JUDGMENT OF THE COURT
22 September 1998 *

In Case C-61/97,

REFERENCE to the Court under Article 177 of the EC Treaty by Retten i Ålborg (Denmark) for a preliminary ruling in the proceedings pending before that court between

Foreningen af danske Videogramdistributører, acting for

Egmont Film A/S,

Buena Vista Home Entertainment A/S,

Scanbox Danmark A/S,

Metronome Video A/S,

Polygram Records A/S,

Nordisk Film Video A/S,

* Language of the case: Danish.

Irish Video A/S,

Warner Home Video Inc.,

and

Laserdisken, in the person of Hans Kristian Pedersen,

supported by:

Sammenslutningen af Danske Filminstruktører,

Michael Viuf Christiansen,

Pioneer Electronics Denmark A/S,

Videoforhandler Ove Jensen,

on the interpretation of Articles 30, 36, 85 and 86 of the EC Treaty and 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 COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet and R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray, J.-P. Puissochet (Rapporteur), G. Hirsch, L. Sevón and K. M. Ioannou, Judges,

Advocate General: A. La Pergola,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Foreningen af danske Videogramdistributører, acting for Egmont Film A/S and Others, by Johan Schlüter, of the Copenhagen Bar,

— Warner Home Video Inc., by Stephen Kon, Solicitor in the firm of S. J. Berwin & Co., and Strange Beck, of the Copenhagen Bar,

— Laserdisken, by its owner, Hans Kristian Pedersen,

— Sammenslutningen af Danske Filminstruktører and Michael Viuf Christiansen, by Anders Hjulmand, of the Ålborg Bar,

— Pioneer Electronics Denmark A/S, by Leif Hansen, 'administrerende direktør',

— Videoforhandler Ove Jensen, by Per Mogensen, of the Åbybro Bar,

— the Danish Government, by Pieter Biering, Head of Department in the Ministry of Foreign Affairs, acting as Agent,

— the French Government, by Kareen Rispal-Bellanger, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Philippe Martinet, Secretary of Foreign Affairs in the same Directorate, acting as Agents,

— the Finnish Government, by Holger Rotkirch, Head of Legal Affairs at the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Daniel Alexander, Barrister,

— the Commission of the European Communities, by Berend Jan Drijber and Hans Støvlbæk, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Foreningen af danske Videogramdistributører, acting for Egmont Film A/S and Others, Warner Home Video Inc., Laserdisken, the Danish Government and the Commission at the hearing on 31 March 1998,

after hearing the Opinion of the Advocate General at the sitting on 26 May 1998,

gives the following

Judgment

1 By order of 7 February 1997, received at the Court on 12 February 1997, Retten i Ålborg (Court of First Instance, Ålborg) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 30, 36, 85 and 86 of the EC Treaty and 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').

2 Those questions were raised in proceedings between Foreningen af danske Videogramdistributører (Association of Danish Video Distributors, 'the FDV'), acting for Egmont Film A/S and Others, and the Danish undertaking Laserdisken, which specialises in marketing films on laser discs ('videodiscs'), concerning the offer of such products imported from the United Kingdom for rental in Denmark.

3 Under Danish law the offer of films for rental is conditional on the consent of the copyright holder (Paragraph 23(3) of the Law on Copyright, as supplemented in 1989). A similar provision was introduced into the laws of England and Wales with effect from 1 August 1989 (the Intellectual Property Law on Copyright, Designs and Patents 1988, sections 16 to 18).

4 Article 1(1) of the Directive requires the Member States to provide a right to authorise or prohibit the rental and lending of originals and copies of copyright works and other subject-matter. In accordance with Article 1(4), the rights so referred to are not exhausted by any sale or other act of distribution. Furthermore, Article 9 of the Directive provides that, without prejudice to the specific provisions concerning rental and lending right, and in particular to Article 1(4), distribution right, which is an exclusive right to make available to the public by sale or otherwise one of the objects referred to, is not to be exhausted except where the first sale in the Community of that object is made by the rightholder or with his consent.

5 Laserdisken, which has since 1985 been selling videodiscs imported from the United Kingdom in Denmark, began to offer those films for rental from 1987 as a measure intended to promote the sales of those products, which are significantly more

expensive than films on videocassette and which are bought mainly by customers who are already familiar with the work. It is apparent from the order for reference that although the copyright holders had implicitly accepted those videodiscs being offered for rental in the United Kingdom, they had not authorised their being offered for rental outside that Member State.

