

European Court of Justice, 11 January 2007, Commission v Ireland

COPYRIGHT

Rental and lending right

• **Exempting all categories of public lending establishments.**

Declares that, by exempting all categories of public lending establishments, within the meaning 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, from the obligation to remunerate authors for the lending carried out by them, Ireland has failed to fulfil its obligations under Articles 1 and 5 of that directive

Source: curia.europa.eu

European Court of Justice, 11 January 2007

(A. Borg Barthet, J. Malenovský and U. Løhmus)

JUDGMENT OF THE COURT (Sixth Chamber)

11 January 2007 (*)

(Failure of a Member State to fulfil obligations – Directive 92/100/EEC – Copyright – Rental and lending right – Exclusive public lending right – Derogation – Condition of remuneration – Exemption – Scope)

In Case C-175/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 19 April 2005,

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

v

Ireland, represented by D. O’Hagan, acting as Agent, with an address for service in Luxembourg,

defendant,

supported by:

Kingdom of Spain, represented by I. del Cuervo Contreras, acting as Agent, with an address for service in Luxembourg,

intervener,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, acting for the President of the Sixth Chamber, J. Malenovský (Rapporteur) and U. Løhmus, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 In its application, the Commission of the European Communities requests that the Court declare that, by exempting all categories of public lending establishments, within the meaning 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’), Ireland has failed to fulfil its obligations under Articles 1 and 5 of that directive.

Legal context

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, entitled ‘Object of harmonisation’, provides as follows:

‘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 Under Article 5 of Directive 92/100, entitled ‘Derogation from the exclusive public lending right’:

‘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 phonograms, 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.

4. The Commission, in cooperation with the Member States, shall draw up before 1 July 1997 a report on public lending in the Community. It shall forward this report to the European Parliament and to the Council.’

Pre-litigation procedure

5 The Commission, by letter of 24 April 2003, called on the Irish authorities to inform it in regard to, in particular, the conditions relating to the implementation of Article 5 of the Directive in Ireland.

6 In its reply of 31 July 2003, Ireland stated that the Copyright and Related Rights Act 2000 (‘the 2000

Act') provides an exclusive lending right in favour of copyright rightholders as well as performers and creates a remuneration right in respect of public lending as far as copyright works are concerned.

7 This reply also stated that, by a ministerial order made pursuant to sections 58(2) and 226(2) of the 2000 Act, classes of institutions were exempted from payment of remuneration in respect of lending in practice, that the overall effect of this designation was to permit all public, educational and academic institutions to which members of the public have access to engage in public lending and that all those public lending institutions were exempt from the lending right and also absolved from payment of remuneration. The Irish authorities also stated that this arrangement was consistent with the recognition of cultural policies contained in Article 5(1) of the Directive and the existence of the exception set out in Article 5(3) thereof.

8 As it concluded that Ireland, by exempting all public lending institutions – and not only certain categories – from payment of the public lending right, had failed to fulfil its obligations under Articles 1 and 5 of the Directive, the Commission, in accordance with Article 226 EC, gave Ireland formal notice on 19 December 2003 to submit its observations within two months.

9 In a letter of 2 June 2004, the Irish authorities referred to the arguments setting out their position in their reply of 31 July 2003, whilst adding that they had decided to consult interested ministerial departments on the introduction of a public lending scheme in Ireland, starting from the premise that the orientation was to introduce such a scheme.

10 On 7 July 2004 the Commission issued a reasoned opinion in which it concluded that, by exempting all categories of public lending establishments, within the meaning of the Directive, Ireland had failed to fulfil its obligations under Articles 1 and 5 thereof and called on Ireland to adopt, within two months, the measures necessary to comply with that opinion.

11 Having received no response from Ireland to this reasoned opinion, the Commission decided to bring the present proceedings.

Procedure before the Court

12 The Commission claims that the Court should:

- declare that, by exempting all categories of public lending establishments, within the meaning of the Directive, Ireland has failed to fulfil its obligations under Articles 1 and 5 of that directive; and
- order Ireland to pay the costs.

13 Ireland claims that the Court should:

- dismiss the action; and
- order the Commission to pay the costs.

14 The Kingdom of Spain and the Republic of Finland applied to intervene in support of the form of order sought by Ireland.

15 By order of the President of the Court of 4 October 2005, the Kingdom of Spain and the Republic of Finland were granted leave to intervene in support of the form of order sought by the defendant.

