. (11) They considered that, because of the further communication to the public, Airfield had to obtain an authorisation additional to that received by the broadcasting organisations for the purpose of using the catalogues of authors whose rights are held by Sabam and Agicoa respectively.

32. In reply, Airfield and Canal Digitaal submitted that they do not carry out rebroadcasting, but merely offer television programmes by satellite to the public on behalf of the broadcasting organisations. They maintained that there is a first and single broadcast by satellite which is carried out by the broadcasting organisations themselves and for which the latter use the services of Airfield and Canal Digitaal in a purely technical respect. They contended that the broadcasting organisations alone carry out an operation relevant for the collection of royalties, as defined in Articles 49 and 50 of the Law on copyright, which transposed Directive 93/83 into Belgian law.

33. As no agreement could be reached, Sabam issued a writ of summons against Airfield and Canal Digitaal (Case C-431/09), while Agicoa issued a writ of summons against Airfield (Case C-432/09), on the basis of the Law on copyright to appear before the President of the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels). The latter found that Airfield and Canal Digitaal had infringed the copyrights and related rights managed by Sabam and Agicoa by communicating protected works in the catalogue of each of the applicants to viewers who subscribed to Airfield programmes, without having obtained the prior authorisation of the applicants.

34. Airfield and Canal Digitaal lodged an appeal before the referring court which, finding that it was unable to give a clear reply to the questions of interpretation and application of Community law arising in the context of the two disputes before it, decided to stay the proceedings and to refer the following questions, which are the same in Cases C-431/09 and C-432/09, to the Court for a preliminary ruling:

‘(1) Does Directive 93/83 preclude the requirement that the supplier of digital satellite television must obtain the consent of the right holders in the case where a broadcasting organisation transmits its programme-carrying signals, either by a fixed link or by an encrypted satellite signal, to a supplier of digital satellite television which is independent of the broadcasting organisation, and that supplier has those signals encrypted and beamed to a satellite by a company associated with it, after which those signals are beamed down, with the consent of the broadcasting organisation, as part of a

package of television channels and therefore bundled, to the satellite television supplier's subscribers, who are able to view the programmes simultaneously and unaltered by means of a decoder card or smart card provided by the satellite television supplier?

(2) Does Directive 93/83 preclude the requirement that the supplier of digital satellite television must obtain the consent of the right holders in the case where a broadcasting organisation transmits its programme-carrying signals to a satellite in accordance with the instructions of a digital satellite television supplier which is independent of the broadcasting organisation, after which those signals are beamed down, with the consent of the broadcasting organisation, as part of a package of television channels and therefore bundled, to the satellite television supplier's subscribers, who are able to view the programmes simultaneously and unaltered by means of a decoder card or smart card provided by the satellite television supplier?'

35. By order of the President of the Court of 6 January 2010, Cases C-431/09 and C-432/09 were joined for the purposes of the written and oral procedure and of the judgment.

36. Written and oral observations, and written replies to the questions raised by the Court in order to clarify the factual background, have been submitted by Airfield and Canal Digitaal jointly, Sabam and Agicoa. The European Commission has submitted written and oral observations. The Finnish Government has submitted only written observations.

V – **Analysis**

A – *Admissibility*

37. First of all, Agicoa asserts that Directive 93/83 is not applicable to the main proceedings and that consequently the two questions referred for a preliminary ruling are inadmissible because the interpretation requested is not helpful to the referring court for giving a decision on the dispute before it. (12) Agicoa submits that, on the contrary, the provisions of Article 3(1) of Directive 2001/29, read in conjunction with Article 11*bis*(1)(ii) of the Berne Convention, (13) should be applied.

38. In support of its assertions, Agicoa states, first, that the Working Group on Satellite Broadcasting, (14) at its meeting of 6 May 2003, (15) recommended that 'satellite platform operators … be clearly distinguished from broadcasting organisations in so far as the former are concerned with the constitution of a cluster of services from a Member State', as is the case with regard to Airfield here. Agicoa concludes, without further explanation, that it is therefore misplaced to plead the concept of communication to the public by satellite and consequently the Court need not reply to the questions referred to it.

39. Agicoa also submits that the main action to which it is a party falls outside the substantive ambit of Directive 93/83 because there is no question of a satellite within the meaning of Article 1 of the directive. (16)

40. Finally, Agicoa considers that Directive 93/83 cannot apply because, in the present instance, there is no cross-border element as envisaged by Directive 93/83 or, at least, that element has never been made clear by Airfield.

41. With regard to the first submission, that the questions referred have no connection with the subject-matter of either of the actions in the main proceedings or are hypothetical, I observe that, upon a reference for a preliminary ruling, the national court is the best placed to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. (17) Where the questions concern the interpretation of European Union law, the Court is, in principle, bound to give a ruling, in the knowledge, according to settled case-law, that questions referred by a national court enjoy a presumption of relevance. (18)

42. In the present case, it cannot be maintained, without producing support for the proposition, that it is not helpful to the outcome of the disputes in the main proceedings to reply to the questions which the referring court considers it both necessary and legally relevant to formulate in order to determine how to apply the law applicable in Belgium, in particular the Law on copyright, in the light of the requirements of Directive 93/83, bearing in mind that the directive was implemented in that Member State by that law, as is pointed out in both of the orders for reference.

