JUDGMENT OF THE COURT (Third Chamber)

26 October 2006 *

In Case C-36/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 31 January 2005,

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

applicant,

v

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

defendant,

* Language of the case: Spanish.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet and J. Malenovský (Rapporteur), 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 29 June 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court for a declaration that, by exempting almost all, if not all, categories of establishments undertaking the public lending of works protected by copyright from the obligation to pay remuneration to authors for the lending carried out, the Kingdom of Spain

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:

'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.'

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 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.'

National legislation

5 The Directive was transposed into Spanish law by Law 43/1994 of 30 December 1994 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (BOE No 313, 31 December 1994, p. 39504). That Law was amended by Royal Legislative Decree 1/1996 of 12 April 1996 approving the consolidated version of the Law on intellectual property (BOE No 97, 22 April 1996, p. 14369) ('the Legislative Decree').

6 As set out in Article 17 of the Legislative Decree:

'The author has the exclusive rights of exploitation of his works regardless of their form and inter alia the exclusive rights of reproduction, distribution, public communication and conversion which cannot be exercised without his permission except in circumstances laid down in this Law.'

7 Article 19 of the Legislative Decree is worded as follows:

'1. "Distribution" means making the original works or copies thereof available to the public by sale, rental, lending or by any other means.

...

3. "Rental" means making originals and copies of a work available for use for a limited period of time and for direct or indirect economic or commercial advantage.

The concept of rental does not include the provision for the purposes of exhibition, public communication from phonograms or audiovisual recordings, including extracts, and provision for consultation "in situ".

4. "Lending" means making originals and copies of a work 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.

It is understood that there is no direct or indirect economic or commercial advantage where the lending carried out by an establishment accessible to the public gives rise to the payment of a sum of money which does not exceed the amount necessary to cover its operating costs.

The concept of lending does not include the transactions mentioned in the second subparagraph of paragraph 3 above or those which are carried out between establishments accessible to the public.'

8 The exclusive lending right conferred on the author by Articles 17 and 19 of the Legislative Decree is subject to the following exception contained in Article 37(2) thereof:

'... museums, archives, libraries, newspaper libraries, sound recording libraries and video recording libraries which are public or which belong to non-profit-making

cultural, scientific or educational bodies of general interest or to teaching institutions which are part of the Spanish educational system, do not need the rightholders' authorisation and do not [need to] pay remuneration for the lending which they effect.'

The pre-litigation procedure

9 On 24 April 2003, the Commission requested that the Kingdom of Spain provide it with information concerning the transposition of Articles 1, 2 and 5 of the Directive. The latter replied by letter of 1 July 2003.

10 In accordance with the procedure provided for in the first paragraph of Article 226 EC, the Commission sent the Kingdom of Spain a letter of formal notice on 19 December 2003 requesting that it adopt the measures necessary to comply with the Directive. Observations were submitted by that Member State on 19 March 2004.

11 As it considered that those explanations were unsatisfactory, the Commission sent a reasoned opinion to the Kingdom of Spain on 9 July 2004 asking it to adopt the measures necessary to comply with that opinion within a period of two months from the date of notification.

12 In reply to that reasoned opinion, the Kingdom of Spain, on 13 September 2004, sent to the Commission a report drawn up by the Ministry of Culture in which, firstly, the arguments submitted by the Spanish authorities in the letter of reply to the formal notice were repeated and, secondly, the 'lack of available budget resources' was put forward.

13 As it was not convinced by the arguments on which the Kingdom of Spain's position is based, the Commission decided to bring the present action.

The action

Arguments of the parties

14 According to the Commission, it is apparent from Article 37(2) of the Legislative Decree that the requirement to pay remuneration to authors for the lending of their works for which the rightholder's authorisation has not been obtained is so limited that there is reason to doubt that it can have any practical application whatsoever. The distinction which is made between the 'establishment' which carries out the lending and the 'body' which controls that establishment is in fact excessively formalistic. It makes the remuneration payable to authors contingent on the legal form chosen by the lender, which makes it possible to evade the requirement to pay remuneration very easily.

15 In fact, that obligation does not apply where the entities which allow the lending belong to public bodies, institutions which are part of the Spanish educational system or non-profit-making private 'cultural, scientific or educational' bodies 'of general interest'.

