Court of Justice EU, 6 July 2006, Commission v Portugal

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Failure to properly implement directive by exempting all categories of public lending establishment form remuneration obligation

- **Declares that, by exempting all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, the Portuguese Republic has failed to fulfil its obligations under Articles 1 and 5 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property;**
- allowing for total derogation from that obligation of remuneration, since the effect of such an interpretation would be to render Article 5(1) meaningless and thus deprive that provision of all effectiveness.
- 24 Finally, the main objective of the directive, as can be seen more precisely from the seventh recital, is to guarantee that authors and performers receive appropriate income and recoup the especially high and risky investments required particularly for the production of phonograms and films (**Case C-200/96 Metronome Musik [1998] ECR I-1953, paragraph 22**).

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Court of Justice EU, 6 July 2006

(A. Rosas, J. Malenovský (Rapporteur), J.‑P. Puissochet, A. Borg Barthet and A. Ó Caoimh)

JUDGMENT OF THE COURT (Third Chamber)

6 July 2006 (*)

(Failure of a Member State to fulfil obligations – Directive 92/100/EEC – Copyright – Rental and lending right – Failure to transpose within the prescribed period)

In Case C-53/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 9 February 2005,

Commission of the European Communities, represented by P. Andrade and W. Wils, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes and N. Gonçalves, acting as Agents,

defendant,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský (Rapporteur), J.-P. Puissochet, A. Borg Barthet and A. Ó Caoimh, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the **Opinion of the Advocate General at the sitting on 4 April 2006**,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court for a declaration that, by exempting all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, the Portuguese Republic has failed to fulfil its obligations under Articles 1 and 5 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61; 'the directive').

Legal context

Community legislation

2 The seventh recital in the preamble to the directive is worded as follows:

'… the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky; … the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned'.

3 Article 1 of the directive provides:

'1. In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 5, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject-matter as set out in Article 2(1).

2. For the purposes of this Directive, "rental" means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage.

3. For the purposes of this Directive, "lending" means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.

4. The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject-matter as set out in Article 2(1).'

4 Article 5(1) to (3) of the directive provides:

'1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

2. When Member States do not apply the exclusive lending right provided for in Article 1 as regards pho-

nograms, films and computer programs, they shall introduce, at least for authors, a remuneration.

3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.'

National legislation

5 The directive was transposed into the Portuguese legal system by Decree-Law No 332/97 of 27 November 1997 (Díario da República I, Series A, No 275, of 27 November 1997, p. 6393; 'the Decree-Law'). In its preamble, the Decree-Law provides:

'This Decree-Law creates a public lending right in respect of works protected by copyright, but its entry into force in the Portuguese legal system shall take place within the limits imposed by Community legislation and in compliance with the specific cultural character and level of development of the country as well as the ensuing cultural policy measures and planning.'

6 According to Article 6 of the Decree-Law:

'1. An author is entitled to remuneration for the public lending of the original or copies of his work.

2. The proprietor of the establishment which makes the original or copies of the work available to the public is responsible for payment of the remuneration …

3. The present Article is not applicable to public, school or university libraries, museums, public archives, public foundations and private non-profit-making institutions.'

Pre-litigation procedure

7 On 19 December 2003, in accordance with the procedure provided for in the first paragraph of Article 226 EC, the Commission sent the Portuguese Republic a letter of formal notice in which it was requested to implement the provisions of the directive.

8 After receiving the response of the Portuguese Republic to that letter, the Commission, on 9 July 2004, issued a reasoned opinion asking that Member State to adopt the measures necessary to comply with that opinion within a period of two months from the date of notification.

9 In that reasoned opinion, referring to the Decree-Law, the Commission took the view that the Portuguese Republic had not adopted the measures necessary to ensure transposition of Articles 1 and 5 of the directive.

10 As the Portuguese Republic did not reply to the reasoned opinion, the Commission decided to bring the present action.

The action

Arguments of the parties

11 According to the Commission, Article 6(3) of the Decree-Law exempts from the obligation to pay a public lending right all State central administrative services, all bodies which are part of indirect State administration, such as public establishments and public associations, and all local administrative services and bodies. To this list can be added all private-law legal persons carrying out functions of a public nature, such as bodies providing administrative services to the public and even private schools and universities, and all private non-profit-making institutions in general. Ultimately, it amounts to exempting any public lending establishment from the obligation of payment.

12 Article 5(3) of the directive provides that Member States may not exempt all categories of establishments, as the Decree-Law provides, but only certain categories. The Portuguese Republic therefore acted outside the limits imposed by the directive and that Decree-Law purely and simply prevents attainment of the directive's objective, which is to ensure that creative and artistic work is adequately remunerated.

13 The Commission refers also to the close relationship between the lending of works by public services or bodies and the rental of works by businesses. In both cases, protected works are being utilised. The difference in legal protection accorded to protected works in Member States has an effect upon the functioning of the internal market and is liable to lead to distortions of competition. The lending of works, books, phonograms and videograms represents a considerable volume of activity. People who use those works and material would not buy them and, as a result, authors and creators would suffer a loss of revenue.