43. Agicoa's second and third arguments are likewise unsupported. Regarding the latter, it is clear from the case-law that the issue of the lack of a cross-border element (19) does not relate to inadmissibility, but to the substance of the case. (20) Besides, it does not seem to me that in the present instance all the elements of the main proceedings are confined within one Member State. (21) Therefore the reference for a preliminary ruling cannot be ruled inadmissible on that basis either.

44. In addition, at the hearing the Commission's representative observed that it was regrettable that the hof van beroep te Brussel had not been more explicit regarding the facts that had given rise to the two disputes in the main proceedings. The Commission's representative stated that it was only following the observations of the parties to the main proceedings that the Commission had become fully aware of the circumstances of the matter and that it therefore wished to add to its own written observations. (22) Consequently it is permissible to ask whether each of the references for a preliminary ruling has been formulated sufficiently precisely for the Court to be able to give a ruling.

45. In view of the information originally submitted to the Court and the information subsequently provided in the course of the written and the oral procedure, I am of the

opinion that the referring court has defined the factual context of the questions it is asking, in accordance with the Court's requirements. (23) The factual circumstances are described by the hof van beroep te Brussel in what is, admittedly, a somewhat complex way, but without any ambiguity which could mislead the reader. I consider that the difficulty mentioned by the Commission arises from its presupposition that the disputes in question could relate only to one form of activity.

46. Therefore I consider that replies should be given to the questions set out above, in the form in which they are put to the Court, that is to say, in the light of the provisions of Directive 93/83.

47. The proposals which I shall set out for that purpose will, after a few general observations, follow the distinction made by the referring court between, on the one hand, the methods of transmission whereby the signals carrying the television programmes are retransmitted by the broadcasting organisations to the satellite with the aid of Airfield and Canal Digitaal (the first question referred) and, on the other hand, the method whereby those organisations broadcast their programmes without the aid of that satellite package provider and its associated company (second question), in accordance with the circumstances described in the account of the facts giving rise to the disputes in the main proceedings.

B – *Preliminary observations*

48. As the referring court points out in explaining the reasons for its two requests for a preliminary ruling, in adopting Article 1(2)(a) to (c) of Directive 93/83, the legislature wished to define the term 'communication to the public by satellite' which is used in that directive and is the subject of the present references for a preliminary ruling, in order to obtain legal certainty at the Community level.

49. It is clear from recital 14 in the preamble to Directive 93/83 that the objective of the abovementioned article is to overcome the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting. (24) In addition, it appeared necessary to define that term 'at Community level' in order to avoid the cumulative application of several national laws to a single act of broadcasting, given the wide territorial impact which satellite broadcasting is capable of having. (25)

50. To this end Article 1(2) of Directive 93/83 gives a very exact definition of 'communication to the public by satellite' within the meaning of the directive, which also specifies the place of the act of communication by adopting the country where the broadcast originates as the single point of connection, without referring to the law of the Member States. Consequently that autonomous concept, that is to say, one specific to European Union law, must be interpreted uniformly. It has consistently been held (26) that such a concept must be interpreted not only by reference to all the terms used in the provision concerned, but also in accordance with its aims, (27) mentioned above, and in

the light of its context, resulting in particular from relevant international conventions and related measures of European Union law, such as Directive 2001/29. (28)

51. In the context of the present case, the referring court is, in essence, uncertain as to whether, in cases of television broadcasting as defined by the two questions referred, which involves, to a more or less significant degree, a satellite package provider, there must be considered to exist:

– a single communication to the public by satellite, attributable to the broadcasting organisation alone, which is therefore the only entity which must obtain the copyrights relating to the programmes thereby broadcast,

– or, on the contrary, two separate communications to the public by satellite, the first from the broadcasting organisation to the public for the initial transmission, and the second from the satellite package provider to the public consisting of its subscribers, (29) which would mean that the copyrights must be observed for each of those operations.

52. First of all, I would observe that the risk of misunderstanding with regard to the concept of simultaneous broadcasting must be removed. In contrast to pre-recorded broadcasting, such 'retransmission', also described as 'direct rediffusion' as Sabam made clear at the hearing, is carried out in parallel, that is to say, at the same time and with the same content as the initial broadcast of programmes, known as 'initial transmission' in the words of Directive 89/552 (30) which is closely related to Directive 93/83. Although the initial transmission and the retransmission are simultaneous, and not successive, these two types of broadcast must be distinguished for the purpose of the copyrights which they may involve. (31)

53. At the hearing the Commission stated that in its written observations it envisaged the situation of the initial broadcast of programmes carried out directly by Airfield, whose activity, fed by mere producers of broadcastable material, could then be treated as that of a broadcasting organisation, and which should undoubtedly obtain authorisation from the authors for making a communication to the public by satellite in that particular case. However, in view of the wording of the questions referred to the Court, it seems to me that the situation which the referring court has in mind is quite different, namely a situation of direct retransmission by Airfield which duplicates the initial and parallel transmission by a broadcasting organisation. Both questions make it clear that the viewing of programmes by Airfield subscribers is 'simultaneous and unaltered', which implies that they are accessible at the same time as the programmes, accessible via a broadcasting system other than that of Airfield, which are transmitted by the broadcasting organisation that 'supplies' Airfield.