16 Consequently, the obligation to pay remuneration applies only in two cases. The first is where the establishment allowing the lending is a private profit-making body. Lending carried out 'with a view to profit' is not considered to be 'lending' for the purposes of the Directive, but 'rental'. It is furthermore very unlikely in practice that a profit-making body would allow free lending. The second case is where the establishment allowing the lending is a private body which is non-profit-making but

which is not a 'cultural, scientific or educational' body 'of general interest'. It is also difficult to conceive that museums, libraries, sound-recording libraries, video libraries or any other establishment which carries out public lending without a view to profit would not be regarded as 'cultural, scientific or educational bodies of general interest'.

17 Thus, though it is true that in the present case the Legislative Decree allows a formal distinction to be made between the different categories of establishments, that distinction cannot be considered to be valid because it has the same effect as the absence of any distinction and results in all lending being exempt from the obligation to pay remuneration.

18 Furthermore, Article 5(3) of the Directive, as a derogation from the obligation to pay remuneration laid down in Article 5(1) thereof, is to be interpreted strictly. It follows that to accord no significance to the adjective 'certain' used in the expression 'certain categories of establishments' renders the obligation to pay remuneration redundant and gives Article 5(3) an interpretation which is contrary to the purpose of the Directive. Furthermore, although it is true that Article 5(3) leaves Member States a significant margin of discretion in defining the categories of establishments which are exempt from the obligation to pay remuneration, an 'exemption' applying to all or almost all establishments would become the general rule.

19 Moreover, the remuneration which authors receive ought to compensate their creative efforts. It follows that the absence of payment or a payment so reduced that it is clearly not adequate to compensate such creative efforts cannot therefore be regarded as 'remuneration' in the proper sense of the term.

20 In its defence, the Kingdom of Spain maintains first that it is not correct to describe as 'extremely restricted' the sphere of application of the obligation to pay remuneration to authors laid down in the Spanish legislation because the Commission incorrectly places 'establishments' and 'bodies' on the same footing. In fact, the absence of a profit-making aim is a condition which should apply not to the establishment itself but to the body controlling that establishment. Placing establishment and body on the same footing thus leads to confusion as it gives the impression that the profit-making aim and the general interest have to apply to the establishment and not to the body controlling it. In those circumstances, the sphere of application of that provision, described as extremely restricted by the Commission, is broader. Furthermore, private companies very frequently engage in patronage and sponsorship activities by publicly lending works free of charge and nothing precludes the bodies owning those establishments from paying remuneration to authors who request it.

21 Secondly, the Kingdom of Spain submits that none of the articles in the Directive provides information or criteria for interpretation as regards the relative scope of the general rule as to the remuneration of authors and the exemption from payment thereof. Thus, the Commission, on which the burden of proof rests, has not established that the scope of the exemption from payment of remuneration to authors for the lending of their works led to insufficient income to the detriment of those authors which was capable of preventing them from being able to produce new creations. Moreover, the Commission neither submitted evidence nor even alleged that that exemption has affected the completion of the internal market.

22 Contrary to the Commission's claim which seeks to restrict, without a legal basis, the power conferred on Member States to exempt certain categories of establishments, if not all of them, the Directive gives the Member States a wide discretion which allows them to restrict, or indeed to remove, the obligation to pay remuneration in so far as necessary to attain the cultural objectives which they have set themselves, a priority requirement which overrides the requirement relating to ensuring that authors receive sufficient income. The Commission's statement in its Report to the Council of the European Union, the European Parliament and the European Economic and Social Committee on the public lending right in the European Union

of 12 September 2002 (COM(2002) 502 final) ('the 2002 report on the public lending right') bears out that interpretation. In that document the Commission states that '[u]nder certain conditions, [Article 5] allows Member States to replace the exclusive right by a remuneration right, or even not to provide for any remuneration at all'.

23 Lastly, the Kingdom of Spain submits that the expression 'certain categories of establishments' does not refer to the quantity, number or significance thereof, but means generally separate, differentiated or defined categories of establishments. It follows that the interpretation of Article 5(3) of the Directive advocated by the Commission does not correspond to the actual meaning of that expression.

Findings of the Court

24 By means of this action for failure to fulfil obligations, the Commission raises, in essence, the question of the scope to be given to the provisions of Article 5(3) of the Directive, according to which Member States may exempt 'certain categories of establishments' from payment of the remuneration provided for in Article 5(1).

25 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).

26 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, and Case C-53/05 *Commission* v *Portugal* [2006] ECR I-6215, paragraph 24).

27 Exempting 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, and *Commission* v *Portugal*, paragraph 25). 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 goes against the main objective of that directive.

