

In Case 270/80

REFERENCE to the Court under [Article 267 TFEU] by the Court of Appeal of England and Wales for a preliminary ruling in the case pending before that court between

POLYDOR LIMITED AND RSO RECORDS INC.

and

HARLEQUIN RECORD SHOPS LIMITED AND SIMONS RECORDS LIMITED,

on the interpretation of Articles 14 and 23 of the Agreement concluded on 22 July 1972 between the European [Union] and the Portuguese Republic (Official Journal, English Special Edition 1972 (31 December) (L 301), p. 167),

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keefe, T. Koopmans, U. Everling, A. Chloros and F. Grevisse, Judges,

Advocate General: S. Razes

Registrar: A. Van Houtte

gives the following

JUDGMENT

Decision

- 1 By order of 15 May 1980, which was received at the Court on 8 December 1980, the Court of Appeal of England and Wales referred to the Court for a preliminary ruling under [Article 267 TFEU] four questions on the interpretation of Articles 14 (2) and 23 of the Agreement between the European [Union] and the Portuguese Republic, which was signed in Brussels on 22 July 1972 and was concluded and adopted on behalf of the [Union] by Regulation (EEC) No 2844/72 of the Council of 19 December 1972 (Official Journal, English Special Edition (31 December) (L 301), p. 166).
- 2 The main proceedings concern an action for infringement of copyright brought against two British undertakings, Harlequin Record Shops Limited and Simons Records Limited (hereinafter referred to as "Harlequin" and "Simons" respectively), specializing in the importation and sale of gramophone records, which imported from Portugal and put on sale in the United Kingdom records featuring the popular music of the group known as "The Bee Gees", without obtaining the consent of the proprietor of the copyrights or of his exclusive licensee in the United Kingdom.
- 3 The proprietor of the copyrights in the sound recordings in question, RSO Records Inc. (hereinafter referred to as "RSO"), granted to an affiliated company, Polydor Limited (hereinafter referred to as "Polydor"), an exclusive licence to manufacture and distribute gramophone records and cassettes reproducing those recordings in the United Kingdom. Records and cassettes reproducing the same recordings were manufactured and marketed in Portugal by two companies incorporated under Portuguese law, which were licensees of RSO in Portugal. Simons purchased records containing those recordings in Portugal in order to import them into the United Kingdom with a view to their sale. Harlequin purchased a number of those records from Simons for the purpose of retail sale.

- 4 The Court of Appeal established that under English law Harlequin and Simons had thereby infringed Section 16 (2) of the Copyright Act, 1956. That provision provides that a copyright is infringed by any person who, without the licence of the owner of the copyright, imports an article into the United Kingdom, if to his knowledge the making of that article constituted an infringement of that copyright, or would have constituted such an infringement if the article had been made in the place into which it is so imported.
- 5 Harlequin and Simons maintained, however, that the proprietor of a copyright might not rely upon that right in order to restrain the importation of a product into a Member State of the [Union], if that product had been lawfully placed on the market in Portugal by him or with his consent. In support of that submission the companies relied upon Articles 14 (2) and 23 of the Agreement between the European [Union] and the Portuguese Republic of 1972 (hereinafter referred to as "the Agreement"), claiming that those provisions were based on the same principles as [Articles 34 and 36 TFEU] and accordingly had to be interpreted in a similar manner.
- 6 In order to enable it to assess that submission on the part of the defence, the Court of Appeal referred to the Court of Justice for a preliminary ruling the following questions:
 - "1. Is the enforcement by Company A of their United Kingdom copyrights against a gramophone record lawfully made and sold in the State of Portugal by licensees under the equivalent Portuguese copyrights a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 14 (2) of the said Agreement dated 22 July 1972 made between the European [Union] and the State of Portugal?
 2. If the answer to the first question is affirmative:
 - (a) Is such enforcement by Company A justified within the meaning of Article 23 of the said Agreement dated 22 July 1980 for the protection of the said United Kingdom copyrights?