54. In the context of the main proceedings, it is common ground that the broadcasting organisation and the satellite package provider are, structurally and economically, separate operators, but what is the situation at the legal level, that is to

say, regarding the exploitation of the works protected by copyright? The implications of the reply are significant because, in the former case referred to above, the authors, by virtue of their right to authorise or to prohibit exploitation, will receive a single payment from the broadcasting organisations, whereas in the latter case they will receive in addition a second payment from the satellite package provider.

55. I note that the Finnish Government considers that the provisions of Directive 93/83 cannot provide a reply to the questions which have been referred for a preliminary ruling in the two orders for reference and that it is necessary to refer to the legislation of the Member States, in accordance with the judgment in *Egeda*, (32) to establish which entity makes a 'communication to the public by satellite' and therefore has to obtain authorisation from the authors of the television programmes. I do not share that view because it is apparent from the preparatory documents that the purpose of Article 1 of Directive 93/83 was to determine both when the broadcasting of programmes constitutes communication to the public by satellite and who is responsible for such communication, which means that that person has to obtain exploitation rights. (33)

C – *The authorisation to be obtained in the context of indirect retransmission of the television channels included in the satellite package*

56. The first question from the hof van beroep te Brussel is, in essence, whether Directive 93/83 precludes the requirement that a satellite package provider must obtain the authorisation of the holders of the rights relating to the communication of protected works in the context of the indirect retransmission of television channels by a broadcasting organisation, in circumstances such as those of the main proceedings.

57. The indirect nature of the operations concerned (34) is due to the fact that the broadcasting organisation provides the programme-carrying signals, via a fixed link, or via satellite with encryption, not by itself but through Airfield which, the referring court points out, is independent of the broadcasting organisation. To be specific, Airfield has the signals encrypted by an associated company, namely Canal Digitaal, and it has the signals beamed up to the Astra satellite.

58. In order to reply to the questions referred, it must be borne in mind that Article 2 of Directive 93/83 states that the author of a work protected by rights owned by him has an exclusive right to authorise the communication of that work to the public by satellite. The relevant provisions of Directive 93/83 in the present case are Article 1(2)(a) and (c), which define the term 'communication to the public by satellite' for the purpose of the directive.

59. The wording of those provisions shows that several criteria must be taken into account in order for the operation in question to be capable of being described as a 'communication to the public by satellite', entailing the need for authorisation by the proprietor of the rights in the broadcast work.

60. The parties to the main proceedings are in agreement as to the set of factors which the Court should consider, but are divided with regard to the reply to be given to the questions which have been referred. On the one hand, Airfield and Canal Digitaal consider that Directive 93/83 precludes any obligation on the part of the satellite package provider to obtain specific authorisation from the authors of programmes, on the ground that the satellite package provider performs merely technical services. On the other hand, Agicoa and Sabam argue to the contrary, claiming that a 'communication to the public by satellite' is made not only by the broadcasting organisations but also by the satellite package provider.

61. First of all, I note that the term 'programme-carrying signals' within the meaning of Article 1(2) of Directive 93/83 presents no problem. There is no doubt that the signals involved in the main proceedings may be described as such.

62. Agicoa and Sabam contend that the signals are intended for the satellite package provider and not for the public as such, whereas, according to Airfield and Canal Digitaal, it is not the satellite package provider which transmits to the public, particularly at the stage of beaming up.

63. It is clear from the case-law that the term 'public' within the meaning of Article 1(2) of Directive 93/83 refers to the general public, as opposed to professionals. (35) Therefore 'communication to the public by satellite' cannot include that part of the acts of retransmission which corresponds to the reception of signals by a professional such as Airfield. The situation contemplated by the referring court is that of an operation which begins with the supply by a broadcasting organisation of its programme-carrying signals and ends with subscribers of the satellite television provider being able ultimately to view the programmes concerned in their entirety, without pre-recording or a change in their nature. In my view, that public alone, even if it is only potential, (36) is relevant for the purpose of the question referred.

