# OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 4 May 2006 [1]

1. Article 4(1) of 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 [2] ('the Copyright Directive' or 'the Directive') requires Member States to give authors the exclusive right to authorise or prohibit any form of distribution to the public.

2. Article 4(2) provides that that right shall not be exhausted within the Community except where the first sale in the Community is made by or with the consent of the rightholder.

3. The effect of exhaustion of the right is that the rightholder may no longer rely on the right to oppose further distribution.

4. The present reference from the Østre Landsret (Eastern Regional Court) (Denmark) asks whether Article 4(2) precludes a Member State from retaining a rule of international exhaustion (namely a rule that the right is to be exhausted wherever the first sale is made) in its legislation and, if so, whether it is valid.

## The Copyright Directive

5. The Copyright Directive was adopted on the basis of Articles 47(2), 55 and 95 EC.

6. Article 47(2) empowers the Council to issue directives for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons. Article 55 applies Articles 45 to 48 in the field of services. Article 95 empowers the Council to adopt measures for the

1 — Original language: English.

2 — OJ 2001 L 167, p. 10

approximation of national provisions which have as their object the establishment and functioning of the internal market.

7. The preamble to the Directive contains the following recitals:

'1. The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

...

3. The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

4. A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation ...

...

7. The Community legal framework for the protection of copyright and related rights must ... be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market ... should be adjusted ...

9. Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers,

producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

...

10. If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

...

11. A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

12. Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.

...

14. This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

...

28. Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. ...'

8. Article 1(1) provides that the Directive 'concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society'. [3]

9. Article 4 is headed 'Distribution right'. It provides:

'1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.'

## National legislation

10. Before Denmark implemented the Copyright Directive, the Ophavsret (Law on copyright) provided for international exhaustion by stating simply 'When a copy of a work is, with the copyright holder's consent, sold or in some other manner transferred to another party, the copy may be distributed further'. [4]

11. The Ophavsret was amended in 2002 in order to implement the Copyright Directive. [5] That was done by adding, after 'to another party', the words 'within the European Economic Area'.

12. It is common ground that the effect of that amendment is to replace the principle of international exhaustion with that of exhaustion within the European Economic Area ('EEA'). I shall use the term 'regional

3 — 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') covers the analogous rights granted to performers (musicians, actors etc.) and entrepreneurs (publishers, film producers etc.).

4 — Section 19.

5 — By Law No 1051 of 17 December 2002.

exhaustion' to describe exhaustion within the EEA or the EU. [6]

## The main proceedings and the questions referred

13. Until 2002 the claimant, a private limited company, sold cinematographic works through three shops in Denmark. The works sold were mostly imported by it directly from other countries within or outside the EU. The claimant focused on offering a wide range of films intended for film enthusiasts, for example special editions, including original American editions, editions filmed using special techniques, and works not available in Europe.

14. In 2003 the claimant brought proceedings before the Landsret against the Ministry of Culture, maintaining that the amendment to the Ophavsretslov did not apply to its import and sale of DVD products lawfully marketed in countries outside the EEA.

15. The Landsret has stayed the proceedings and referred the following questions for a preliminary ruling:

'(1) Is Article 4(2) of 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 invalid?

(2) Does Article 4(2) of 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 preclude a Member State from retaining international exhaustion in its legislation?'

6 — As will be seen below (points 38 and 39), the principle of exhaustion as developed by the Court of Justice was, unsurprisingly, limited to exhaustion by sale in the Community. The Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) extended the rule to goods sold with the consent of the right-holder anywhere in the EEA (see Articles 6, 11 and 13 together with Article 2 of Protocol No 28 on intellectual property). Most of the directives cited in footnotes 7 to 12 have moreover been extended to all EEA countries (the Member States together with Iceland, Liechtenstein and Norway) and their provisions as to exhaustion amended so as to provide for EEA-wide exhaustion. For the purposes of the analysis in the present case, the principles apply equally to EU-wide and EEA-wide exhaustion. Since nothing turns on the distinction, I shall use the terms 'Community exhaustion' and 'regional exhaustion' interchangeably in the remainder of this Opinion.