14 The Commission adds that, in order to be able to make cultural works available to their citizens free of charge, Member States have to remunerate all those who contribute to the functioning of libraries, that is, not only the staff, but, above all, the authors of the works. Remunerating the latter is in the common interest of the Community.

15 In its defence, the Portuguese Republic argues that Article 5 of the directive, in particular paragraph 3 thereof, is 'a compromise text', imprecise, difficult to interpret and open to challenge as regards its meaning and scope. The drafting of that provision was also intended to be open-textured and flexible in order to take into account the levels of cultural development specific to the different Member States. Moreover, the directive does not give any indication as to the meaning of that article.

16 The Portuguese Republic further argues that transposition of the directive directly poses the problem of the choice of 'categories of establishments' and, indirectly, the problem of whether persons who are the indirect addressees of the directive can or cannot, and to what extent, derive benefit, in an equal or almost equal manner, from the provisions of that directive which authorise Member States to allow for exemptions from the payment of the remuneration provided for in Article 5(1) of the directive on public lending. That question relates to the issue of the conflict between Article 5(3) and the principles of equal treatment, impartiality, solidarity and social cohesion. The effect of exempting certain 'categories of establishments' from payment of the public lending right would be that Portuguese citizens would not have access to, and would not be able to enjoy, intellectual works under the same conditions. Moreover, the proprietors of the rights should in principle have obtained appropriate revenue in the exercise of their rights of reproduction and distribution.

17 In addition, the Portuguese Republic contends that public lending is residual, as the market concerned is limited to the national territory and is of minor importance in the economic area, so that the internal market could not be affected by that situation. It is therefore possible to conclude that the objectives of cultural development are more important than the disadvantages for the internal market. That is the reason why removing those disadvantages would run counter to the principle of proportionality.

18 Finally, that Member State argues that, in view of the specific cultural character and different levels of development of the Member States, the adoption of a new scheme for public lending and its incorporation into the national legal systems must, under the principle of subsidiarity, remain within the sphere of competence of those Member States.

Findings of the Court

19 Firstly, the subject-matter of the dispute between the Commission and the Portuguese Republic is solely the question relating to the scope to be given to Article 5(3) of the directive, according to which Member States may exempt 'certain categories of establishments' from the payment of the remuneration referred to in Article 5(1).

20 According to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objective pursued by the rules of which it is part (see, inter alia, Case C-301/98 KVS International [2000] ECR I-3583, paragraph 21, and Case C-156/98 Germany v Commission [2000] ECR I-6857, paragraph 50).

21 As regards firstly the wording of Article 5(3) of the directive, it should be noted that this refers to 'certain categories of establishments'. Therefore it clearly follows that the legislature did not intend to allow Member States to exempt all categories of establishments from payment of the remuneration referred to in Article 5(1).

22 Next, under Article 5(3), the directive allows Member States to derogate, in respect of public lending, from the general obligation of remuneration of authors referred to in paragraph 1 of that article. According to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be strictly interpreted (Case C-476/01 Kapper [2004] ECR I-5205, paragraph 72).

23 Moreover, Article 5(3) cannot be interpreted as allowing for total derogation from that obligation of remuneration, since the effect of such an interpretation would be to render Article 5(1) meaningless and thus deprive that provision of all effectiveness.

24 Finally, the main objective of the directive, as can be seen more precisely from the seventh recital, is to guarantee that authors and performers receive appropriate income and recoup the especially high and risky investments required particularly for the production of phonograms and films (**Case C-200/96 Metronome Musik [1998] ECR I-1953, paragraph 22**).

25 It follows that the fact of exempting all categories of establishments which engage in such lending from the obligation laid down in Article 5(1) of the directive would deprive authors of remuneration with which they could recoup their investments, with inevitable repercussions for the creation of new works (**see Metronome Musik, paragraph 24**). In those circumstances, a transposition of the directive that resulted in such an exemption for all categories of establishments would go directly against the objective of that directive.

26 The Portuguese Republic does not in effect dispute that the transposition of the directive effected by the Decree-Law results in exempting all the categories of establishments listed in paragraph 11 of this judgment.

27 Accordingly, it must be acknowledged that the effect of the Portuguese legislation is to exempt all categories of public lending establishments from the obligation to pay the remuneration provided for in Article 5(1) of the directive.

28 To justify such a measure, that Member State puts forward various arguments, none of which, however, can be considered relevant.

29 Firstly, the Portuguese Republic argues that the public lending market is essentially national and not significant at an economic level. It follows that the normal functioning of the internal market cannot be affected by that situation and that, under the principle of subsidiarity, the activity of public lending should remain within the sphere of competence of the Member States.