64. In the present case, the public reached by Airfield's activity is constituted by the persons who have taken out a subscription with it. The broadcasting organisation may very well have targeted a different public, given that none of the organisations whose programmes are included in Airfield's packages limits distribution of its signals exclusively to Airfield. This approach involving the existence of a 'new public' was taken by the Court in the judgment in *SGAE*, relating to 'communication to the public by satellite' as provided for by Article 3(1) of Directive 2001/29, (37) which aims basically to replace Article 2 of Directive 93/83. (38) In the present instance, the view may be taken that the communication originally made to the public by the broadcasting organisation, which can be received without payment by any person with appropriate means of access, must be dissociated from the communication to the public by the satellite package provider, which can be accessed only by subscribers who have received a decoder card. Since their publics are different, the economic interests of those two operators, which according to both orders for reference are independent, are also distinct. (39)

65. At the hearing, Airfield admitted that special authorisation from authors, and therefore additional remuneration for them, would be necessary in the eventuality, not established in the present case, that the retransmission which it carries out were to take place at a different time from that of the broadcasting organisations. Nevertheless, like Sabam and the Commission, I consider that it is of little importance whether the transmission by the satellite package provider is pre-recorded or, as in the main proceedings, simultaneous. The essential criterion for separate acts of exploitation is that Airfield acted with a particular target, that is to say, the public specifically aimed at by means of the grouping of programmes, an operation which offers added economic value for the satellite package provider.

66. Airfield defines its own public by forming packages of television channels which are, by definition, a different audiovisual product from the individual channels constituting them. As the Commission stated at the hearing, there might be either an initial transmission by Airfield or retransmission, but in either case the satellite package provider must have its own authorisation from the copyright holders. In my view, the only permissible exception would be where, under the terms of a contractual agreement with the authors which complies with national legislation, (40) the broadcasting organisation could have assigned its authorisation to the satellite package provider which carries out a simultaneous retransmission. However, that possibility appears to be ruled out in the present case in view of the statements by Sabam at the hearing, which explained that the general authorisation and remuneration contracts which it concluded with the broadcasting organisations concerned required them themselves to broadcast protected works, expressly excluding any right for them to use a third party to distribute or retransmit the programmes covered by the authorisation granted to them by the copyright holders.

67. After pointing out that Directive 93/83 does not clearly define 'act of introducing, under the control and responsibility of the broadcasting organisation' within the meaning of Article 1(2)(a) of the directive, Airfield and Canal Digitaal submit that they act as mere sub-contractors, providing only technical assistance for the broadcasting organisations, as they themselves do not decide on the content of the programmes broadcast or the time of the broadcast. (41)

68. At the hearing, the Commission took the view that the satellite package provider nevertheless acts as a broadcasting organisation in that it at least gives instructions and groups television channels together. Agicoa and Sabam also contest the arguments of Airfield and Canal Digitaal on the ground that the latter act as 'facilitators' in relation to the broadcasting organisations with which contracts have been concluded.

69. I note that in the present instance, in the words of its first question, the referring court assumes that 'the broadcasting organisation transmits its programme-carrying signals … to a supplier of digital satellite television'. It follows that it is indeed the broadcasting organisation which appears to originate the process of communication. The question that remains then is whether it is the broadcasting organisation, and not

Airfield, which carries out the relevant 'act of introducing' a communication to the public by satellite within the meaning of Directive 93/83, or whether the broadcasting organisation, as a mere producer of broadcastable material, only provides the audiovisual content the broadcasting of which by satellite is legally and technically carried out under the control of Airfield and Canal Digitaal.

70. I consider that the answer can be found in Airfield's carriage agreements with the broadcasting organisations. It appears from paragraph 7.2 of the standard form carriage agreement in the court file that Airfield enjoys a discretion in selecting the television programmes which it wishes to include in its service throughout a territory or in part thereof, and that privilege is obtained in return for payment. Therefore it is Airfield that decides on what is beamed up. Consequently, as the person responsible for the communication to the public, it must obtain the authorisation of the right holders.

71. I would point out that the practical effect of Article 1(2)(a) of Directive 93/83 is to define the act of exploitation which is relevant from the copyright viewpoint, in the context of satellite broadcasting. The approach taken by the Community legislature makes sense only if commmunication to the public by satellite is understood as a single, closed causal chain which consists in an act of introducing signals, followed by beaming up to the satellite and then beaming down, all under the responsibility and the control of the broadcasting organisation which carried out the initial transmission.

72. The Commission stated in its written observations that, in view of the aim of legal certainty pursued by Directive 93/83, the applicability of its provisions should not be made to depend on random technical factors associated with the satellite. It is clear from the Court's case-law that the broadcasting system must be closed in the sense that the public must not have access to the programme-carrying signals while they are situated in the chain of communication. (42) I consider that that is precisely the case here as no interception by a third party is possible because the signal transmitted is encrypted.

73. Airfield and Canal Digitaal submit that, as their intervention is limited to 'normal technical procedures', they cannot be regarded as liable to cause an interruption of the signal, (43) in accordance with recital 14 in the preamble to Directive 93/83. (44) At the hearing, Airfield and Canal Digitaal argued that composition of satellite packages does not cause interruption because the programmes are retransmitted as received by them from the broadcasting organisation, without change in their content or even in the time of broadcasting, and that the technical operations which they carry out are not therefore acts giving rise to a right to collect royalties.