16. Written observations have been submitted by the claimant, the Polish Government, the Council, the Parliament and the Commission, all of which with the exception of the Polish Government were represented at the hearing.

17. Although the first question is not explicitly stated to arise only if the second question is answered in the affirmative, that is the tenor of the order for reference. The referring court essentially wishes to know whether, if Article 4(2) precludes a Member State from retaining international exhaustion in its legislation, it is invalid for that reason. As the Commission points out, it is logical therefore to answer the second question (does Article 4(2) preclude a Member State from retaining international exhaustion in its legislation?) before the first question (is Article 4(2) valid?).

**Community legislation on exhaustion of analogous rights**

18. In the context of intellectual property rights other than copyright and related rights, numerous legislative instruments provide for exhaustion of the specific rights to which they relate.

19. Article 9(2) of the Rental and Lending Rights Directive [7] is couched in similar terms to Article 4(2) of the Copyright Directive. It provides that the exclusive distribution right conferred by Article 9(1) on performers, phonogram producers, film producers and broadcasting organisations 'shall not be exhausted within the Community in respect of [respectively fixations of their performances, their phonograms, the original and copies of their films and fixations of their broadcasts, including copies thereof], except where the first sale in the Community of that object is made by the rightholder or with his consent'.

20. Other provisions are expressed in more positive, and perhaps simpler, terms. Thus, Article 4(c) of the Software Directive [8] provides that the 'first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy'. Similarly, Article 5(c) of the Databases Directive [9] provides that the 'first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community'.

7 — 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).

8 — Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42).

9 — Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

21. In another variation, Article 7(1) of the Trade Marks Directive [10] provides that the 'trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent'.

22. There are analogous provisions, albeit expressed differently, in the field of design rights [11] and the legal protection of topographies of semiconductor products. [12]

**The second question**

23. By its second question, the referring court asks whether Article 4(2) of the Copyright Directive precludes a Member State from retaining international exhaustion in its legislation.

24. The claimant and the Polish Government consider that that question should be answered in the negative. The Commission takes the opposite view. Neither the Council nor the Parliament has made submissions on the second question.

25. I consider that the answer should be in the affirmative, namely that Article 4(2) of the Copyright Directive precludes a Member State from retaining international exhaustion in its legislation.

26. First, the wording of the provision is quite clear. Article 4(2) states unequivocally that the distribution right 'shall not be exhausted within the Community *except* where the first sale ... in the Community ... is made by the rightholder or with his consent'. Article 4(2) is a derogation from the rule in Article 4(1) requiring Member States to provide an exclusive distribution right for authors. It should accordingly be narrowly construed. Recital 28 in the preamble [13] is also clearly worded to the same effect.

27. The Explanatory Memorandum moreover explicitly states that the provision

10 — First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1)

11 — Article 15 of Directive 98/71/EC of the European Parliament and the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28).

12 — Article 5(5) of Council Directive 87/54 EEC of 16 December 1986 on the legal protection of topographies of semiconductor products (OJ 1987 L 24, p. 36).

13 — Set out in point 7 above.

(which was essentially unchanged [14] from that in the first proposal for the directive [15]) 'excludes the possibility of Member States to apply international exhaustion'. The wording was therefore chosen deliberately.

28. Next, the Court has already ruled on the analogous question in the context of the Trade Marks Directive. [16] In *Silhouette* [17] the Court was asked whether national rules providing for exhaustion of trade mark rights in respect of products put on the market outside the EEA under that mark by the proprietor or with his consent were contrary to Article 7(1) of the Trade Marks Directive. [18]

29. The Court noted that according to the text of Article 7, exhaustion occurs only where the products have been put on the market in the EEA. [19] It was however argued that Article 7, like the Court's case-law concerning Articles 28 and 30 EC, [20] was limited to requiring the Member States to provide for exhaustion within the Community. Article 7, it was submitted, therefore did not comprehensively resolve the question of exhaustion of rights conferred by the trade mark, but left it open to the Member States to adopt rules on exhaustion going further than those explicitly laid down in that provision. [21] Such rules could therefore include international exhaustion.