- (b) Does such enforcement by Company A constitute a means of arbitrary discrimination or a disguised restriction on trade between the State of Portugal and the European [Union]?
3. Is Article 14 (2) of the said Agreement dated 22 July 1980 directly enforceable by individuals within the European [Union] having regard in particular to the said European [Union] Council regulation dated 19 December 1972 giving effect to the said Agreement?
4. Can an importer into the United Kingdom of the gramophone records referred to in Question 1 rely on Article 14 (2) of the said Agreement dated 22 July 1972 as a defence when sued by Company A for infringement of their said copyrights in the United Kingdom?"
- 7 According to the well-established case-law of the Court, the exercise of an industrial and commercial property right by the proprietor thereof, including the commercial exploitation of a copyright, in order to prevent the importation into a Member State of a product from another Member State, in which that product has lawfully been placed on the market by the proprietor or with his consent, constitutes a measure having an effect equivalent to a quantitative restriction for the purposes of [Article 34 TFEU], which is not justified on the ground of the protection of industrial and commercial property within the meaning of Article 36 of [TFEU].
- 8 The first two questions, which may be considered together, seek in substance to determine whether the same interpretation must be placed on Articles 14 (2) and 23 of the Agreement. In order to reply to those questions it is necessary to analyse the provisions in the light of both the object and purpose of the Agreement and of its wording.
- 9 By virtue of [Article 218 TFEU] the effect of the Agreement is to bind equally the [Union] and its Member States. The relevant provisions of the Agreement read as follows:

Article 14 (2). "Quantitative restrictions on imports shall be abolished on 1 January 1973 and any measures having an effect equivalent to quantitative restrictions on imports shall be abolished not later than 1 January 1975."

Article 23. "The Agreement shall not preclude prohibitions or restrictions on imports ... justified on grounds of ... the protection of industrial and commercial property ... Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties."

- 10 According to its preamble, the purpose of the Agreement is to consolidate and to extend the economic relations existing between the [Union] and Portugal and to ensure, with due regard for fair conditions of competition, the harmonious development of their commerce for the purpose of contributing to the work of constructing Europe. To that end the contracting parties decided to eliminate progressively the obstacles to substantially all their trade, in accordance with the provisions of the General Agreement on Tariffs and Trade (hereinafter referred to as the "General Agreement") concerning the establishment of free-trade areas.
- 11 Under Article XXIV (8) of the General Agreement a free-trade area is to be understood to mean "a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories."
- 12 In pursuance of the above-mentioned objective the Agreement seeks to liberalize trade in goods between the [Union] and Portugal. According to Article 2 the Agreement is to apply, subject to special arrangements provided for in respect of certain products, to products originating in the [Union] or in Portugal which fall within Chapters 25 to 99 of the Brussels Nomenclature.
- 13 In that connection Articles 3 to 7 of the Agreement provide for the abolition of customs duties and of charges having equivalent effect in trade between the [Union] and Portugal. The same principle is applied by Article 14 to quantitative restrictions and measures having equivalent effect. Those provisions are

supplemented in Article 21 by the prohibition of fiscal measures or practices of a discriminatory nature and in Article 22 by the abolition of all restrictions on payments relating to trade in goods. Moreover, in Articles 26 and 28 the Agreement contains certain rules on competition, public aid and dumping. By virtue of Article 32 a joint committee is established which is to be responsible for the administration of the Agreement and to ensure its proper implementation.

- 14 The provisions of the Agreement on the elimination of restrictions on trade between the [Union] and Portugal are expressed in terms which in several respects are similar to those of the Treaty [on the Functioning of the European Union] on the abolition of restrictions on intra-[Union] trade. Harlequin and Simons pointed out in particular the similarity between the terms of Articles 14 (2) and 23 of the Agreement on the one hand and those of [Articles 34 and 36 TFEU] on the other.
- 15 However, such similarity of terms is not a sufficient reason for transposing to the provisions of the Agreement the above-mentioned case-law, which determines in the context of the [Union] the relationship between the protection of industrial and commercial property rights and the rules on the free movement of goods.
- 16 The scope of that case-law must indeed be determined in the light of the [Union]'s objectives and activities as defined by [Article 3 TEU]. As the Court has had occasion to emphasize in various contexts, the Treaty, by establishing a common market and progressively approximating the economic policies of the Member States, seeks to unite national markets into a single market having the characteristics of a domestic market.
- 17 Having regard to those objectives, the Court, *inter alia*, in its judgment of 22 June 1976 in Case 119/75 *Terrapin (Overseas) Ltd. v Terranova Industrie C. A. Kapferer & Co.* (1976) ECR 1039, interpreted [Articles 34 and 36 TFEU] as meaning that the territorial protection afforded by national laws to industrial and commercial property may not have the effect of legitimizing the insulation of national markets and of leading to an artificial partitioning of the markets and that consequently the proprietor of an industrial or commercial property right protected by the law of a Member State cannot rely on that law to prevent the importation of a product which has lawfully been marketed in another Member State by the proprietor himself or with his consent.
- 18 The considerations which led to that interpretation of [Articles 34 and 36 TFEU]