6 In 1992 an action was brought against Laserdisken for unlawful rental contrary to Paragraph 23(3) of the Law on Copyright and an injunction was issued prohibiting the defendant, subject to FDV's providing security for any damage which might be caused by the injunction, from renting out films in which the manufacturing and distribution rights in Denmark belonged to members of the association. The injunction was issued by the Fogedret (Bailiff's Court, with jurisdiction to give interlocutory judgments in this matter) and upheld by the Vestre Landsret (Western Regional Court).

7 Retten i Ålborg, considering that the outcome of the dispute in the proceedings justifying the injunction depended on interpretation of Community law, decided to refer questions to the Court for a preliminary ruling, a decision confirmed on appeal by the Vestre Landsret which, however, slightly altered the wording of those questions. In the final version, those questions are worded as follows:

'Do Article 30, in conjunction with Article 36, or Articles 85 to 86, of the EC Treaty preclude a person to whom the holder of the exclusive rights to a film has transferred an exclusive manufacturing and distribution right in respect of copies of the film in one Member State from giving consent to the rental of his own releases while at the same time preventing the rental of imported releases which have been placed on the market in another Member State, where the holder of exclusive manufacturing and distribution rights in copies of the film has transferred ownership of copies with tacit acceptance that the copies will be rented out in that latter Member State?

In view of the fact that Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights relating to copyright in the field of intellectual property has entered into force, the same question is repeated on the basis that the directive is applicable to the reply.'

8 By those two questions, the national court is asking the Court of Justice whether it is contrary to the articles of the Treaty referred to or to the Directive for the holder of an exclusive rental right to prohibit copies of a film from being offered for rental in a Member State even where offering those copies for rental has been authorised within another Member State.

9 It should be noted at the outset that, while the order for reference includes Articles 85 and 86 of the Treaty among the Community provisions interpretation of which is requested by the national court, it gives no explanation of the reasons for which it raised the question of the effect of those articles in connection with the matters of fact and law in the main proceedings. In the absence of such information the national court, as the Advocate General pointed out at point 17 of his Opinion, has failed to put the Court in a position to give an interpretation of those articles which could be of use to it.

10 In those circumstances, according to settled case-law whose requirements are of particular importance in the area of competition, which is characterised by complex factual and legal situations (see, *inter alia*, the judgment in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraphs 6 and 7, and the order in Case C-157/92 *Pretore di Genova* v *Banchero* [1993] ECR I-1085, paragraphs 4 and 5), the questions referred by the national court must be regarded as inadmissible in so far as they concern the interpretation of Articles 85 and 86 of the Treaty. As a result, those questions can be considered only with regard to the interpretation of Articles 30 and 36 of the Treaty and the Directive.

11 In this regard, FDV, Warner Home Video Inc., the Danish, French, Finnish and United Kingdom Governments and the Commission propose that the Court should answer the national court's questions in the negative. Their argument is, essentially, that it follows from the Court's case-law (Case 158/86 *Warner Brothers and Another* v *Christiansen* [1988] ECR 2605) and the Directive that the right to authorise or prohibit the rental of a film is comparable to the right of public performance and, unlike the right of distribution, is not exhausted as soon as it has first been exercised.

12 On the other hand, Laserdisken and the parties intervening in its support in the main proceedings consider that the result of giving consent for rental is exhaustion of the exclusive right to prohibit copies of a film from being rented and that the exercise of such a right in the circumstances described is incompatible with Articles 30 and 36 of the Treaty and with the Directive's particular objective of introducing an area without internal frontiers.

13 As the Court pointed out in paragraph 14 of its judgment in Case C-200/96 *Metronome Musik* v *Music Point Hokamp* [1998] ECR I-1953, the principle of exhaustion of distribution rights where copyright works are offered for sale by the rightholder or with his consent is expressed in the settled case-law according to which, whilst Article 36 of the EC Treaty allows derogations from the fundamental principle of the free movement of goods on grounds of the protection of industrial and commercial property, such derogations are allowed only to the extent to which they are justified by the fact that they safeguard the rights which constitute the specific subject-matter of that property. However, the exclusive right guaranteed by the legislation of a Member State on industrial and commercial property is exhausted when a product has been lawfully distributed on the market in another Member State by the actual proprietor of the right or with his consent (see in particular Joined Cases 55/80 and 57/80 *Musik-Vertrieb Membran and K-tel International* v *GEMA* [1981] ECR 147, paragraphs 10 and 15, and Case 58/80 *Dansk Supermarked* v *Imerco* [1981] ECR 181, paragraph 11).

14 However, as the Court also pointed out in *Warner Brothers and Another* v *Christiansen*, literary and artistic works may be the subject of commercial exploita-

tion, whether by way of public performance or of the reproduction and marketing of the recordings made of them. That applies, for example, to the rental of video-cassettes, which involves a public distinct from the one for the sale of those products and constitutes an important potential source of revenue for makers of films.