30. The Court rejected that argument. It ruled that national rules providing for exhaustion of trade-mark rights in respect of products put on the market outside the EEA are contrary to Article 7(1) of the Directive, as amended by the EEA Agreement.

31. Given that the wording of Article 4(2) of the Copyright Directive is, if anything, even clearer than that of Article 7(1) of the Trade Marks Directive, I see no reason not to interpret Article 4(2) consistently with the Court's ruling in *Silhouette*.

32. Finally, that interpretation is in line with the single market objectives of the Copyright Directive. I will examine this issue further in

14 — The only change was to replace 'thereof' with 'of the work'.

15 — Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM(97) 628 final (OJ 1998 C 108, p. 6).

16 — Cited in footnote 10.

17 — Case C-355/96 [1998] ECR I-4799.

18 — See footnote 6 concerning the extension throughout the EEA of Article 7(1).

19 — Paragraph 18.

20 — See points 38 to 40 below.

21 — See paragraph 21.

the context of the first question referred, to which I now turn.

## The first question

33. By its first question, the referring court asks whether Article 4(2) of the Copyright Directive is invalid.

34. The claimant and the Polish Government consider that the answer should be in the affirmative. The Council, the Parliament and the Commission take the contrary view.

35. I agree with the institutions that Article 4(2) is not invalid.

36. As indicated above, [22] it is clear from the order for reference that the referring court essentially wishes to know whether, if Article 4(2) precludes a Member State from retaining international exhaustion in its legislation, it is invalid for that reason. I shall approach the question on that basis.

37. It is first appropriate to say a few words about the principle of Community exhaustion of intellectual property rights.

38. In *Deutsche Grammophon* [23] the Court in effect imposed the rule of Community exhaustion in the context of a right related to copyright, [24] stating:

'If a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimise the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.

22 — Point 17.

23 — Case 78/70 [1971] ECR 487

24 — See footnote 3

That purpose could not be attained if, under the various legal systems of the Member States, nationals of those States were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between Member States.

Consequently, it would be in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a Member State, in such a way as to prohibit the sale in that State of products placed on the market by him or with his consent in another Member State solely because such distribution did not occur within the territory of the first Member State.' [25]

39. In *Dansk Supermarked* [26] the Court repeated this principle in the context of copyright in the strict sense:

'... Articles [28 and 30 EC] must be interpreted to mean that the judicial authorities of a Member State may not prohibit, on the basis of a copyright or of a trade mark, the marketing on the territory of that State of a product to which one of those rights applies if that product has been lawfully marketed on the territory of another Member State by the proprietor of such rights or with his consent'. [27]

40. It may be noted that in 1974 the Court developed analogous rules of Community exhaustion in the context of both trade marks [28] and patents. [29]

41. The effect of applying the rule of Community exhaustion is that the Community is regarded as a single market, as indeed it should be. The claimant and the Polish Government are therefore incorrect when they submit that the effect of harmonised implementation of regional exhaustion is that the internal market 'will be repartitioned into separate territories and markets' and that regional exhaustion entails partitioning of the market since it enables rightholders to decide whether to introduce a product on a given national market. On the contrary: the rule of Community exhaustion guarantees that, once a product is placed on the national market of one Member State with the right owner's consent, it may then be sold on freely throughout the 25 national markets comprising the EU single market.

25 — Paragraphs 12 and 13.

26 — Case 58/80 [1981] ECR 181.

27 — Paragraph 12.

28 — Case 16/74 *Centrafarm* v *Winthrop* [1974] ECR 1183.

29 — Case 15/74 *Centrafarm* v *Sterling Drug* [1974] ECR 1147.