28 However, in that regard the Kingdom of Spain maintains that the cultural promotion objective takes precedence over guaranteeing that authors receive appropriate income. The freedom conferred on Member States by the Directive thus enables them to allow authors only very limited, symbolic remuneration, or even none. Furthermore, the 2002 report on the public lending right bears out that interpretation.

29 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 in order to ensure that they receive appropriate income is also a specific objective of the Directive, as the seventh recital in the preamble clearly 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.

30 Furthermore, the interpretation of the directive on the basis of its main objective, as set out in paragraph 26 of this judgment, is borne out by the very wording of Article 5(3), a provision which refers only to 'certain categories of establishments'. Therefore the Community legislature did not intend to allow Member States to exempt almost all, if not all, categories of establishments from payment of the remuneration referred to in Article 5(1) (*Commission* v *Portugal*, paragraph 21).

31 In addition, under Article 5(3), the Directive in fact 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, and *Commission* v *Portugal*, paragraph 22).

32 It follows that, contrary to the submission of the Kingdom of Spain and as is apparent from paragraph 30 of this judgment, the expression 'certain categories of establishments' in Article 5(3) is to be understood as meaning that it refers to a concept which is quantitative in nature. Thus, only a limited number of categories of establishments potentially required to pay remuneration pursuant to Article 5(1) are capable of being exempt from that requirement.

33 Lastly, it is important to bear in mind that, in the absence of sufficiently precise Community criteria in a directive to delimit the obligations under the directive, 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).

34 In that regard, 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 Article 5(1) must be imposed on all the establishments concerned (*Commission* v *Belgium*, paragraph 20).

35 The Kingdom of Spain relies on the argument that the exemption provided for in Article 37(2) of the Legislative Decree does not apply to the 'establishment' which carries out the lending, but to the 'body' which controls that establishment.

36 As the Commission correctly points out, to make the exemption from the obligation to pay remuneration contingent on the legal form chosen by the lender is a matter of excessive legal formality which is liable to allow the lender to evade easily the obligation to pay remuneration. Furthermore, the Kingdom of Spain does not provide any evidence establishing the relevance of the distinction thus made between the establishment and the body controlling it, as those two entities are in a substantially identical position in the light of the lending activity.

37 The Kingdom of Spain also submits that the Commission has not shown that the exemption provided for in Article 37(2) of the Legislative Decree deprives authors of an adequate income and distorts competition in the internal market.

38 That argument must however be rejected in the light of the settled case-law of the Court from which it is clear that 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), so that failure to comply with an obligation imposed by a rule of Community law is itself sufficient to constitute a 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). By taking the view that it could interpret the Directive by reference to the consequences of its implementation, such as insufficient income for authors, the Kingdom of Spain is making the interpretation of the directive contingent on the effects of its application, which does not respect the logical order of those two stages of legal reasoning.

39 Furthermore, though it is true that, in the 2002 report on the public lending right, the Commission states that Article 5 of the Directive provides for no remuneration under certain circumstances, that possibility of providing for no remuneration relates only to categories of establishments which, under Article 5(3) of the Directive, are exempt from the obligation to pay remuneration. Thus, as is clear from paragraph 31 of this judgment, that provision must be strictly interpreted.

40 In any event, even if that report could be relied on in support of the Kingdom of Spain's arguments, the report is at the very most, as Advocate General Sharpston correctly pointed out at point 31 of her Opinion, only one aid to interpretation among others and it cannot be binding on the Court.

41 It follows that the Kingdom of Spain, by including in the list of establishments which are exempt from the obligation to pay remuneration contained in Article 37(2) of the Legislative Decree, almost all, if not all, of the categories of establishments normally subject to the obligation to pay remuneration, is applying to Article 5(3) of the Directive an interpretation which is not consistent with the main objective of the Directive or with the strict interpretation which that provision calls for, in so far as it derogates from the general obligation of remuneration of authors.

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

43 As a result, it must be held that by exempting almost all, if not all, categories of establishments undertaking the public lending of works protected by copyright from the obligation to pay remuneration to authors for the lending carried out, the Kingdom of Spain has failed to fulfil its obligations under Articles 1 and 5 of the directive.

Costs

44 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 Kingdom of Spain has been unsuccessful and the Commission has applied for costs, the Kingdom of Spain must be ordered to pay the costs.

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

1. **Declares that, by exempting almost all, if not all, categories of establishments undertaking the public lending of works protected by copyright from the obligation to pay remuneration to authors for the lending carried out, the Kingdom of Spain 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 Kingdom of Spain to pay the costs.**

[Signatures]