16 By letter lodged at the Court Registry on 16 November 2005, the Republic of Finland informed the Court that it was withdrawing its intervention in the present case.

17 By order of the President of the Court of 17 January 2006, the Republic of Finland was removed as an intervener in the proceedings.

The action

18 The issue in the present case is to determine the scope of Article 5(3) of the Directive, under which Member States may exempt 'certain categories of establishments' from payment of the remuneration referred to in Article 5(1).

19 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 objectives 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).

20 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; Case C-53/05 Commission v Portugal [2006] ECR I-0000, paragraph 24; and Case C-36/05 Commission v Spain [2006] ECR I-0000, paragraph 26).

21 The exemption of almost all, if not 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 allowing them to 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 results, in practice, in such an exemption for almost all, if not all, categories of establishments runs counter to the main objective of that directive (*Commission v Portugal*, paragraph 25, and *Commission v Spain*, paragraph 27).

22 Ireland does not dispute that the transposition of the Directive, as it results from the 2000 Act and the ministerial order, has the effect that all categories of public lending establishments are exempt from the obligation to pay the remuneration provided for in Article 5(1) of the Directive.

23 However, that Member State argues that it has merely availed of the derogation which is provided for by Article 5(3) of the Directive and which, reflecting the principle of subsidiarity, recognises the national cultural and educational policy aspects of public lending. The Kingdom of Spain, intervening in support of the form of order sought by Ireland, submits in that respect that the objective of guaranteeing authors an adequate income must not prevail over that of cultural promotion.

24 It is true that cultural promotion is an objective in the general interest which allows the exemption, under

Article 5(3) of the Directive, of certain public lending establishments from the obligation to pay remuneration. However, the protection of rightholders with a view to ensuring that they receive appropriate income is also a specific objective of the Directive, as the seventh recital in the preamble expressly states. It was precisely to preserve that remuneration right that the Community legislature sought to limit the scope of the exemption by requiring that national authorities exempt only certain categories of establishments from that obligation (Commission v Spain, paragraph 29).

25 Furthermore, the interpretation of the Directive on the basis of its main objective, as set out in paragraph 20 of this judgment, is borne out by the actual wording of Article 5(3), a provision which refers only to ‘certain categories of establishments’. The Community legislature therefore did not intend to allow Member States to exempt all categories of public lending establishments from payment of the remuneration referred to in Article 5(1) (Commission v Portugal, paragraph 21, and Commission v Spain, paragraph 30).

26 In addition, under Article 5(3), the Directive allows Member States to derogate, in respect of public lending, from the general obligation to remunerate 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; see also Commission v Portugal, paragraph 22, and Commission v Spain, paragraph 31).

27 Thus, contrary to the submission of Ireland, only a limited number of categories of establishments potentially required to pay authors remuneration pursuant to Article 5(1) of the Directive are capable of being exempt from that requirement (Commission v Spain, paragraph 32).

28 Ireland also submits that it is simply incidental that the categories of public lending establishments exempted by national law on the basis of Article 5(3) of the Directive constitute the majority or in fact the entire extent of those establishments.

29 In that regard, it has 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, as Article 5(3) of the Directive implies, the obligation to pay the remuneration provided for in Article 5(1) must be imposed on all the establishments concerned (Case C-433/02 Commission v Belgium [2003] ECR I-12191, paragraph 20, and Commission v Spain, paragraph 34).

30 It follows that, by exempting all public lending establishments from the obligation to pay remuneration, the ministerial order interprets Article 5(3) of the Directive in a manner which is not in conformity with the principal objective of that directive, or with the duty of strict interpretation that that provision requires in

that it derogates from the general obligation to remunerate authors.

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

32 Consequently, it must be held that, by exempting all categories of public lending establishments, within the meaning of Directive 92/100, from the obligation to remunerate authors for the lending carried out by them, Ireland has failed to fulfil its obligations under Articles 1 and 5 of that directive.

Costs

33 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. Since the Commission has asked that Ireland be ordered to pay the costs and the latter has been unsuccessful in its defence, Ireland must be ordered to pay the costs. In accordance with Article 69(4), the Kingdom of Spain must bear its own costs.

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

1. Declares that, by exempting all categories of public lending establishments, within the meaning 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, from the obligation to remunerate authors for the lending carried out by them, Ireland has failed to fulfil its obligations under Articles 1 and 5 of that directive;
2. Orders Ireland to pay the costs;
3. Orders the Kingdom of Spain to pay its own costs.