30 However, on the assumption that that Member State thereby intended to dispute the validity of the directive, it should be remembered that, outside the period prescribed in Article 230 EC, it cannot contest the lawfulness of an act adopted by the Community legislature which has become final in its regard. It is settled case-law that a Member State cannot properly plead the unlawfulness of a directive or decision addressed to it as a defence in an action for a declaration that it has failed to implement that decision or comply with that directive (see, inter alia, Case C-74/91 Commission v Germany [1992] ECR I-5437, paragraph 10; Case C-154/00 Commission v Greece [2002] ECR I-3879, paragraph 28; and **Case C-194/01 Commission v Austria [2004] ECR I-4579, paragraph 41**).

31 In any event, the Court has already held that, like other industrial and commercial property rights, the exclusive rights conferred by literary and artistic property are by their nature such as to affect trade in goods and services and also competitive relationships within the Community. For that reason, those rights, although governed by national legislation, are subject to the requirements of the EC Treaty and therefore fall within its scope of application (**Joined Cases C-92/92 and C-326/92 Phil Collins and Others [1993] ECR I-5145, paragraph 22**).

32 Thus, contrary to the Portuguese Republic's assertion, the difference in the legal protection which protected cultural works enjoy in the Member States as regards public lending is such as to affect the normal

functioning of the internal market of the Community and create distortions of competition.

33 Secondly, that Member State argues that the proprietors of copyrights have, in principle, already received remuneration for reproduction and distribution rights in respect of their works.

34 However, forms of exploitation of a protected work, such as public lending, are different in nature from sale or any other lawful form of distribution. The lending right remains one of the prerogatives of the author notwithstanding sale of the physical recording. Furthermore, the lending right is not exhausted by the sale or any other act of distribution, whereas the distribution right may be exhausted, but only and specifically upon the first sale in the Community by the rightholder or with his consent (**see, to that effect, Metronome Musik, paragraphs 18 and 19**).

35 Thirdly, the Portuguese Republic contends that Article 5(3) of the directive is open-textured and flexible so as to take into account the cultural development of each Member State, and the expression 'certain categories of establishments' calls for a 'variable geometry' style interpretation.

36 However, Article 5(3) of the directive cannot, as indicated in paragraph 22 of the present judgment, be interpreted as allowing for total derogation from the obligation of remuneration laid down in Article 5(1).

37 Fourthly, the Portuguese Republic maintains that there is a conflict between Article 5(3) of the directive and the principles of equal treatment, impartiality, solidarity and social cohesion. To exempt only certain 'categories of establishments' from that obligation of remuneration would amount to permitting a situation in which Portuguese citizens did not have access to, and were not able to enjoy, intellectual works under the same conditions.

38 In that respect, the exemption of certain public lending establishments, provided for in Article 5(3) of the directive, from the obligation to pay the remuneration referred to in Article 5(1) allows Member States, by leaving them a choice as to which establishments will be covered by the exemption, to retain discretion to decide, from among the sections of the public concerned, those for whom such an exemption will do most to facilitate access to intellectual works, whilst respecting fundamental rights and, in particular, the right to not be discriminated against.

39 Moreover, in the absence of sufficiently precise Community criteria in a directive to delimit the obligations thereunder, it is for the Member States to determine, in their own territory, what are the most relevant criteria for ensuring, within the limits imposed by Community law, and in particular by the directive concerned, compliance with that directive (see, to that effect, **Case C-245/00 SENA [2003] ECR I-1251, paragraph 34**, and Case C-433/02 Commission v Belgium [2003] ECR I-12191, paragraph 19).

40 In that respect, it has already been held that Article 5(3) of the directive authorises but does not oblige a Member State to exempt certain categories of establishments. Consequently, if the circumstances prevailing in the Member State in question do not enable the relevant criteria to be determined for drawing a valid distinction between categories of establishments, the obligation to pay the remuneration provided for in paragraph 1 of the article must be imposed on all the establishments concerned (Commission v Belgium, paragraph 20).

41 In those circumstances, the action brought by the Commission must be regarded as well founded

42 As a result, it must be held that, by exempting all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, the Portuguese Republic has failed to fulfil its obligations under Articles 1 and 5 of the directive.

Costs

43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has asked that costs be awarded against the Portuguese Republic and the latter has been unsuccessful, the Portuguese Republic must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Declares that, by exempting all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, the Portuguese Republic has failed to fulfil its obligations under Articles 1 and 5 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property;

2. Orders the Portuguese Republic to pay the costs.

[Signatures]

* Language of the case: Portuguese.

OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 4 April 2006 (1)
Case C-53/05
Commission of the European Communities
v
Portuguese Republic
and
Case C-61/05
Commission of the European Communities
v
Portuguese Republic

1. In these two actions brought by the Commission against Portugal under Article 226 EC, the Commission seeks declarations (2) that Portugal has not correctly implemented Articles 2, 4 and 5 (read in conjunction with Article 1) of Council Directive 92/100/EEC of 19 November 1992 on rental and lending rights and on certain rights relating to copyright in the field of intellectual property ('the Directive'). (3)

The Directive

2. The Directive was adopted on the basis of inter alia Article 95 EC. It seeks to eliminate differences in the legal protection provided in the Member States for copyright works and the subject-matter of related rights

(4) protection as regards rental and lending. (5) It is intended to be limited to establishing that Member States provide rights with respect to rental and lending for certain groups of rightholders and to establishing the rights of fixation, (6) reproduction, distribution, broadcasting and communication to the public for certain groups of rightholders in the field of related rights protection. (7) The first chapter of the Directive, with which the present action is concerned, provides for rental and lending rights in accordance with the first of those objectives.

