JUDGMENT OF THE COURT
28 April 1998 *

In Case C-200/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Landgericht Köln (Germany) for a preliminary ruling in the proceedings pending before that court between

Metronome Musik GmbH

and

Music Point Hokamp GmbH

on the validity of Article 1(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),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathélet and R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, D. A. O. Edward, J.-P. Puissochet (Rapporteur), G. Hirsch, P. Jann and L. Sevón, Judges,

* Language of the case: German.

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Metronome Musik GmbH, by Hartwig Ahlberg, Rechtsanwalt, Hamburg,

— Music Point Hokamp GmbH, by Martin Matzat, Rechtsanwalt, Münster,

— the German Government, by Alfred Dittrich, Regierungsdirektor in the Federal Ministry of Justice, assisted by Sabine Maass, Regierungsrätin in the Federal Ministry of the Economy, acting as Agents,

— the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Philippe Martinet, Foreign Affairs Secretary in the same directorate, acting as Agents,

— the Italian Government, by Professor Umberto Leanza, Head of the Legal Service, Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato,

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

— the Council of the European Union, by Bjarne Hoff-Nielsen, Legal Adviser, and Stephan Marquardt, of its Legal Service, acting as Agents, and

— the Commission of the European Communities, by Jürgen Grunwald, Legal Adviser, and Berend Jan Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Metronome Musik GmbH, Music Point Hokamp GmbH, the German Government, the Italian Government, the Council and the Commission at the hearing on 21 October 1997,

after hearing the Opinion of the Advocate General at the sitting on 22 January 1998,

gives the following

Judgment

1 By order of 18 April 1996, received at the Court on 13 June 1996, the Landgericht (Regional Court) Cologne, referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty a question on the validity of Article 1(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, hereinafter 'the Directive').

2 That question was raised in proceedings between Metronome Musik GmbH (hereinafter 'Metronome'), which produces sound recordings, including compact discs, and Music Point Hokamp GmbH (hereinafter 'Hokamp'), whose business includes the rental of compact discs.

3 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. Pursuant to Article 1(4), those rights are not to be exhausted by any sale or other act of distribution. Finally, under Article 2(1), the exclusive right to authorise or prohibit rental and lending is to 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.

4 Under Article 9 of the Directive, without prejudice to the specific provisions concerning the lending and rental right, and those of Article 1(4) in particular, the distribution right, which is the exclusive right to make any of the abovementioned objects available to the public by sale or otherwise, 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 Finally, Article 13, which is concerned with the applicability of the Directive in time, allows the Member States, under paragraph 3, to provide that rightholders are deemed to have given their authorisation to the rental of an object made available to third parties or acquired before 1 July 1994, the date by which the Directive was to be implemented.

6 In Germany, the obligations imposed by the Directive were put into effect by the Law of 23 June 1995 (BGBl. I, p. 842), which amended the Urheberrechtsgesetz of 9 September 1965 (Copyright Law, BGBl. I, 1273, hereinafter 'the UrhG'). In particular, that Law removed rental from the category of 'subsequent distribution', which is lawful where the original of the work or copies thereof has been put into circulation with the consent of the holder of the distribution right.

7 On the basis of the new provisions of the UrhG, Metronome, which produced the compact disc 'Planet Punk', recorded by the group 'Die Ärzte' and issued on 15 September 1995, sought an interlocutory injunction from the Landgericht Köln against Hokamp to restrain it from renting out the compact disc.

8 On 4 December 1995, that court granted an interim order restraining the defendant from offering that compact disc for rental or renting it out in Germany.

9 Hokamp applied to have that order set aside, contending that the abovementioned provisions of the Directive and those of the UrhG implementing it were contrary to the fundamental rights guaranteed by Community law and by constitutional law, in particular the freedom to pursue a trade or profession.

10 In those proceedings, the Landgericht Köln entertained doubts as to the validity of the introduction of an exclusive rental right, which would in particular adversely affect the exercise of a business activity hitherto pursued without restriction. Consequently, the national court decided to refer the following question to the Court of Justice for a preliminary ruling:

'Is the introduction of an exclusive rental right, contrary to the principle of the exhaustion of distribution rights, by Article 1(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 compatible with Community law, in particular Community fundamental rights?'

11 Metronome, the German, French, Italian and United Kingdom Governments, the Council and the Commission consider that the Directive is valid. They maintain, essentially, that the exclusive rental right, which moreover is provided for in international conventions to which the Community and the Member States are parties, reflects objectives of general interest in the field of intellectual property and does not impair the substance of the right to pursue a trade or profession.

12 Hokamp contends, however, that the introduction of such a right by the Directive must be regarded as void since it encroaches upon the fundamental rights of undertakings which operate rental businesses, including the right freely to pursue a trade or activity, and because it distorts competition in the Member States in which that activity was carried on independently of phonogram producers.

13 It is clear from the grounds of the order for reference and the wording of the question submitted that the national court is concerned that the introduction of an exclusive rental right might infringe the principle of exhaustion of distribution rights in the event of the offering for sale, by the rightholder or with his consent, of copyright works.

14 That principle is expressed in the settled case-law of the Court of Justice according to which, whilst Article 36 of the EC Treaty allows derogations from the fundamental principle of the free movement of goods by reason of rights recognised by national legislation in relation to 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).