42. Against that background, I turn to consider the various arguments adduced by the claimant and the Polish Government.

*The Rental and Lending Rights Directive*

43. The claimant traces the history of Article 9(2) of the Rental and Lending Rights Directive, the wording of which is essentially identical to that of Article 4(2) of the Copyright Directive. It submits that it was not until 1994 (thus, two years after adoption of the Rental and Lending Rights Directive) that the Commission, in response to a written question from Geoffrey Hoon MEP, stated that it understood the provisions pertaining to distribution rights to be a prohibition on international exhaustion. The claimant considers that the case-law of the Court of Justice, which Article 9(2) sought to reflect, did not at that stage preclude international exhaustion; and that the prohibition of international exhaustion was thus introduced not by legislation but outside the proper legislative channels.

44. The claimant's argument seems to be that when the Commission presented its proposal for the Rental and Lending Rights Directive, [30] it did not intend Article 9(2) to be a prohibition on international exhaustion.

45. It is admittedly not clear from the Explanatory Memorandum to that proposal [31] whether the Commission so understood that provision, although the statement that 'exhaustion on the basis of Community law relates only to the intra-Community distribution' suggests that it did. In any event, while statements in the Explanatory Memorandum may in some circumstances be helpful, the legal effect of legislation once adopted cannot depend on the Commission's earlier view as to the likely effect of the proposal therefor. The Court is the ultimate arbiter. In deciding on the proper interpretation of legislation, the Court will pay particular attention to the objective, scheme and wording of the version ultimately adopted.

46. In the present case the claimant, it seems to me, is saying no more than that Article 9 (2) of the Rental and Lending Rights Directive was ambiguous when it was introduced. While it may be undesirable that Community legislation is equivocal, it is

30 — Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright, 24 January 1991 (OJ 1991 C 53, p. 35)

31 — COM(90) 586 final, commentary on Article 7(2), the forerunner of Article 9(2).

hardly unprecedented; indeed, it may at times be inevitable. It is in such circumstances that the Court is called upon to construe the provision concerned.

47. If Article 9(2) of the Rental and Lending Rights Directive were to be interpreted by the Court, it seems to me that, by analogy with *Silhouette*, the conclusion should be the same. That provision, however, is not the subject of the questions referred to the Court in the present case.

*Silhouette*

48. The claimant submits that the Court was wrong to take the view in *Silhouette* that international exhaustion could be an obstacle to the internal market: on the contrary, the functioning of the internal market would be guaranteed if Community exhaustion were abolished and international exhaustion applied.

49. That view might be correct if international exhaustion were mandatory for all Member States. That is not however being suggested. [32] As explained above, [33] the referring court is asking whether Article 4(2) of the Copyright Directive precludes a Member State from retaining international exhaustion (see the second question, discussed above) and, if so, whether that provision is invalid. The Court in *Silhouette* dealt expressly with the question whether optional international exhaustion [34] would be an obstacle to the internal market. It concluded that precluding such an option was 'the only interpretation which is fully capable of ensuring that the purpose of the [Trade Marks] Directive is achieved, namely to safeguard the functioning of the internal market. A situation in which some Member States could provide for international exhaustion while others provided for Community exhaustion only would inevitably give rise to barriers to the free movement of goods and the freedom to provide services.' [35]

50. The claimant seeks to minimise the relevance of *Silhouette*, submitting that judgments of the Court concerning provisions from directives other than the Copyright Directive worded similarly to Article 4(2) thereof are irrelevant to the present issue.

32 — Nor was it, indeed, in *Silhouette*: see point 31 of the Opinion of Advocate General Jacobs and paragraph 19 of the judgment.

33 — Point 17.

34 — I.e., permitting Member States, if they so chose, to retain international exhaustion in addition to the (mandatory) Community exhaustion put in place by the Community legislator.

35 — Paragraph 27. See also points 41 and 42 of the Opinion.