3. The preamble to the Directive contains the following recitals:

[Whereas]

'[1] differences exist in the legal protection provided by the laws and practices of the Member States for copyright works and subject-matter of related rights protection as regards rental and lending; whereas such differences are sources of barriers to trade and distortions of competition which impede the achievement and proper functioning of the internal market;

[2] such differences in legal protection could well become greater as Member States adopt new and different legislation or as national case-law interpreting such legislation develops differently;

[3] such differences should therefore be eliminated in accordance with the objective of introducing an area without internal frontiers as set out in Article 8a of the Treaty so as to institute, pursuant to Article 3(f) of the Treaty, a system ensuring that competition in the common market is not distorted;

[4] rental and lending of copyright works and the subject-matter of related rights protection is playing an increasingly important role in particular for authors, performers and producers of phonograms and films; …;

…

[7] the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky; whereas the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned;

…

[15] it is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers;

…

[17] the equitable remuneration must take account of the importance of the contribution of the authors and performers concerned to the phonogram or film;

[18] it is also necessary to protect the rights at least of authors as regards public lending by providing for specific arrangements …'.

4. Article 1(1) requires Member States to provide a right to authorise or prohibit the rental or lending of originals and copies of copyright works.

5. Article 1(2) defines 'rental' as 'making available for use, for a limited period of time and for direct or indirect economic or commercial advantage'. Article 1(3) defines 'lending' as 'making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public'.

6. Article 2(1) provides:

'The exclusive right to authorise or prohibit rental and lending shall belong:

– to the author in respect of the original and copies of his work,

– to the performer in respect of fixations of his performance,

– to the phonogram producer in respect of his phonograms, and

– to the producer of the first fixation of a film in respect of the original and copies of his film. For the purposes of this Directive, the term "film" shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.'

7. Article 2(2) provides that the principal director of a cinematographic or audiovisual work is to be considered to be its author or one of its authors.

8. Article 2(4) provides that the rights referred to in Article 2(1) may be transferred, assigned or subject to the granting of contractual licences.

9. Article 4 provides in so far as relevant:

'1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.

2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.

…

4. Member States may regulate … the question from whom this remuneration may be claimed or collected.'

10. Article 5 provides in so far as relevant:

'1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

…

3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in [paragraph 1].'

11. Article 15(1) of the Directive required Member States to implement the Directive not later than 1 July 1994.

Relevant national legislation

12. Portugal sought to implement the Directive by Decree Law No 332/97 of 27 November 1997.

13. Article 5 of that law provides:

'1. Where the author transfers or assigns his rental rights concerning a phonogram, a videogram or the original or a copy of a film to a phonogram or film producer, he has an inalienable right to an equitable remuneration for the rental.

2. For the purpose of paragraph (1), the producer is responsible for paying the remuneration which, in the

absence of agreement, is set by arbitration and in accordance with the law.'

14. Article 6(1) provides that an author is entitled to remuneration for the public lending of the original or copies of his work.

15. Article 6(3) provides:

'The present article is not applicable to public, school or university libraries, museums, public archives, public foundations and private non-profit making institutions.'

16. Article 7(2) confers rental and lending rights on:

'– … the performer in respect of the fixation of his performance,

– … the phonogram or videogram producer in respect of his phonograms or videograms, and

– … the producer of the first fixation of a film in respect of the original and copies of his film.'

17. Article 7(4) defines 'film' as 'a cinematographic work, audiovisual work and any moving images, whether or not accompanied by sound'.

Case C-61/05: alleged infringement of Article 2

18. The Commission submits that the effect of Article 7 of Decree Law No 332/97 is that the producer of the first fixation of a film cannot necessarily authorise or prohibit the rental of copies of his film, including videogram or DVD recordings thereof; he certainly does not have the exclusive right so to do, as required by Article 2(1) of the Directive. (8)

19. Portugal argues that the list in Article 2(1) is not exhaustive and that the vague definition of the term 'film' in that provision may have the effect that the producer of the first fixation of a film may himself be the producer of copies of the film and may also assign rights to the original and copies, or just to copies, to another person – the videogram producer. Portuguese law treats videogram producers on an equal footing with phonogram producers.

20. In my view, the Commission's action is well founded in so far as it alleges infringement of Article 2 of the Directive.