15 However, as the Court pointed out in Case 158/86 *Warner Brothers and Metronome Video* v *Christiansen* [1988] ECR 2605, literary and artistic works may be the subject of commercial exploitation by means other than the sale of the recordings made of them. That applies, for example, to the rental of video-cassettes, which reaches a different public from the market for their sale and constitutes an important potential source of revenue for makers of films.

16 In that connection, the Court observed 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 Metronome Video*, cited above, paragraphs 15 and 16).

17 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).

18 As the Advocate General has rightly indicated in point 14 of his Opinion, the release into circulation of a sound recording cannot therefore, by definition, render lawful other forms of exploitation of the protected work, such as rental, which are of a different nature from sale or any other lawful form 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), the rental right remains one of the prerogatives of the author and producer notwithstanding sale of the physical recording.

19 Thus, the distinction drawn in the Directive between the effects of the specific rental and lending right, referred to in Article 1, and those of 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, is justified. The former is not exhausted by the sale or any other act of distribution of the object, whereas the latter may be exhausted, but only and specifically upon the first sale in the Community by the rightholder or with his consent.

20 The introduction by the Community legislation of an exclusive rental right cannot therefore constitute any breach of the principle of exhaustion of the distribution right, the purpose and scope of which are different.

21 Furthermore, according to settled case-law, the freedom to pursue a trade or profession, and likewise the right to property, form part of the general principles of Community law. However, those principles are not absolute but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, provided that any restrictions in fact correspond to objectives of general interest pursued by the European Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the

rights guaranteed (see, in particular, Case C-44/94 *R* v *Minister of Agriculture, Fisheries and Food*, ex parte *Fishermen's Organisations and Others*, [1995] ECR I-3115, paragraph 55).

22 The object of the Directive 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. According to the first three recitals in its preamble, such harmonisation is intended to eliminate differences between national laws which are liable to create barriers to trade, distort competition and impede the achievement and proper functioning of the internal market. As is stated, more specifically, in the fourth, fifth and seventh recitals in the preamble to the Directive, the rental right, which, as a result of the increasing threat of piracy, is of increasing importance to the economic and cultural development of the Community must in particular guarantee that authors and performers can receive appropriate income and amortise the especially high and risky investments required particularly for the production of phonograms and films.

23 Those objectives in fact conform with the objectives of general interest pursued by the Community. It should be borne in mind, in particular, that the protection of literary and artistic property, which is a category of industrial and commercial property within the meaning of Article 36 of the Treaty, constitutes a ground of general interest which may justify restrictions on the free movement of goods (see *Warner Brothers and Metronome Video*, cited above, paragraph 11). It should also be noted that the cultural development of the Community forms part of the objectives laid down by Article 128 of the EC Treaty, as amended by the Treaty on European Union, which is intended in particular to encourage artistic and literary creation.

24 More particularly, the inclusion, challenged by the defendant in the main proceedings, of phonogram producers among the beneficiaries of the exclusive rental right appears justified by the protection of the extremely high and risky investments which are required for the production of phonograms and are essential if authors are to go on creating new works. As the Advocate General has explained in point 26 of his Opinion, the grant of an exclusive right to producers certainly constitutes the most effective form of protection, having regard in particular to the development of new technologies and the increasing threat of piracy, which is favoured by the extreme ease with which recordings can be copied. In the absence of such a right, it is likely that the remuneration of those who invest in the creation of those products would cease to be properly guaranteed, with inevitable repercussions for the creation of new works.

25 Furthermore, as pointed out by most of those who have submitted observations, the obligation to establish, for the producers of phonograms and all other holders of rights in respect of phonograms, an exclusive right to authorise or prohibit the commercial rental of those products is in conformity with the combined provisions of Articles 11 and 14 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPs'), annexed to the agreement establishing the World Trade Organisation, signed in Marrakesh on 15 April 1994 and approved 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).

26 Thus, the general principle of freedom to pursue a trade or profession cannot be interpreted in isolation from the general principles relating to protection of intellectual property rights and international obligations entered into in that sphere by the Community and by the Member States. Since it does not appear that the objectives pursued could have been achieved by measures which preserved to a greater extent the entrepreneurial freedom of individuals or undertakings specialising in the commercial rental of phonograms, the consequences of introducing an exclusive rental right cannot be regarded as disproportionate and intolerable.

27 It must also be observed that, regardless of the transitional measures provided for in Article 13, the Directive does not have the effect of eliminating any possibility of rental. Those engaged in the business of hiring out can negotiate with rightholders in order to obtain an authorisation to hire out the objects in question or a contractual licence, on terms acceptable to both parties.

28 As regards the distortions of competition which the defendant in the main proceedings contends would result from the overall prohibition of rental which would be imposed by certain groups producing phonograms, it need merely be observed that, even if such distortions were proved, they would not be the direct consequence of the contested provisions, which do not necessarily have either the object or the effect of encouraging interested parties systematically to prohibit the rental of their products solely for the purpose of eliminating competitors from the rental market.

29 The answer to be given to the national court must therefore be that examination of the question submitted has disclosed no factor of such a nature as to affect the validity of Article 1(1) of the Directive.

Costs

30 The costs incurred by the German, French, Italian and United Kingdom Governments, the Council of the European Union 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 question referred to it by the Landgericht Köln by order of 18 April 1996, hereby rules:

Examination of the question submitted has disclosed no factor of such a kind as to affect the validity of Article 1(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.

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Schintgen Mancini

Moitinho de Almeida Kapteyn Edward

Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 28 April 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President