51. I do not agree. The Court developed the doctrine of Community exhaustion in relation to various branches of intellectual property through the application of Articles 28 and 30 EC. [36] The Community legislature has explicitly provided for Community exhaustion in relation to various branches of intellectual property in several harmonising directives based on Article 95 EC. [37] The principle underlying the doctrine in relation to all branches of intellectual property derives directly from the imperative of the free movement of goods in the internal market. Like the Trade Marks Directive, the Copyright Directive is based on Article 95 EC. It is a harmonising directive and it is clear from its extensive preamble that its principal objectives were to 'ensur[e] that competition in the internal market is not distorted' and in order to 'help to implement the four freedoms of the internal market' and 'the smooth functioning of the internal market'. [38] I see no reason not to give weight to judgments of the Court concerning similar provisions adopted in an analogous context.

52. Admittedly, there is no overriding requirement of principle for the geographical scope of exhaustion to be the same for all intellectual property rights harmonised by Community law. However, I agree with the Council that it would be difficult to justify granting a more limited distribution right to the author of a literary or artistic work than to the author of a database. Moreover, audiovisual material such as that at issue in the present case will frequently be protected by trade mark rights in addition to copyright and related rights. Providing for international exhaustion of the author's distribution right would thus not have the effect desired by the claimant in the present case, since the holders of those trade mark rights would in any event be able to oppose parallel imports of recordings not sold in the Community by or with the consent of those rightholders.

*The principle of proportionality*

53. The claimant, supported by the Polish Government, submits that if (as in its view is the case) uniform application of international exhaustion has the same effect on the internal market as, and is less restrictive in other ways than, Community exhaustion, the principle of proportionality requires that

36 — See points 38 to 40 above.

37 — The Rental and Lending Right Directive, cited in footnote 7; the Software Directive, cited in footnote 8; the Databases Directive, cited in footnote 9; the Trade Marks Directive, cited in footnote 10; Directive 98/71 on the legal protection of designs, cited in footnote 11; and Directive 87/54 on the legal protection of topographies of semiconductor products, cited in footnote 12.

38 — Recitals 1, 3 and 7, all set out in point 7 above.

international exhaustion be imposed in place of the latter.

54. The principle of proportionality is often relevant to assessing specific measures and choices made within an overall policy adopted by the Community legislature. It cannot, however, be used as a means for determining the legality of the fundamental policy choice here made by the Community legislator between mandatory international exhaustion and mandatory regional exhaustion. It is no part of the Court's function to seek to evaluate such policy considerations. [39]

55. Also in connection with the principle of proportionality, the claimant argues that the principle of regional exhaustion is unrelated to combating piracy, the legitimate aim of Article 4(2) of the Copyright Directive. Accordingly, the Commission abused its powers.

56. As the Council and the Commission correctly submit, however, combating piracy was not the legislator's primary objective in adopting the provision. In any event, it seems to me that the fact that the exclusive distribution right is not exhausted for pirated copies (because such copies are not put into circulation with the author's consent) demonstrates that Article 4 is indeed an appropriate provision for combating unlawful distribution.

57. More generally, it seems to me that the nub of this whole action is, indeed, the claimant's strongly held view that the Community legislator made the wrong policy choice in opting for regional exhaustion of rights rather than international exhaustion of rights. Whilst it is perfectly legitimate for the claimant to take that view and to seek to have it vindicated, the Court is not the appropriate forum in which to pursue the point.

*Competition*

58. The claimant and the Polish Government submit that the rule of Community exhaustion infringes the fundamental Community objective of promoting greater competition within the Union. Community exhaustion tips the balance of interests too much in favour of the rightholder and reduces consumer choice.

39 — Point 51 of the Opinion in *Silhouette*. It should also be noted that the referring court's question does not ask about imposition of mandatory international exhaustion.

59. Again, that argument goes to the question whether mandatory international exhaustion would have been a better policy choice than prohibiting international exhaustion. As such, it cannot be entertained. [40] To the more limited extent that it seeks to impugn the principle of Community exhaustion as such, it does not in my view succeed. Competition within the single market will indeed be enhanced by removing the market irregularities that arise when some Member States operate international exhaustion and others do not. Community exhaustion thus enhances competition within the single market: indeed, that is its rationale. In so far as the claimant is seeking to improve competition at international level, I can only agree with the Parliament that that is not among the Community's objectives.