21. First, while I accept that the list in Article 2(1) of the Directive may not necessarily be wholly exhaustive, that does not mean that a Member State may add any category of rightholder to it. As the Court stated in Warner Brothers, (9) the right to prohibit the hiring-out of videograms is liable to influence trade in videograms in a Member State and hence, indirectly, to affect intra-Community trade in those products. The purpose of the Directive, as is clear from its preamble, is to eliminate differences in the legal protection for copyright works as regards rental and lending with a view to reducing barriers to trade and distortions of competition. That objective would manifestly not be achieved if different Member States were free to confer the right to control rental of videograms on different categories of persons.

22. That interpretation is moreover consistent with the travaux préparatoires. The Explanatory Memorandum to the first proposal for the Directive (10) states that while Article 2(1) (which survived the legislative process essentially unscathed) 'covers all of the main groups of right owners whose works and protected subject-matter are rented and lent', its wording 'does not prevent Member States from extending the rental and lending right to further groups of neighbouring right owners such as owners of a right in simple photographs'. (11) The Commission added, however, that since 'the cases in question are of minor economic importance as regards rental and lending, the harmonisation effect thereby is not threatened'. (12) That is clearly not the case with regard to videogram rental. The Explanatory Memorandum also states (13) with regard to Article 2(1) that 'by [the limitation to "first fixations"] producers of simple copies of films shall be excluded from protection; this applies, for example, to copies made from cinema films and adapted for video distribution'.

23. Second, Article 2(1) expressly confers an exclusive right to control rental on the producer of the first fixation of a film in respect of the original and copies of his film. If the producer of a videogram of that film is in addition granted a right to control rental of that videogram, the film producer's right would manifestly not be exclusive.

24. Third, the right that Portugal has given to producers of videograms does not 'merely' add a further category of right holder to the list in Article 2(1) of the Directive. Rather, the rights granted cut across, and indeed undermine, the specific exclusive rights envisaged by Article 2(1).

25. Fourth, it is apparent from the preamble (in which, it might be added, videogram producers, unlike authors, performers, phonogram producers and film producers, are conspicuous by their absence (14)) that the rationale for protecting the lending rights of phonogram and film producers is to guarantee the recoupment of the especially high and risky investments required. (15) It has not been suggested that any such 'especially high and risky' investments are needed in order to produce videograms.

26. On the contrary, the Court has recognised 'the extreme ease with which recordings can be copied'. (16) Although that statement was made in the context of sound recordings, it is equally true of video recordings.

27. I accordingly conclude that Portugal has failed to fulfil its obligations under Article 2 of the Directive.

Case C-61/05: alleged infringement of Article 4

28. The Commission submits that, since Article 7(4) of Decree Law No 332/97 defines 'film' so as to include videograms, a videogram producer could also fall within the definition of a film producer for the purpose of Article 5(2) of the Decree Law. There are thus two persons who fall within that definition and who may therefore be liable to pay the rental remuneration. That has led to confusion which prevents Portuguese performers from receiving the remuneration to which they are entitled since they do not know who is the 'producer' responsible for paying them. The Directive in contrast is clear: only the producer of the first fixation of a film is so liable.

29. Portugal responds that in principle and in the absence of evidence to the contrary the right to remu-

neration is to be met by the producer of the first fixation of the film. Any ambiguity derives not only from the Portuguese legislation but also from the Directive itself. The definition of 'film' in Article 2(1) seems to encompass both the cinematographic work (and to confer rights on the producer of the first fixation) and the work as fixed on a videogram (and to confer rights on the producer of that videogram).

30. I have already explained why I do not consider that Article 2(1) can be interpreted so as to permit Member States to add videogram producers to the categories of rightholders there listed.

31. Article 4 was introduced in order to ensure that authors (for example, the director of a film (see Article 2(2) of the Directive), the author of a novel on which a film is based or the composer of the theme music) and performers benefit from the rental rights conferred on them by the Directive. Without express provision, that would often not be the case since authors and performers frequently assign their rights to the film or phonogram producer; indeed Article 2(4) of the Directive recognises this. In the absence of remuneration for such assignment, the rental right would be worthless. Since authors and performers generally have less contractual bargaining power than film and phonogram producers, they did not always receive equitable remuneration for assigning their rights. Article 4 seeks to ensure that they do. (17) It is clear from its wording that it is designed for the situation where the assignee of rental rights concerning an original or copy of a film is the film producer.

32. Portugal accepts that its implementing legislation is ambiguous. Whilst Article 4(4) allows Member States to decide who is liable to pay the remuneration, the principle of legal certainty requires that it must be clear who is so liable. In my view, the implementing legislation is not sufficiently precise. I accordingly consider that Portugal has failed to fulfil its obligations under Article 4 of the Directive.

