Court of Justice EU, 13 July 2006, Commission v Portugal

COPYRIGHT

No rental right for producers of videograms

- **It follows from the foregoing that, by creating in national law a rental right also in favour of producers of videograms, the Portuguese Republic has failed to fulfil its obligations under Article 2(1) of the directive and, by creating in national legislation some doubt as to who is responsible for paying the remuneration owed to artists on assignment of the rental right, the Portuguese Republic has failed to comply with Article 4 of the Directive, in conjunction with Article 2(5) and (7) thereof**

27 In addition, under the seventh recital in the preamble to the Directive, the protection of the exclusive rental rights of the producers of phonograms and films is justified on the grounds of the necessity to safeguard the recoupment of extremely high and risky investments which are required for their production and which are essential if authors are to go on creating new works (see, in particular, as regards specifically the producers of phonograms, Metronome Musik, paragraph 24).

28 It does not appear that the production of videograms requires such high and risky investments that they merit special protection. The Court has already recognised the extreme ease with which recordings could be copied (see Metronome Musik, paragraph 24). Although that statement was made in the context of sound recordings, the development of new technologies has also helped to facilitate the reproduction of picture recordings.

29 It follows that the Decree-Law, in so far as it provides for a rental right also in favour of videogram producers, does not comply with the Directive

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Court of Justice EU, 13 July 2006

(A. Rosas, J. Malenovský, S. von Bahr, A. Borg Barthet and U. Lõhmus)

JUDGMENT OF THE COURT (Third Chamber)

13 July 2006 (*)

(Failure of a Member State to fulfil obligations – Directive 92/100/EEC – Copyright – Exclusive right to authorise or prohibit rental and lending – Incorrect transposition)

In Case C-61/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 10 February 2005,

Commission of the European Communities, represented by P. Guerra e 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 Chamber, J. Malenovský (Rapporteur), S. von Bahr, A. Borg Barthet and U. Lõhmus, 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 requests the Court to declare that:

– by creating in national law a rental right in favour of producers of videograms, the Portuguese Republic has failed to fulfil its obligations under Article 2(1) 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), as last amended by 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; 'the Directive')

– by creating in national legislation some doubt as to who is responsible for paying the remuneration owed to artists on assignment of the rental right, the Portuguese Republic has failed to comply with Article 4 of the Directive, read in conjunction with Article 2(5) and (7) thereof.

Legal context

Community legislation

2 The first recital in the preamble to the Directive states:

'whereas 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'.

3 The seventh recital in the preamble to the Directive provides:

'whereas 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'.

4 Article 2(1), (5) and (7) of the Directive states:

'1. 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.

…

5. Without prejudice to paragraph 7, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 4.

…

7. Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorising rental, provided that such contract provides for an equitable remuneration within the meaning of Article 4. …'

5 Under Article 4 of the Directive:

'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.

3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.

4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.'

National legislation

6 The Directive was transposed into Portuguese law by Decree-Law No 332/97 of 27 November 1997 (Diário de República I, Series A, No 275, of 27 November 1997, p. 6393; 'the Decree-Law') establishing the obligation to pay remuneration to artists who have assigned their rental right.

7 Article 5 of the Decree-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.'

8 Article 7 of the Decree-Law provides:

'1. The distribution rights, including the right of rental and lending free of charge, is also granted to:

(a) the performer in respect of the fixation of his performance;

(b) the phonogram or videogram producer in respect of his phonograms or videograms;

(c) the producer of the first fixation of a film in respect of the original and copies of his film.

2. The rights referred to in paragraph 1 shall not be extinguished upon sale or any other act of distribution of the objects mentioned.

3. In addition to the provisions of paragraphs 1 and 2, the right to authorise reproduction of the original and copies of that film is also granted to the producer of the first fixation of a film.

4. For the purposes of the present act, "film" is defined as "a cinematographic work, audiovisual work, and any moving images, whether or not accompanied by sound".'

9 Under Article 8 of the Decree-Law:

'The conclusion of a film production contract between performers and the producer gives rise to the presumption, in the absence of a contrary provision, of assignment of the performer's rental right in favour of the producer, without prejudice to the inalienable right to equitable remuneration for the rental, in accordance with Article 2(5).'

Pre-litigation procedure

10 By letter of 31 March 2003, the Commission made the Portuguese authorities aware of its doubts as regards a correct transposition of the directive, in the sense that the Decree-Law grants exclusive rental rights to the producer of videograms and does not define who is responsible for paying the remuneration for the rental. The Commission therefore sent them a request for information.

11 Having received no response within the prescribed period and taking the view that the Portuguese legislation was contrary to Article 2(1) and (4) of the Directive, the Commission, by letter of formal notice of 19 December 2003, initiated proceedings for failure to fulfil obligations under Article 226 EC.

12 By letter of 8 January 2004, the Portuguese Republic presented its observations. Although they related to the Commission's request for information sent on 31 March 2003, the Commission presumed that those observations were also in response to the letter of formal notice.