*Freedom of expression*

60. The claimant submits that the principle of Community exhaustion is contrary to the freedom of expression enshrined in Article 10 of the European Convention on Human Rights, since its effect is to prohibit imports from third countries and thus prevent citizens from receiving information.

61. That article states that everyone is to have the right to freedom of expression, which includes freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers. It is common ground that Article 10 covers the expression of ideas by means of film. [41]

62. The European Union is required to respect fundamental rights as guaranteed by the Convention. [42]

63. Prohibiting international exhaustion does not of course equate to prohibiting imports from third countries. It does however mean that certain items protected by copyright and related rights and not distributed within the Community may not be available in the Community or may be so available only at a price higher than the

40 — It may be noted that the same argument was unsuccessfully adduced in *Silhouette*: see points 48 to 53 of the Opinion

41 — Accepted by the European Court of Human Rights in *Otto-Preminger Institut* v *Austria* A 295-A (1994).

42 — Article 6(2) of the Treaty on European Union, restating principles developed in a body of case-law (see for example Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 71 to 73, and the case-law there cited).

lowest price which obtains outside the Community.

64. Since the author of such an item can ensure that it is available throughout the Community by putting it on the market in any Member State, it is clear that the principle of Community exhaustion does not infringe the author's freedom to impart ideas.

65. On the other hand, prohibiting international exhaustion might in principle affect the right to receive ideas, since a person within the Community wishing to acquire such an item may find that he cannot, or can do so only at a price higher than that charged outside the Community. However, the Court of Human Rights has stated that 'the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others *wish or may be willing to impart to him*'. [43] Prohibiting international exhaustion involves no restriction on the right as so expressed.

66. Even if the Court were to conclude in the present case that there was a restriction on the freedom of expression, that restriction would in my view be justified. Article 10(2) of the Convention provides that the exercise of freedom of expression, 'since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the ... rights of others'.

67. The Court has held that the exercise of the right to freedom of expression may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of their aim, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed. The interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck. [44]

68. It seems clear that the choice of mandatory Community exhaustion rather than optional international exhaustion reflects a satisfactory balancing of the interests involved. The regulation of intellectual property rights in the Community inevitably reflects an attempt to balance the competing interests of the rightholder and the free movement of goods. The Copyright Direc-

43 — *Leander* v *Sweden*, A 116 (1987), paragraph 74, emphasis added.

44 — *Schmidberger*, cited in footnote 42, paragraphs 80 and 81.

tive explicitly seeks to achieve this balance: the preamble stresses both the importance of the internal market [45] and the need for a high level of protection of intellectual property. [46] Recital 3 moreover emphasises that the legislature was aware of the conflicting interests, stating that the proposed harmonisation 'relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest'.

69. The Court has stated that, in terms of Article 10(2) of the Convention, 'specific restrictions on the exercise of the right of freedom of expression can, in principle, be justified by the legitimate aim of protecting the rights of others'. [47]

70. It has also stated that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the objectives mentioned in Article 10(2) varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest [48] and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. That holds true for the commercial use of freedom of expression. [49]

71. It seems to me that there is nothing in the present case to suggest that the choice by the Community legislator of mandatory Community exhaustion rather than optional international exhaustion was either unreasonable or disproportionate.

*Equal treatment*

72. The claimant submits that the principle of Community exhaustion infringes the principle of equal treatment. In illustration,

45 — See in particular recitals 1, 3 and 7, set out in point 7 above

46 — See in particular recitals 4, 9 and 10, set out in point 7 above

47 — Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 46. In that context, it may be noted that Article 1 of the First Protocol to the Convention protects the right to property, which includes intellectual property: *Smith Kline and French Laboratories* v *Netherlands* 66 DR 70, p. 79 (1990).

48 — In the sense of participating in a debate affecting the general interest: see *VGT Verein gegen Tierfabriken* v *Switzerland*, Reports of Judgments and Decisions 2001-VI, paragraphs 69 to 70, citing *Hertel* v *Switzerland*, Reports 1998-VI, pp. 2325-26, in which the Court of Human Rights had stated: 'It is however necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely "commercial" statements, but his participation in a debate affecting the general interest, for example, over public health' (paragraph 47).