Case C-53/05: alleged infringement of Article 5

33. The Commission submits that Article 5(3) of the Directive permits Member States to exempt 'certain categories' of establishments from payment of the remuneration otherwise guaranteed by Article 5(1) as consideration for derogating from the exclusive lending right conferred by Article 1. Article 6(3) of Decree Law No 332/97 however exempts all public, school or university libraries, all museums, all public archives, all public foundations and all private non-profit making institutions. Thus the derogation covers all State central administrative services, all bodies which are part of indirect State administration, such as public establishments and public associations, and all local administrative services and bodies, together with all private-law legal persons carrying out functions of a public nature and even private schools and universities and all private non-profit making institutions. That list comprises all bodies who lend without charge, and therefore all bodies involved in 'lending' within the meaning of Article 1(3). An exemption which exempts everyone is not an exemption but an annulment of the underlying obligation. The effect of Portugal's implementation of Article 5 of the Directive is that no public lending establishment is bound to pay the remuneration provided for in Article 5(1). That infringes the exclusive lending right and the protection which the Directive confers.

34. I consider that the Commission's action in Case C-53/05 is well founded. In my view, it follows clearly from the objectives of the Directive and the scheme and wording of Article 5(3) that a Member State is not free to exempt in practical terms all categories of establishments referred to in that provision.

35. One of the principal objectives of the Directive is to secure an adequate income for the creative work of authors. (18) In line with that objective, Article 5(1) requires that authors still be remunerated for the lending of their works where a Member State has derogated from their exclusive right to authorise or prohibit such lending. Thus although Article 5(1) is described as a derogation, that provision is in fact the primary requirement of the whole Directive, namely a requirement that authors be remunerated, consistent with Articles 1 and 2 of the Directive.

36. Article 5(3) provides for a true derogation from that requirement for remuneration, by permitting Member States to exempt 'certain categories of establishments' from the payment of remuneration. As such, it falls to be construed strictly. The language of Article 5(3) strongly suggests that only a limited number of categories of establishments (19) potentially liable to pay remuneration pursuant to Article 5(1) may be exempted from that liability. That is also the case in at least the Dutch, French, German, Italian, Portuguese and Spanish versions of the Directive. (20)

37. It is true that the position is not unequivocal, since 'certain' can mean, as well as 'some but not all', also 'clearly defined'. A legislative provision authorising Member States to introduce special measures in order 'to prevent "certain" types of tax evasion or avoidance' can hardly mean that Member States may not prevent all types of tax evasion. (21)

38. The Court however has already made it clear that it interprets Article 5(3) in a limited way, stating that 'if the circumstances prevailing in the Member State in question do not enable a valid distinction to be drawn between categories of establishments, the obligation to pay the remuneration in question must be imposed on all the establishments concerned'. (22)

39. I agree with the Commission that an exemption from a liability which exempts all who would otherwise be liable is not an exemption but an annulment of the underlying obligation. In the present case, Portugal does not seek to deny that the scope of its exemption is effectively coterminous with the categories of establishments which would otherwise be liable to pay the remuneration. Instead it puts forward a number of arguments which in its view validate its legislative choice.

40. Portugal submits first that at the date of publication of the Directive, most States in the world did not regulate lending, nor were they required to do so by the various Treaties in force. (23) The Commission's 1988

Green Paper (24) did not seek to regulate public lending.

41. It is not clear what point Portugal is making. Article 5(1) derogates from the exclusive right to authorise or prohibit lending conferred on authors by Article 2(1). That exclusive right dates from the Commission's first proposal for the Directive. (25) Indeed the 1988 Green Paper mentions that it 'has been suggested … that the question of public lending or rental of books and the possible right of the author to receive remuneration for this use of his work is an issue requiring a solution at the Community level', (26) although in fact the Commission decided at that point that Community action would not be justified. (27) The idea of legislating for a public lending right surfaced again in 1989 in a Communication from the Commission. (28) Although at that stage the Commission did not consider that harmonising legislation would be justified, it stated that 'the problem of public lending right is bound to become increasingly acute' and that it would monitor developments and, if appropriate, put forward specific proposals.

42. It seems therefore that although there was no Community (or international (29)) regulation, actual or envisaged, at that point, it was public knowledge as from 1988 that legislation was likely in the future. Thus the provision in the Commission's first proposal for an exclusive lending right for authors was hardly unheralded, as Portugal seems to suggest.

43. Second, Portugal submits that it is unlikely that public lending is of sufficient economic importance to merit specific legislative treatment at Community level: the size of the market is fundamentally national and economically insignificant. For cultural and economic reasons, this area should remain in the competence of the Member States.

44. To the extent that those submissions amount to a plea that the Directive, or Article 5, was adopted on an incorrect legal basis or in breach of the principle of subsidiarity, that plea cannot of course be entertained. (30)

45. In any event, Portugal has not in my view substantiated its arguments.

46. The Commission gave the following explanation of the economic case for regulating public lending in the travaux préparatoires: (31)

'To the extent that the field of activity of rental shops and public libraries is similar, those institutions are competing with each other. Given the lower lending fees, public libraries should, in general, be far more attractive. Indeed, the development of the public library system at the beginning of this century resulted in the elimination of a large number of the commercial book rental shops existing at that time. Since public libraries increasingly lend not only books but also other media, in particular phonograms and videograms, which up to now have been available in rental shops, a similar evolution for these media as was the case with books cannot be excluded.