13 Taking the view that the responses of the Portuguese Republic were unsatisfactory, on 9 July 2004, the Commission delivered a reasoned opinion requesting that Member State to adopt the measures necessary to comply with that opinion within two months of its notification.

14 Having received no further information, the Commission decided to bring the present action.

The action

The first complaint, alleging infringement of Article 2(1) of the Directive

Arguments of the parties

15 The Commission argues that the provisions of Article 2(1) of the Directive do not permit, contrary to the provisions of the Decree-Law, the extension to videogram producers of the exclusive right to authorise or prohibit rental enjoyed by the producer of the first fixation of a film.

16 According to the Commission, the list in Article 2(1) is exhaustive and therefore it is only for the producer of the first fixation and not the producer of videograms to authorise or prohibit the rental of the original and copies of a film. That list is in no way minimal or supplementary. Only the first fixation of a film justifies specific protection by Community law. Protecting copies of a film by means of a right related to copyright is unjustified due to the absence of any 'ancillary' link with the literary or artistic work.

17 It follows that the effect of the Decree-Law, contrary to the provisions of the Directive, is to deprive the producer of the first fixation of a film of the exercise of his exclusive right by no longer allowing him to authorise or prohibit the rental of copies of his film.

18 In its defence, the Portuguese Republic observes that, on the date the Decree-Law was adopted, the Code of copyright and related rights (Código do Direito de Autor e dos Direitos Conexos) gave an identical status to producers of phonograms and videograms. In order to respect that equality and to avoid causing imbalances in the current status of the two types of producer, the legislature thus added the videogram producer to the list of proprietors of exclusive rights. It is therefore with the aim of adapting to the characteristics of its national system that the Decree-Law at issue aligns the treatment of a videogram producer with that of a phonogram producer and, accordingly, grants the videogram producer a level of protection higher than that introduced by Community law.

19 The Portuguese Republic argues moreover that the Directive itself contains an ambiguity. By using, in Article 2(1), the vague term 'film', the Directive seems to amalgamate into one definition cinematographic works and works recorded on videogram. It is therefore permissible to consider that the producer of the first fixation may also be the producer of copies of a film.

20 Finally, that Member State argues that the Decree-Law would be contrary to the Directive only if it transpired that its aims contradicted national legislation, if the Decree-Law undermined the functioning of the internal market or if it infringed third party rights. The application of that Decree-Law has raised no concrete problem at the level of either the internal market or the national market, since no one has been deprived of the rights provided for by the directive and no complaint has been made.

Findings of the Court

21 At the outset, it must be stated that that first complaint gives rise to the question whether exclusive rental rights are also granted to the videogram producer.

22 Granting an exclusive right also to videogram producers would not simply add an extra category of rightholders to the list in Article 2(1) of the Directive, but would, on the contrary, call into question the specific exclusive rights set out in that provision.

23 In that respect, Article 2(1) of the Directive confers on the producer of the first fixation an exclusive right to authorise or prohibit rental and lending in respect of the original and copies of his film. It follows that, if the producer of a videogram were also granted the right to control the rental of that videogram, the right of the producer of the first fixation would manifestly no longer be exclusive.

24 That interpretation is confirmed by the object of the Directive, which is to establish harmonised legal protection in the Community for the rental and lending right and certain rights related to copyright in the field of intellectual property (**see Case C-200/96 Metronome Musik [1998] ECR I-1953, paragraph 22**).

25 As is specifically apparent from the first recital in the preamble thereto, the Directive aims to eliminate the differences between the Member States in respect of the legal protection for copyright works as regards rental and lending, with the aim of reducing barriers to trade and distortions of competition. If Article 2(1) of that Directive allowed Member States freely to confer the right to authorise or prohibit the rental of videograms to different categories of persons, that aim would manifestly not be achieved.

26 In that respect, the Court has already held that the commercial distribution of videocassettes takes the form of sales, but also of hiring-out. The right to prohibit such hiring-out in a Member State is liable to influence trade in videocassettes in that State and hence, indirectly, to affect intra-Community trade in those products (**see Case 158/86 Warner Brothers and Others [1988] ECR 2605, paragraph 10**).

27 In addition, under the seventh recital in the preamble to the Directive, the protection of the exclusive rental rights of the producers of phonograms and films is justified on the grounds of the necessity to safeguard the recoupment of extremely high and risky investments which are required for their production and which are essential if authors are to go on creating new works (**see, in particular, as regards specifically the producers of phonograms, Metronome Musik, paragraph 24**).

28 It does not appear that the production of videograms requires such high and risky investments that they merit special protection. The Court has already recognised the extreme ease with which recordings could be copied (**see Metronome Musik, paragraph 24**). Although that statement was made in the context of sound recordings, the development of new technologies has also helped to facilitate the reproduction of picture recordings.

29 It follows that the Decree-Law, in so far as it provides for a rental right also in favour of videogram producers, does not comply with the Directive.

30 That conclusion is in no way invalidated by the argument of the Portuguese Republic that, with the aim of 'adapting to the characteristics of its national system', Portuguese law gives an identical status to the producers of videograms and phonograms.