74. In the light of the wording of the question referred and the information in the file, I share the contrary view held by Agicoa and Sabam that the abovementioned intervention (45) requires technical adaptation of the signals transmitted by the broadcasting organisations and, therefore, results in interruption of the chain of communication. It is important to note that Airfield, with the technical assistance of

Canal Digitaal, modifies the nature of the signals transmitted by the broadcasting organisations and uses its own frequency to broadcast the television programmes, permitting the conclusion that the satellite package provider in question acts independently of those organisations. I consider that those acts go beyond 'normal technical procedures', (46) that there is an interruption of the chain of communication which was initially opened by the broadcasting organisations and that a new chain is then created and defined by Airfield. That operation enables it to direct the satellite retransmission of the programmes concerned at a different public from that of the broadcasting organisation which made the initial transmission, even if the programmes are broadcast simultaneously and their content is entirely identical.

75. On reading the two orders for reference, it is apparent that the referring court starts from the presumption that the programme-carrying signals are transmitted in encrypted form and received in that condition by the subscribers of the satellite package provider, which gives them a decoder card to enable them to decrypt the signals. Therefore that situation is indeed covered by the provisions of Article 1(2)(a) of Directive 93/83.

76. Airfield states that the broadcasting organisations gave their consent for it to sell decoder cards to its customers. According to Agicoa and Sabam, however, the persons concerned have not adduced proof of the alleged consent. It will be for the national court to determine whether sufficient evidence is adduced.

77. Airfield submitted at the hearing in relation to the last mentioned criterion that the broadcasting organisations request its technical assistance in encrypting programmes precisely so that they can be received only in the chosen territory, namely Belgian Flanders, and not be accessible to the whole of the public. (47) In my view, this shows that the intervention of the satellite package provider has a substantial effect as regards to whom the 'communication to the public by satellite' within the meaning of Directive 93/83 is directed. In my opinion, the authorisation given by the right holders to an organisation for the act of exploitation which consists in the broadcasting of initial transmissions by satellite cannot be presumed to cover the retransmission of the same programmes by an independent operator to its customers, who constitute a different public.

78. Taking all those factors into account, I consider that the reply to the first question from the referring court should be in the negative, that is to say, Directive 93/83 must be interpreted as meaning that it is not incompatible with European Union law for the law of a Member State to require a satellite package provider to obtain specific authorisation to use the programme-carrying signals which are protected by copyright where those signals are retransmitted by a broadcasting organisation indirectly, which entails greater involvement on the part of the provider, in circumstances such as those of the main proceedings.

D – *The authorisation to be obtained in the context of direct retransmission of the television channels included in the satellite package*

79. The second question from the hof van beroep te Brussel is, in essence, whether Directive 93/83 precludes a requirement for a satellite package provider to obtain authorisation from the holders of the rights relating to the communication of protected works in the context of the direct retransmission of television channels by a broadcasting organisation in the circumstances of the present case.

80. The differences between this question and the first relate not to the rules of European Union law whose interpretation is sought, because the provisions at issue are still the relevant provisions of the abovementioned directive, but to the facts of the main proceedings which are the subject of the reference for a preliminary ruling. In what the referring court designates as situation 2, it refers to a different distribution of the respective roles whereby the broadcasting organisation plays a larger part in the broadcasting of the television channels offered by the satellite package provider, to be precise, at the initial stage of the process (beaming up). (48)

81. In this situation retransmission may be described as 'direct' because the broadcasting organisation itself, or with the assistance of third parties, carries out the encryption of the programme-carrying signals and their transmission to the satellite, without the intervention of Airfield and Canal Digitaal. The satellite package provider and its associated company merely give the broadcasting organisation 'instructions', in accordance with the terminology employed in the second question referred.

82. The conditions for the application of Article 1(2)(a) and (c) of Directive 93/83 which were examined in relation to the first question are also valid in this respect. Although the general considerations set out above concerning those conditions remain valid here, the conditions, by contrast, must be the subject of a specific examination pertaining to the present situation in light of the differences that have been noted compared with the other situations set out by the referring court.

83. The parties to the main proceedings have adopted the same opposing positions as in relation to the reply to the first question. As the involvement of the satellite package provider in the operation in question is *ex hypothesi* more limited in the present instance than in the case referred to by the first question, if it were to transpire that the reply to the first question should be in the affirmative, it seems to me that the Court should *a fortiori* take the view that the satellite package provider cannot be required to obtain authorisation for retransmission in which a more active part is taken by the broadcasting organisation. I wish to say straight away that I propose that the Court give an interpretation of the relevant provisions of Directive 93/83 which leads to the opposite reply in both cases.

84. Following the example of what was said concerning the first question, the view can be taken that the programme-carrying signals which the broadcasting organisation

transmits, directly this time, at the stage of beaming up are not intended as such to be received by the public, whereas they are intended to be so received at the stage of beaming down. Nevertheless, at the end of the chain of communication, which must be seen as a whole, the signals reach the specific, and therefore in economic terms new, public constituted by Airfield's customers.

85. In my opinion, the satellite package provider intervenes here too at the first stage of broadcasting, although in a more summary way than in the circumstances covered by the first question. According to the two orders for reference, the satellite package provider gives its 'instructions' to the broadcasting organisations concerned so that, in the encryption operations which they themselves carry out, they use the same codes as the satellite package provider in order to enable Airfield's customers subsequently to decrypt the signals by means of the card provided to them by Airfield and to view the programmes of the broadcasting organisations.