Thus, if only rental were to be regulated but not lending, there would be a risk that such a legislation [sic] would be negated to the extent that rental would in fact be replaced by lending. Moreover, since the activity of public libraries has, by its very nature, more of a cultural dimension than that of commercial rental shops, regulating only the rental right would amount to an unjustifiable disregard of the economic situation of the creators of particularly valuable cultural goods and the broader situation in this field of such services. Thus, a rental right cannot be dealt with in a comprehensive way without also dealing with lending right.

In addition, the fact that public lending right at present exists only in four Member States creates distortions of competition between authors and neighbouring right owners from the different Member States. They must be able to base their activities and services on uniform conditions throughout the Community. Moreover, in principle, similar economic and social conditions have to be created for authors and neighbouring right owners. In the Internal Market, it cannot be accepted that authors and neighbouring right owners obtain a remuneration for the use of their works and achievements in one part of the market, for example in one Member State, and that they are thereby provided with a certain economic basis for further creation, whereas this is not the case in other parts of this market.' (32)

47. That account seems to me to explain lucidly and cogently why failure to provide for a public lending right as well as a rental right would affect the internal market. There is nothing in Portugal's pleadings to cast doubt on the explanation.

48. Third, Portugal argues that the requirement to pay remuneration for public lending is inappropriate. The rightholders concerned have already obtained appropriate remuneration by way of their reproduction and distribution rights.

49. That argument however is based on a misconception of the nature and objective of the public lending right. While it is true that authors will already have received income from their reproduction and distribution rights, that income will not reflect books lent rather than sold. (33) It is of course true that not every person who borrows books from a public library (or consults them in situ) would, in the absence of that facility, buy each book borrowed; there is however a general pattern. (34) In any event, the Directive represents a clear policy decision to confer both an exclusive lending right and an entitlement to remuneration where Member States have derogated from that right.

50. Finally, Portugal submits that Article 5 was the subject of particularly lively discussions between the Commission and the Member States; the wording adopted – particularly that of Article 5(3) – was a compromise: open-textured, imprecise and ambiguous.

51. The final wording of Article 5 does indeed, as Portugal submits, reflect the divisions among the Member States in this area. (35) That does not however necessarily mean that it is vague and imprecise. Article 5 does, it is true, leave the Member States a degree of discretion in several areas – whether to apply the derogation at all, whether, if so, books, phonograms and/or films are to be covered by it, how to determine the re-

muneration, who is to pay the remuneration (for example, the State, the library etc. concerned or some other entity), who is to administer collection and payment of the remuneration (for example, collecting societies), whether to exempt certain categories of establishments from the payment of remuneration and, if so, what categories – but that is different.

52. It seems to me that many, if not all, of the underlying issues raised by Portugal in its defence can in fact be dealt with precisely through the areas in which Article 5 does leave Member States a degree of discretion. That discretion does not, however, stretch to making provision for all relevant establishments to be exempted altogether from paying remuneration for public lending. As discussed above, (36) the meaning of Article 5, and in particular Article 5(3), appears to me to be clear.

53. I am accordingly of the view that Portugal has failed to fulfil its obligations under Article 5, read in conjunction with Article 1, of the Directive.

A final comment

54. I would like to conclude with a comment on the style of the Commission's written observations in both these cases. In its reply in each case, the Commission uses language which I regard as manifestly inappropriate for an institution addressing the Court of Justice and, in effect, a Member State. In Case C-53/05 the Commission states that Portugal could not read the Directive and accuses Portugal of an act of piracy in expropriating authors and confiscating their intellectual property. In Case C-61/05 the Commission accuses Portugal of effrontery and of 'pulling a fast one' and asks whether it knows how to read. In both documents the Commission uses a sarcastic and derisive tone generally. Whatever the rights and wrongs of the infringement action, I regard such language and tone as unacceptable.

Conclusion

55. Accordingly I suggest that the Court should:

– In Case C-53/05, declare that Portugal has failed to fulfil its obligations under Article 5, read in conjunction with Article 1, of Council Directive 92/100/EEC of 19 November 1992 on rental and lending rights and on certain rights relating to copyright in the field of intellectual property;

– In Case C-61/05, declare that Portugal has failed to fulfil its obligations under Articles 2 and 4 of Council Directive 92/100/EEC of 19 November 1992 on rental and lending rights and on certain rights relating to copyright in the field of intellectual property;

– In both cases, order Portugal to pay the costs.

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1 – Original language: English.

2 – In Case C-53/05, the alleged infringement is of Article 5 read in conjunction with Article 1; in Case C-61/05 the alleged infringements are of Articles 2 and 4.

3 – OJ 1992 L 346, p. 61.