do not apply in the context of the relations between the [Union] and Portugal as defined by the Agreement. It is apparent from an examination of the Agreement that although it makes provision for the unconditional abolition of certain restrictions on trade between the [Union] and Portugal, such as quantitative restrictions and measures having equivalent effect, it does not have the same purpose as the Treaty [on the Functioning of the European Union], inasmuch as the latter, as has been stated above, seeks to create a single market reproducing as closely as possible the conditions of a domestic market.

- 19 It follows that in the context of the Agreement restrictions on trade in goods may be considered to be justified on the ground of the protection of industrial and commercial property in a situation in which their justification would not be possible within the [Union].
- 20 In the present case such a distinction is all the more necessary inasmuch as the instruments which the [Union] has at its disposal in order to achieve the uniform application of [Union] law and the progressive abolition of legislative disparities within the common market have no equivalent in the context of the relations between the [Union] and Portugal.
- 21 It follows from the foregoing that a prohibition on the importation into the [Union] of a product originating in Portugal based on the protection of copyright is justified in the framework of the free-trade arrangements established by the Agreement by virtue of the first sentence of Article 23. The findings of the national court do not disclose any factor which would permit the conclusion that the enforcement of copyright in a case such as the present constitutes a means of arbitrary discrimination or a disguised restriction on trade within the meaning of the second sentence of that article.
- 22 For all those reasons the reply which must be given to the first two questions is that the enforcement by the proprietor or by persons entitled under him of copyrights protected by the law of a Member State against the importation and marketing of gramophone records lawfully manufactured and placed on the market in the Portuguese Republic by licensees of the proprietor is justified on the ground of the protection of industrial and commercial property within the meaning of Article 23 of the Agreement and therefore does not constitute a restriction on trade between the [Union] and Portugal such as is prohibited by Article 14 (2) of the Agreement. Such enforcement does not constitute a means of arbitrary discrimination or a disguised restriction on trade between the [Union] and Portugal.

23 In view of the replies given to the first two questions, it is unnecessary to reply to the third and fourth questions.

Costs

24 The costs incurred by the Government of the United Kingdom, the Government of the Federal Republic of Germany, the Government of the Kingdom of Denmark, the Government of the French Republic, the Government of the Kingdom of the Netherlands and the Commission of the European [Union], which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Court of Appeal by order of 15 May 1980, hereby rules:

The enforcement by the proprietor or by persons entitled under him of copyrights protected by the law of a Member State against the importation and marketing of gramophone records lawfully manufactured and placed on the market in the Portuguese Republic by licensees of the proprietor is justified on the ground of the protection of industrial and commercial property within the meaning of Article 23 of the Agreement between the European [Union] and the Portuguese Republic of 22 July 1972 (Official Journal, English Special Edition 1972 (31 December) (L 301), p. 167) and therefore does not constitute a restriction on trade such as is prohibited by Article 14 (2) of that Agreement. Such enforcement does not constitute a means of arbitrary discrimination or a disguised restriction on trade between the [Union] and Portugal within the meaning of the said Article 23.

Mertens de Wilmars Bosco Touffait
Due Pescatore Mackenzie Stuart O'Keefe
Koopmans Everling Chloros Grevisse

Delivered in open court in Luxembourg on 9 February 1982.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

Robert Schütze European Union Law Lisbonised Cases