86. In the present instance, there is no doubt that the programme-carrying signals are introduced into the chain of communication under the control and the responsibility of the broadcasting organisation because (and this is the most significant difference from the situation previously discussed) the broadcasting organisation sends the signals to the satellite by its own means. Therefore that act is attributable to the broadcasting organisation and not to the provider, and it should be noted that, according to the referring court, they are entities independent of each other.

87. However, the broadcasting organisations lose control of the operations because of Airfield's intervention. In concrete terms Airfield does more than provide them with mere technical support since it decides, first, on the encryption codes and, second, on the composition of the programme packages, under the binding conditions laid down by the heads of agreement which it concludes with each of the broadcasting organisations that have opted for so-called direct retransmission. In particular, paragraph 3.1 of those agreements provides that Airfield has a discretion to include or not to include the television programmes in its service, with payment of remuneration for the benefit thus conferred. It seems to me that, in those circumstances, the organisations concerned do not have complete control of, and therefore the entire responsibility for, the upbeaming operations, but they at least share control and responsibility with the satellite package provider, who may even have sole control and responsibility.

88. According to Airfield, its limited intervention in the chain of communication is a normal technical procedure and is not a cause of interruption in the chain. However, in my view, the 'instructions' which it gives are not negligible because they are frequent (49) and, above all, because it is they that, first, ensure that the public targeted by that provider, namely its subscribers, can in fact receive the programmes and decrypt them (50) and, second, enable those programmes to be grouped into packages made up in accordance with the selection made by the provider.

89. The authorisation for communication to the public given to a broadcasting organisation by the author of a television programme does not necessarily amount to consent for the programme to be associated, by means of the grouping chosen by Airfield, with other programmes the nature or purpose of which may appear incompatible with the public which the author of the protected work aimed to reach. (51) The fact that the satellite package provider must also obtain the author's consent would enable the author to protect his financial interests and also his moral rights in the programme broadcast as part of a group.

90. The satellite package provider gives its subscribers the decrypting device which is necessary for viewing the programmes concerned, but it appears to do so with the consent of the broadcasting organisation. As this fact is disputed, it will be for the referring court to determine whether it has been proved.

91. The last-mentioned factor does not call into question my conclusion that the satellite package provider in reality performs an act of exploitation of the works protected by copyright and by rights related to copyright, which is distinct from the act of the broadcasting organisation and constitutes a 'communication to the public by satellite' within the meaning of Directive 93/83. (52)

92. I consider therefore that the reply to the second question should be in the negative, like the reply to the first, although the programme-carrying signals are in this instance retransmitted directly by the broadcasting organisation, that is to say, with more limited intervention by the satellite package provider in the present circumstances.

VI – **Conclusion**

93. In the light of the foregoing considerations, I propose that the Court reply as follows to the two questions referred for a preliminary ruling by the hof van beroep te Brussel:

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission does not preclude a provider of packages of satellite television channels from being required to obtain the authorisation of the holders of the copyrights or rights related to copyright for operations in which a broadcasting organisation provides it with the programme-carrying signals in circumstances such as those in the main proceedings.

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1 – Original language: French.

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2 – OJ 1993 L 248, p. 15.

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3 – OJ 1989 L 298, p. 23. That directive was amended in 1997 (OJ 1997 L 202, p. 60) and 2007 (OJ 2007 L 332, p. 27).

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4 – See recitals 4, 5 and 12 in the preamble to Directive 93/83.

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5 – OJ 2001 L 167, p. 10.

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6 – In Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 30, the Court observed that Directive 2001/29 applies to all communications to the public of protected works, whereas Directive 93/83 only provides for minimal harmonisation of certain aspects of protection of copyright and related rights in the case of communication to the public by satellite or cable retransmission of programmes from other Member States.

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7 – *Moniteur belge*, 27 July 1994, p. 19297. The Law entered into force on 1 August 1994.

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8 – The words in brackets were added by the Law of 22 May 2005, which transposed Directive 2001/29 into Belgian law.

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9 – The referring court states that only an English-language version of the agreements was submitted to it.

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10 – To be exact, Agicoa Belgium, one of the applicants in the main proceedings, engages in its activity pursuant to management mandates entrusted to it by the Association of International Collective Management of Audiovisual Works (AGICOA), an association governed by Swiss law, and by the beheers-en belangenvennootschap

voor audiovisuele producenten (BAVP), a limited liability cooperative society governed by Belgian law.

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11 – Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention').

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12 – On that point, Agicoa refers to Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19, and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 22, which state, in accordance with settled case-law, that 'the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it'.

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13 – 'Authors of literary and artistic works shall enjoy the exclusive right of authorising …(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one'.

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14 – The report of the first meeting of the Working Group on 28 November 2002 observes that 'consultation of the economic operators concerned … was announced in the report on the application of Directive 93/83'. This report is available on the Commission's internet site: http://ec.europa.eu/internal_market/copyright/docs/satellite-cable/working-group-satellite_en.pdf

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15 – Report of the second meeting, accessible on the Commission's internet site: http://ec.europa.eu/internal_market/copyright/docs/satellite-cable/working-group-satellite-05-03_en.pdf.