4 – In the context of EC law, copyright ('droit d'auteur') comprises the exclusive rights granted to authors, composers, artists etc. while related rights ('droits voisins') cover the analogous rights granted to performers (musicians, actors etc.) and entrepreneurs (publishers, film producers etc.). I will however in the interests of brevity refer simply to 'copyright works' rather than the more cumbersome term used by the directive, namely 'copyright works and the subject-matter of related rights', since nothing turns on the distinction in the present case.

5 – First recital in the preamble.

6 – This infelicitous word, unfortunately a leitmotif running through EC copyright harmonisation legislation (and indeed international conventions), appears to mean no more than recording.

7 – Eleventh recital in the preamble.

8 – The Commission also refers to the definitions of 'videogram' and 'videogram producer' in Article 176(3) of the Portuguese Code on copyright and related rights. That provision does not however appear to add to the analysis. I accordingly do not propose to deal with it.

9 – Case 158/86 [1988] ECR 2605, paragraph 10.

10 – Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright, 24 January 1991, COM(90) 586 final.

11 – Paragraphs 2.1.3 and 2.1.4.

12 – Paragraph 2.1.4. J. Reinbothe and S. von Lewinski, The EC Directive on Rental and Lending Rights and on Piracy (1993) suggests that in principle the list in Article 2(1) is exhaustive, but indicates that 'it seems to have been the common understanding of the Commission and the Member States that the Directive does not intend, with respect to existing public lending right schemes, to abolish the existing rights of certain groups of rightholders, particularly when the cases in question are of minor economic significance. Accordingly, the existing neighbouring rights of photographers, scientific editors and publishers with respect to lending may continue to exist' (p. 50).

13 – At paragraph 2.1.2.2. See also Reinbothe and von Lewinski, op. cit. footnote 12, pp. 48 to 50.

14 – They also fail to make an appearance in Article 14 of the Agreement on trade-related aspects of intellectual property rights, set out in Annex 1C to the Agreement establishing the World Trade Organisation; approved on behalf of the European Community as regards matters within its competence by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1) ('the TRIPs Agreement') (headed 'Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organisations') or in 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 (OJ 2001 L 167, p. 10), which requires Member States to provide for the exclusive right to authorise or prohibit reproduction for five categories of rightholders – the first four reflect the list in Article 2(1) of Directive

92/100 and the fifth concerns broadcasting organisations.
15 – See also Case C-200/96 Metronome Musik [1998] ECR I-1953, in particular paragraphs 24 and 25.
16 – Metronome Musik, cited in footnote 15, paragraph 24.
17 – Explanatory Memorandum in the Proposal, cited in footnote 10, paragraph 3.1.1.
18 – See the seventh recital in the preamble, set out in point 3 above.
19 – It appears that Article 5(3) was inserted in order to meet the concerns of two Member States which wished to be able to exclude libraries at educational establishments and public libraries from public lending right payments: see Reinbothe and von Lewinski, op. cit. footnote 12, p. 82.
20 – Respectively 'bepaalde categorieën', 'certaines catégories', 'bestimmte Kategorien', 'alcune categorie', 'determinadas categorias' and 'determinadas categorías'.
21 – See point 17 of the Opinion of Advocate General Jacobs in Case C-144/94 Italittica [1995] 3653.
22 – Case C-433/02 Commission v Belgium [2003] ECR I-12191, paragraph 20.
23 – Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961; World Intellectual Property Organisation Performances and Phonograms Treaty and Copyright Treaty, both of 20 December 1996, and the TRIPs Agreement, cited in footnote 14.
24 – Green Paper of 7 June 1988 on Copyright and the challenge of technology – Copyright issues requiring immediate action (COM(88) 172 final).
25 – Cited in footnote 10.
26 – Paragraph 4.4.4. Those suggestions apparently date from 1977 ('Community action in the cultural sector', Bulletin of the European Communities, Supplement 6/77, paragraph 26) and 1978 (A. Dietz, Copyright Law in the European Community, paragraph 233): see endnote 19 to Chapter 4 of the Green Paper cited in footnote 24.
27 – Paragraph 4.4.10.
28 – 'Books and Reading: a cultural challenge for Europe', 3 August 1989, COM(89) 258 final, section I.B.3.
29 – Although by January 1991 the World Intellectual Property Organisation had apparently included an exclusive rental right and an optional public lending right in its draft model provisions in the field of copyright then under discussion: see the Explanatory Memorandum to the original proposal for the directive, cited in footnote 10.
30 – See the fifth paragraph of Article 230 EC.
31 – Explanatory Memorandum to the original proposal for the Directive, cited in footnote 10.
32 – Paragraph 44.
33 – I use the example of books; obviously the public lending right may apply also to phonograms and videograms which are recordings of performances or copies of films or other audiovisual works (although videograms are perhaps more frequently rented than lent).
34 – See by analogy, paragraph 44 of the Explanatory Memorandum to the original proposal, cited in footnote 10, set out in point 45 above. See also the Commission's Report of 12 September 2002 to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, COM(2002) 502 final, section 2.
35 – See Reinbothe and von Lewinski, op. cit. footnote 12, pp. 77 to 82.
36 – See points 34 to 38 above.