15 In that connection, the Court pointed out that, by authorising the collection of royalties only on sales to private individuals and to persons hiring out video-cassettes, it is impossible to guarantee to makers of films a remuneration which reflects the number of occasions on which the video-cassettes are actually hired out and which secures for them a satisfactory share of the rental market. Laws which provide specific protection of the right to hire out video-cassettes are therefore clearly justified on grounds of the protection of industrial and commercial property pursuant to Article 36 of the Treaty (*Warner Brothers and Another* v *Christiansen*, cited above, paragraphs 15 and 16).

16 In the same judgment, the Court also rejected the argument that a maker of a film who has offered the video-cassette of that film for sale in a Member State whose legislation confers on him no exclusive right of hiring it out must accept the consequences of his choice and the exhaustion of his right to restrain the hiring-out of that video-cassette in any other Member State. Where national legislation confers on authors a specific right to hire out video-cassettes, that right would be rendered worthless if its owner were not in a position to authorise the operations for doing so (paragraphs 17 and 18).

17 The release into circulation of a picture and sound recording cannot therefore, by definition, render lawful other acts of exploitation of the protected work, such as rental, which are of a different nature from sale or any other lawful act of distribution. Just like the right to present a work by means of public performance (see, in

that connection, Case 395/87 *Ministère Public* v *Tournier* [1989] ECR 2521, paragraphs 12 and 13), rental right remains one of the prerogatives of the author and producer notwithstanding sale of the physical recording (*Metronome Musik*, paragraph 18).

18 The same reasoning must be followed as regards the effects produced by the offer for rental. As the Advocate General pointed out in point 15 of his Opinion, the exclusive right to hire out various copies of the work contained in a video film can, by its very nature, be exploited by repeated and potentially unlimited transactions, each of which involves the right to remuneration. The specific right to authorise or prohibit rental would be rendered meaningless if it were held to be exhausted as soon as the object was first offered for rental.

19 As for the Directive, it should be noted that the facts which gave rise to the dispute in the main proceedings predate its adoption. Nevertheless, since the proceedings before the national court were still in progress after the Directive began to produce legal effects in the Member States concerned and as that court has specifically questioned the Court in that regard, the answer to its request for interpretation must also have regard to the Directive.

20 While the third recital in the preamble to the Directive refers, in order to justify eliminating the differences between national laws, to the objective set out in Article 8a of the Treaty, namely to introduce an area without internal frontiers, the object of the Directive is, as the Court found in paragraph 22 of *Metronome Musik*, to establish harmonised legal protection in the Community for rental and lending right and certain rights related to copyright in the field of intellectual property. Here it draws a distinction between the specific rental and lending right, referred to in Article 1, and the distribution right, governed by Article 9 and defined as an exclusive right to make one of the objects in question available to the public, principally by way of sale. Whereas lending right is not exhausted by the sale or any other act of distribution of the object, distribution right, by contrast, is exhausted upon the first sale in the Community by the rightholder or with his consent (*Metronome Musik*, paragraph 19).

21 Thus the Directive expressly precludes the possibility that lending right, unlike distribution right, can be exhausted by any act of distribution of the object in question. As stated at paragraph 18 of this judgment, such exclusion is justified by the very nature of rental right, which would be rendered worthless if it were held to be exhausted as soon as the object was first offered for rental.

22 Accordingly, contrary to the submissions of the defendant and interveners in the main proceedings, it follows both from the interpretation of Articles 30 and 36 of the Treaty, as regards the protection of copyright, and from the interpretation of the Directive that the exclusive right to authorise or prohibit the rental of a film is not exhausted when it is first exercised in one of the Member States of the Community. The exercise of such a right in circumstances such as those described in the order for reference is therefore not contrary to those provisions.

23 The answer to be given to the national court must therefore be that it is not contrary to Articles 30 and 36 of the Treaty or to the Directive for the holder of an exclusive rental right to prohibit copies of a film from being offered for rental in a Member State even where the offering of those copies for rental has been authorised in the territory of another Member State.

Costs

24 The costs incurred by the Danish, Finnish, French and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Retten i Ålborg by order of 7 February 1997, hereby rules:

It is not contrary to Articles 30 and 36 of the EC Treaty or to 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 for the holder of an exclusive rental right to prohibit copies of a film from being offered for rental in a Member State even where the offering of those copies for rental has been authorised in the territory of another Member State.

Rodríguez Iglesias Gulmann Wathelet

Schintgen Mancini Moitinho de Almeida

Murray Puissochet Hirsch

Sevón Ioannou

Delivered in open court in Luxembourg on 22 September 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President