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16 – Article 1 defines 'satellite' as 'any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication'. In this

regard, see the Opinion of Advocate General Tizzano in Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, point 33 et seq.

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17 – See Case C-467/08 *Padawan* [2010] ECR I-0000, paragraph 21 et seq. and the case-law cited, and the Opinion of Advocate General Trstenjak in that case, point 48 et seq.

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18 – The presumption was recently referred to by the Court in Case C-45/09 *Rosenbladt* [2010] ECR I-0000, paragraph 33.

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19 – This issue was referred to by the Working Group on Satellite Broadcasting at its second meeting, in 2003. The abovementioned passage cited by Agicoa continues as follows: 'in this respect, the Commission recalled that only activities involving a cross-frontier dimension could be taken into account within the framework of [Directive 93/83] and that the retransmission of national channels by the aforementioned satellite operators for public reception within national frontiers could not fall within the scope of that Directive, which was based on Articles 43 and 49 of the EC Treaty covering freedom of establishment and the freedom to provide services'.

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20 – Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraphs 14 and 15.

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21 – According to the two orders for reference, the satellite package provider is a Belgian company which cooperates with a Netherlands company, the programme-carrying signals are received in both the Netherlands and Luxembourg, and the programmes broadcast by satellite originate from several Member States of the European Union and can be viewed by audiences in different territories, particularly Belgium and Luxembourg.

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22 – The Commission stated that, since it had doubts as to whether Airfield's broadcasts were initial transmissions, as it had considered in its pleadings, or retransmissions, it did not intend to change its original position should the referring court find that in the present case initial transmissions were involved, but it wished to add some considerations in order to respond also in relation to the alternative hypothesis.

23 – That is to say, according to the settled case-law (see, inter alia, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 34 and the case-law cited), in such a way as not only to enable the Court to provide answers which will be of use to the national court in deciding the main proceedings but also to enable the Governments of the Member States, and the other interested parties, to submit observations in accordance with Article 23 of the Statute of the Court of Justice.

24 – The same objective is stated in recital 5 in the preamble to Directive 93/83.

25 – See the Commission proposal at the origin of Directive 93/83 (COM(91) 276 final, p. 33 et seq.), the Commission report on the application of the directive (COM(2002) 430, final, in particular pp. 6 to 8), Case C-293/98 *Egeda* [2000] ECR I-629, paragraph 15, 20 and 21, and *Lagardère Active Broadcast*, paragraph 42.

26 – See the case-law cited in *Padawan*, paragraph 31 et seq., and the Opinion of Advocate General Trstenjak in that case, point 61 et seq., the reasoning of which appears to me to be transposable to the present case.

27 – See, inter alia, *Lagardère Active Broadcast*, paragraph 26 et seq.

28 – See, in particular, the Berne Convention and the Copyright Treaty adopted in Geneva on 20 December 1996 by the World Intellectual Property Organisation ('the WIPO Copyright Treaty'). For the connection between the term 'communication to the public' in those instruments and the same term within the meaning of Article 3(1) of Directive 2001/29, see the Opinion of Advocate General Sharpston in *SGAE*, point 35 et seq., and the Opinion of Advocate General Kokott in Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, still pending before the Court, point 127 et seq.

29 – I note that Article 3(2) of Directive 93/83, concerning 'the acquisition of broadcasting rights', states that 'a Member State may provide that a collective agreement between a collecting society and a broadcasting organisation concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that … the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster …'. In that situation, the broadcasting organisation will benefit from the system only if there is an initial transmission simultaneously with the communication to the public by satellite.

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30 – In the version applicable at the time of the adoption of Directive 93/83, Article 1(a) of Directive 89/552 stated that 'for the purpose of this Directive … "television broadcasting" means the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public'. On the other hand, it seems to me that Directive 93/83 does not apply only to initial transmission by satellite, given that it also governs cable retransmission.

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31 – See Article 1(3) of Directive 93/83, concerning cable broadcasting, which states that, 'for the purposes of this Directive, "cable retransmission" means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public'.

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32 – Paragraph 25 et seq. See also, in this regard, *SGAE*, paragraph 30.

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33 – See the initial proposal for the directive (COM(91) 276 final, p. 33, point 3) and the amended proposal for a directive (COM(92) 526 final, in particular p. 7).

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34 – Namely situations 1 and 3 described by the referring court, in contrast to situation 2, detail on which has already been set out in the factual background.

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35 – For 'public' within the meaning of Directive 93/83, see *Lagardère Active Broadcast*, paragraph 31 et seq., which cites Case C-89/04 *Mediakabel* [2005] ECR I-4891, paragraph 30, concerning the interpretation of 'public' within the meaning of Directive 89/552. The Court referred to those two judgments in interpreting the same word for the purpose of Directive 2001/29 in *SGAE*, paragraph 37 et seq.

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36 – It is immaterial whether the programmes broadcast are actually viewed or not. As in the case of books, it is solely the making available of the work to the public that matters when justifying the collection of royalties in the event of sale.

