Case C-106/24

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

8 February 2024

Referring court:

Hof van Cassatie (Belgium)

Date of the decision to refer:

25 January 2024

Applicant:

OV

Defendant:

WEAREONE.WORLD BV

Subject matter of the main proceedings

The main proceedings concern the alleged infringement of copyright in creations that the applicant, living in the Netherlands, produced under contract for a Belgian company. The issues at stake include whether Dutch or Belgian law should be applied to determine who owns the copyright.

Subject matter and legal basis of the request

This request under Article 267 TFEU concerns the concept of 'contractual obligations' in the Rome Convention on the law applicable to contractual obligations ('the Rome Convention'), and in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('the Rome I Regulation'), in force since the end of 2009. The referring court wonders whether that convention and that regulation apply for the purpose of determining the law applicable when establishing who holds the copyright in a work created in performance of a commission contract.

Question referred for a preliminary ruling

Should Article 1(1) of the Rome Convention and Article 1(1) of the Rome I Regulation be interpreted as meaning that the question of ownership of copyright in a work created in performance of an obligation under an employment or commission contract, that is, the question of who is the original owner and whether and to what extent that right is transferable to a subsequent owner, is covered by the concept of 'contractual obligations'?

Provisions of European Union law relied on

Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (OJ 1980 L 266, p. 1).

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

Provisions of national law relied on

Belgian law

Economic Law Code, Article XI.165, Section 2

Law of 16 July 2004 on the Code of Private International Law, Articles 2 and 93

Netherlands law

Law on Copyright 1912, Article 8

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant in the main proceedings, resident in the Netherlands, has designed creations such as logos, main stages and festival decorations every year since 2009 for the defendant, a Belgian company that organises, inter alia, the Tomorrowland Festival. This was done by the applicant in execution of commission contracts concluded verbally.

2 The defendant terminated the collaboration in 2017 following a dispute over the copyright to the creations. These copyrights consist of property rights (including the right to exploit a work and, for example, to make and distribute reproductions for that purpose) and moral rights (personality rights of the author, such as the right to indication of name). Due to infringement of both types of copyright, the applicant claimed damages of EUR 2 200 000 and EUR 225 000 respectively before the ondernemingsrechtbank Antwerpen (Commercial Court of Antwerp, Belgium).

3 The Commercial Court of Antwerp ruled under Belgian law that the property rights in the creations had been transferred to the defendant under Belgian law and that the applicant had not demonstrated moral rights.

4 On appeal, the Hof van Beroep Antwerpen (Court of Appeal of Antwerp) found that copyright ownership had to be determined by reference to the Rome Convention and the Rome I Regulation. It follows from Articles 4(1) and (2) of the Rome Convention and Article 4(1)(b) of the Rome I Regulation that Netherlands law had to be applied, specifically Article 8 of the (Netherlands) Law on Copyright. That article stipulates that if, inter alia, a company 'discloses a work as originating from it', it is deemed to be the creator of that work. This article thus provides for a 'fictitious creatorship' from the point at which a work is created. On that basis, the defendant had to be considered the fictitious creator of the creations and therefore possessed the property rights thereon. Moreover, that Article 8 of the Netherlands Law on Copyright also ruled out the possibility that the applicant could invoke moral rights.

5 The applicant then appealed in cassation to the referring court.

The essential arguments of the parties in the main proceedings

6 The applicant emphasises that both the Rome Convention and the Rome I Regulation essentially state that they apply to 'contractual obligations' in cases where a choice must be made between the laws of different countries. However, the manner of creation, existence, nature, content, availability, transferability and extinction of intellectual property rights are, according to the applicant, governed by the aspects of those rights pertaining to substantive law and not by the contractual obligations entered into in respect of those rights. In those aspects pertaining to substantive law, the designation of the applicable law is, in the opinion of the applicant, determined by the Belgian Code of Private International Law ('WIPR') and not by the Rome Convention or the Rome I Regulation.

7 The applicant points to the first subparagraph of Article 93 WIPR, which states that intellectual property rights are governed by the law of the State in respect of whose territory protection is sought. He also invokes Article 94(1) WIPR. On that premiss, the right to be determined on the basis of this law is decisive for the existence of intellectual property rights and for the question of who are the rightholders thereof. The applicant sought protection of his copyrights in Belgium (where they were used at festivals), so in his opinion, Belgian law applies. Since the Court of Appeal held that Netherlands copyright law applied, the applicant claims that it violated, inter alia, the first subparagraph of Article 93 and Article 94(1) WIPR.

8 With regard specifically to moral rights, the applicant submits that they are not transferable under Belgian copyright law (Article XI.165, Section 2 of the Economic Law Code). He thus derives an inalienable moral right from Belgian law. Therefore, in holding that he is not entitled to moral rights under Article 8 of

the Netherlands Law on Copyright, the Court of Appeal was in breach of the relevant Belgian law.

Succinct presentation of the reasoning in the request for a preliminary ruling

9 The referring court points to the settled case-law of the Court of Justice of the European Union on the concept of 'contractual obligations' within the meaning of Article 1(1) of the Rome Convention and the Rome I Regulation. According to that case-law, that concept must be interpreted independently, by reference to its scheme and purpose (judgment of 21 January 2016, *Ergo Insurance*, C-359/14 and C-475/14, EU:C:2016:40, paragraph 43; see, by analogy, judgment of 24 November 2020, *Wikingerhof*, C-59/19, EU:C:2020:950, paragraph 25).

10 With regard to the scheme and purpose of the Rome Convention, the referring court quotes the Report on the Rome Convention by M. Giuliano and P. Lagarde (OJ 1980 C 282, p. 1), which states the following about Article 1(1) thereof: 'First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An Article in the original preliminary draft had expressly so provided. However, the Group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing as between the various legal system of the Member States of the Community.'

11 With regard to the Rome I Regulation, the referring court points to the comments on the proposal for that regulation made by the European Max-Planck Group for Conflict of Laws in Intellectual Property on 4 January 2007 [*Comments on the European Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations ('Rome I') of December 15, 2005 and the European Parliament Committee on Legal Affairs' Draft Report on the Proposal of August 22, 2006*]. These state that issues that concern the intellectual property right itself but are closely related to the agreement on this right, such as the transferability of the right, the conditions under which a transfer or licence can be authorised or whether a transfer or licence can be invoked against third parties, are not subject to the law applicable to the agreement, but are governed by the law of the country in respect of which protection is sought.

12 It seems to follow from these views that the question of who owns the copyright in a work created under a commission contract, and whether this right is transferable, is a question of substantive law that falls outside the material scope of the Rome Convention or the Rome I Regulation.

13 Nevertheless, there appears to be debate about this position in several Member States. There is also a view in the legal literature that original ownership is determined by the agreement precisely because of its close connection to the contractual obligation in performance of which the creation was designed. According to that view, the question of ownership would therefore be covered by

the concept of ‘contractual obligation’ set out in Article 1(1) of the Rome Convention or the Rome I Regulation. In view of this discussion, the referring court takes the view that the interpretation of Article 1(1) of the Rome Convention or the Rome I Regulation is not so obvious that there cannot reasonably be any room for doubt, and asks the question referred for a preliminary ruling.