49 — Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 51, citing case-law of the European Court of Human Rights (including *VGT Verein gegen Tierfabriken*, cited in footnote 48).

the claimant notes that a Turkish producer can control Turkish editions in the EU while a Greek producer cannot. Conversely, a Greek licensee for, say, a book has access to the entire EU while a Turkish licensee does not.

73. Those illustrations, however, concern on the one hand a rightholder or licensee who is established in a third country and on the other hand a rightholder or licensee established in the Community. The situations are thus manifestly different. The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. As the Council, the Parliament and the Commission all submit, the principle of equal treatment would therefore not in any event require these situations to be treated similarly.

*Legal basis and third country agreements*

74. The claimant submits that the Copyright Directive was adopted on an incorrect legal basis and that Article 4(2) entails a possible conflict with third-country agreements. Unfortunately the claimant adduces no further argument in support of either submission. [50]

75. With regard to legal basis, I agree with the Council and the Commission that Articles 47(2), 55 and 95 EC [51] permit the legislature to take measures necessary for the functioning of the internal market by harmonising national copyright law. The objective of the Directive, in particular Article 4, is the realisation of the internal market (see in particular recital 3 in the preamble [52]). Laying down a harmonised criterion at Community level for exhaustion of distribution rights undeniably enables that objective to be attained, since otherwise two different regimes would co-exist in the internal market — precisely the situation which led the Court in *Silhouette* [53] to confirm that an analogous harmonisation in the context of trade marks could be based on Article 95 EC. Nothing in the Directive suggests that it has any other objective. The fact that it affects

50 — Although he expressed the view at the hearing that the lack of legal basis derived from the fact that imposing Community exhaustion limits competition. That argument has been dealt with in points 57 and 58 above.

51 — See point 6 above.

52 — Set out in point 7 above.

53 — Cited in footnote 17.

undertakings both in third countries and in the Community differently does not affect its legal basis.

76. With regard to third country agreements, the claimant has not suggested that any international convention or bilateral agreement entered into by the Community requires the Community to adopt international exhaustion. Nor has there been any suggestion that the Council was required to take into account the situation of intellectual property rightholders in third countries when adopting the Directive. Any discrimination against such rightholders cannot therefore invalidate the measure. Internal market measures are inherently liable to affect imports from third countries. They may none the less be properly based on Article 95 EC. [54]

*Education and cultural heritage*

77. Finally, the claimant submits that the principle of Community exhaustion infringes the right to education (Article 153(1) EC [55]) and the Danish and European cultural heritage (Article 151 EC [56]).

78. The claimant appears to mean that the right to education and the flowering of Danish and European culture are infringed because traders in the Member States may not be able to import items from outside the Community, in particular from the USA. With regard to Article 153(1) EC, the Council, the Parliament and the Commission essentially submit that the Directive also pursues the objective of education (see recital 14), which is realised by the permitted exception to copyright in Article 5(3)(a) concerning 'use for the sole purpose of illustration for teaching or scientific research'. Cultural aspects were taken into account by the Council, as is apparent from recitals 9, 11 and 12. The Commission adds that it does not see how Article 4 could prejudice the rights invoked. Nor do I.

54 — See also point 46 of the Opinion in *Silhouette*, explaining why Article 7(1) of the Trade Marks Directive, if interpreted as precluding international exhaustion, would not 'regulate relations between Member States and third States', and paragraphs 28 and 29 of the judgment in that case.

55 — 'In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as protecting their right to information, education ...'

56 — 'The Community shall contribute to the flowering of the cultures of the Member States ...'

## Conclusion

79. I am accordingly of the view that the questions referred by the Østre Landsret should be answered as follows:

(1) Examination of Article 4(2) of 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 has disclosed no factor affecting its validity.

(2) Article 4(2) of Directive 2001/29/EC of the European Parliament and of the Council precludes a Member State from retaining international exhaustion in its legislation.