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37 – In *SGAE*, paragraph 40 et seq., the Court, on the basis of the provisions of the Berne Convention, observes that 'the transmission [of works communicated by means of television sets installed in hotel rooms] is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public'. If the reception of the broadcasts concerned is intended for a larger audience by means of an independent act through which the broadcast work is communicated to a new public, such public reception falls within the scope of the author's exclusive right to authorise it. See also the order of 18 March 2010 in Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, paragraph 38 et seq., and the Opinion of Advocate General Kokott in *Football Association Premier League and Others*, point 118 et seq.

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38 – See, to that effect, Hugenholtz, B., 'Nouvelle lecture de la Directive Satellite-Câble: passé, présent, avenir', *Convergence, droit d'auteur et télévision transfrontière*, IRIS Plus 2009-8, European Audiovisual Observatory, Strasbourg, p. 10, who states that Article 3 of Directive 2001/29 provides for a right of communication to the public which is worded in such a general way that it probably covers acts of broadcasting by satellite. I also note that recital 23 in the preamble to that directive states that this right should be understood in a broad sense covering any transmission or retransmission to a public not present at the place where the communication originates, including broadcasting.

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39 – Regarding the taking into account of independent acts of exploitation by an operator and the economic benefit it derives from them, see the Opinion of Advocate General Sharpston in *SGAE*, points 56, 57 and 64, which refers to the position taken in that connection by Advocate General La Pergola in *Egeda*. The communication was found by the Court to be of a profit-making nature in *SGAE*, paragraph 44.

40 – See recital 15 in the preamble to Directive 93/83.

41 – The criteria relating to a clear decision on the content and the broadcast are indeed important according to the preparatory documents for Directive 93/83 (see COM(91) 276 final, p. 33 et seq., and COM(92) 526 final, p. 7).

42 – It is stated in *Lagardère Active Broadcast*, paragraph 39, that '[Directive 93/83] is concerned with a closed communications system, of which the satellite forms the central, essential and irreplaceable element, so that, in the event of malfunction of the satellite, the transmission of signals is technically impossible and, as a result, the public receives no broadcast'. In the present case, it is not disputed that the satellite is the key element of the system concerned.

43 – A break in the chain of communication after the passing of the signals through the satellite was noted in *Lagardère Active Broadcast* (see point 48 et seq. of the Opinion of Advocate General Tizzano in that case). The break might also result from the introduction of different advertisements from those contained in the initial programmes.

44 – The amended proposal leading to the adoption of Directive 93/83 (COM(92) 526 final, p. 7) makes it clear that there is no interruption provided that the technical procedure used is normal and so long as communication remains under the control of the broadcasting organisation. For the continuous nature of the chain, see also the initial proposal for the directive (COM(91) 276 final, paragraph 4).

45 – That is to say, in particular, compressing, multiplexing, scrambling and selecting of the signals intended to make up the packages broadcast by Airfield, which goes beyond just a 'technical means to ensure or improve reception of the original broadcast' and constitutes a 'technical intervention … enabling the customer to receive the signal … and thereby to gain access to the protected work', as the Court was able to observe in *SGAE*, paragraph 42, and *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, paragraph 40 et seq.

46 – This term may be compared, by analogy, with the joint declaration concerning Article 8 of the WIPO Copyright Treaty, which provides that 'it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention'.

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47 – In its 2002 report on the application of Directive 93/83 (COM(2002) 430 final, paragraph 3.1.1), the Commission observed that the use of encryption, together with the limited provision of the necessary means of decoding, leads to the grant of exclusive territorial rights and therefore to fragmentation of the internal market, contrary to the aims of the directive.

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48 – I note that, on the other hand, the two questions are worded in the same way in every respect with regard to the particulars of beaming down.

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49 – At the hearing, Airfield's representative stated that the codes are changed every month, which means that the operator regularly gives new instructions to the broadcasting organisations regarding the method of encryption which they are to use.

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50 – Agicoa has rightly observed that Airfield, which alone has control over the signals, could decide to interrupt their transmission to one of its customers, without any intervention on the part of the broadcasting organisations, should the person concerned not pay his subscription.

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51 – Likewise, a literary author might object to his book being sold in an indivisible package, forming a new product, which would include works that might convey what he considers a negative image.

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52 – To that effect, I note that at the 2003 meeting of the Working Group on Satellite Broadcasting the majority of the participants, when expressing a view on free, non-encrypted foreign channels broadcast by satellite from another Member State which can be received in all Member States, considered that a contract between a satellite package provider and a broadcaster providing for integration of the channel in question into the

package (with a view to greater visibility in the package through the channel's position in the electronic programme guide) was an agreement equivalent to authorisation by the broadcaster, implying remuneration of the right holders (report accessible on the Commission's internet site mentioned above). In my opinion, if an agreement of the same type relates to the cross-border broadcasting of pay-to-view channels, the satellite package provider, who derives an even more certain financial benefit from the operation, should *a fortiori* discharge obligations relating to copyright and related rights.