31 According to settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations and time-limits laid down by a directive (see, inter alia, Case C-114/02 Commission v France [2003] ECR I-3783, paragraph 11, and Case C-358/03 Commission v Austria [2004] ECR I-12055, paragraph 13).

32 Finally, as an action for failure to fulfil obligations is objective in nature (see, inter alia, Case C-73/92 Commission v Spain [1993] ECR I-5997, paragraph 19), failure to comply with an obligation imposed by a rule of Community law is itself sufficient to constitute the breach, and the fact that such a failure had no adverse effects is irrelevant (see, inter alia, Case C-392/96 Commission v Ireland [1999] ECR I‑5901, paragraphs 60 and 61, and Case C‑233/00 Commission v France [2003] ECR I-6625, paragraph 62). The argument of the Portuguese Republic that the alleged failure to fulfil obligations did not cause any concrete problem must therefore be rejected.

33 In the light of the foregoing considerations, it must be found that the complaint alleging infringement of Article 2(1) of the Directive by the Portuguese Republic must be upheld.

The second complaint, alleging infringement of Article 4 of the Directive, read in conjunction with Article 2(5) and (7) thereof

Arguments of the parties

34 As regards the transfer of the rental right from the performer to the film producer, the Commission argues that the Decree-Law is confused, in so far as it can refer to two different producers, namely the producer of videograms and the producer of the first fixation of a film.

35 Under Article 5(2) of the Decree-Law, the producer is responsible for paying the remuneration for the rental. This gives rise to a difficulty for performers in collecting the remuneration to which they are entitled since they do not know which of the two producers is required to pay that remuneration. On that point, the Directive is clear: only the producer of the first fixation of a film can be assigned the rental right of performers and required to pay the remuneration to which they are entitled. A transposition such as that carried out by the Decree-Law is therefore intended, in actual fact, to favour the copying industry.

36 The Portuguese Republic disputes the allegedly confused nature of the Decree-Law. In the absence of evidence to the contrary, the Decree-Law imposes the obligation to pay remuneration on the producer of the first fixation of a film. Moreover, the ambiguity derives not only from the Decree-Law but also from the definition of the term 'film' given by the Directive.

Findings of the Court

37 According to settled case-law, each Member State is bound to implement the provisions of directives in a manner that fully meets the requirements of clarity and certainty in legal situations imposed by the Community legislature, in the interests of the persons concerned established in the Member States. To that end, the provisions of a directive must be implemented with unquestionable binding force and with the requisite specificity, precision and clarity (see Case C-207/96 Commission v Italy [1997] ECR I‑6869, paragraph 26).

38 As a preliminary point, it is apparent from Article 2(5) and (7) of the Directive that the rights of performers may be presumed to be transferred or transferred by the effect of the law to a film producer. In exchange for transferring that right, Article 4 of that Directive guarantees an equitable remuneration to those performers.

39 Article 8 of the Decree-Law provides for the assignment of exclusive rental rights from the performer to the film 'producer' without further defining that term. According to Article 5 of the Decree-Law, the film producer is responsible for paying the remuneration in respect of the assignment of the rental right relating to a videogram or the original or copy of a film. The interpretation of those two articles combined could lead to the conclusion that the producer of videograms comes within the category of film producers, who are liable for the remuneration.

40 In that respect, the Portuguese Republic itself admits that its Decree-Law is ambiguous.

41 On the other hand, although Article 4(1) of the Directive, as regards the assignment of the rental right, relates to a film producer, in actual fact it refers only to the producer of the first fixation of a film. Since videograms are not mentioned in that article, the producer of videograms does not therefore enjoy the status of film producer.

42 The effect, therefore, of that transposition of the Directive is a situation which may prevent performers in Portugal from collecting the remuneration to which they are entitled, in so far as it is not clear who is the producer responsible for paying the equitable remuneration provided for in Article 4 of the Directive.

43 In those circumstances, the complaint alleging incorrect transposition of Article 4 of the Directive, read in conjunction with Article 2(5) and (7) thereof, must be upheld.

44 It follows from the foregoing that, by creating in national law a rental right also in favour of producers of videograms, the Portuguese Republic has failed to fulfil its obligations under Article 2(1) of the directive and, by creating in national legislation some doubt as to who is responsible for paying the remuneration owed to artists on assignment of the rental right, the Portuguese Republic has failed to comply with Article 4 of the Directive, in conjunction with Article 2(5) and (7) thereof.

Costs

45 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 as the latter has been unsuccessful, the Portuguese Republic must be ordered to pay the costs.

On those grounds, the Court (Third Chamber):

1. Declares that:

– by creating in national law a rental right also in favour of producers of videograms, the Portuguese Republic has failed to fulfil its obligations under Article 2(1) 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, as last amended by 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.

– by creating in national legislation some doubt as to who is responsible for paying the remuneration owed to perfomers on assignment of the rental right, the Portuguese Republic has failed to comply with Article 4 of Directive 92/100, as amended by Directive 2001/29, in conjunction with Article 2(5) and (7) thereof;

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 remuneration 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 remuneration, 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 di-

rective, 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.