OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 29 June 2006 [1]

1. In this action brought by the Commission against Spain under Article 226 EC, the Commission seeks a declaration that Spain has not correctly implemented Articles 1 and 5 of Council Directive 92/100/EEC of 19 November 1992 on rental and lending rights and on certain rights relating to copyright in the field of intellectual property ('the Directive'). [2]

The Directive

2. The Directive seeks to eliminate differences in the legal protection provided in the Member States for copyright works and the subject matter of related rights [3] protection as regards rental and lending. [4] In particular, it requires Member States to provide rights with respect to rental and lending for certain groups of rightholders.

3. The seventh recital in the preamble to the Directive reads as follows:

'the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky; the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned; ...'.

1 — Original language: English.

2 — OJ 1992 L 346, p. 61.

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') cover the analogous rights granted to performers (musicians, actors etc.) and entrepreneurs (publishers, film producers etc.). I will however in the interests of brevity refer simply to 'copyright works' rather than the more cumbersome term used by the directive, namely 'copyright works and the subject matter of related rights', since nothing turns on the distinction in the present case.

4 — First recital in the preamble.

4. Article 1(1) requires Member States to provide a right to authorise or prohibit the rental or lending of originals and copies of copyright works 'as set out in Article 2'.

5. Article 1(2) defines 'rental' as 'making available for use, for a limited period of time and for direct or indirect economic or commercial advantage'. Article 1(3) defines 'lending' as '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.'

6. Article 2(1) provides:

'The exclusive right to authorise or prohibit rental and lending shall 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. For the purposes of this Directive, the term "film" shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.'

7. Article 5 provides in so far as relevant:

'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.

...

3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in [paragraph 1].'

8. Article 15(1) of the Directive required Member States to implement the Directive not later than 1 July 1994.

Relevant national legislation

9. The Spanish legislation at issue in the present case is the Texto refundido de la Ley de Propiedad Intelectual (consolidated version of the Law on Intellectual Property; 'LPI').

10. Article 17 of the LPI confers on authors the exclusive right of exploitation of their work, including the right of distribution.

11. Article 19(1) provides that the right of distribution is to include lending.

12. Article 19(3) provides:

'"Rental" means the provision of originals and copies of a work for use for a limited time with a direct or indirect economic or commercial benefit.

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".'

13. The first and third indents of Article 19(4) provide:

'"Lending" means the provision of originals and copies of a work for use for a limited time with no direct or indirect economic or commercial benefit, provided that the lending is effected by establishments accessible to the public.

...

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

14. The exclusive lending right conferred by Articles 17 and 19 is subject to the following exception contained in Article 37(2) of the LPI:

'... 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.'

Assessment

15. The Commission submits that Article 5 (3) of the Directive permits Member States to exempt only 'certain categories' of establishments from payment of the remuneration otherwise guaranteed by Article 5(1) as consideration for derogating from the exclusive lending right conferred by Article 1. Article 37(2) of the LPI, however, exempts virtually all lending, both from the requirement to obtain the authors' authorisation and from the requirement to pay authors remuneration. As a result of that exemption, the obligation to remunerate authors for the unauthorised lending of their works applies only where the undertaking that lends is either (1) a private profit-making body or (2) a private body which is non-profit-making but which is not a cultural, scientific or educational body of general interest. The scope of those two categories is so limited, however, that it may reasonably be doubted whether they have any practical effect. With regard to the first category, it seems very unlikely that a profit-making body will offer free lending. Since lending 'for direct or indirect economic or commercial advantage' falls within the definition of 'rental' and not 'lending' for the purpose of the Directive, it is not covered by Article 5(1) of the Directive. With regard to the second category, it seems unlikely that a museum, archive, library, newspaper library, sound recording library or video recording library which provides public lending and which is non-profit-making will not be a cultural, scientific or educational body of general interest.

16. The Commission concludes that, while Article 5(3) of the Directive leaves Member

States a wide margin of assessment to define the categories of establishment exempted from the obligation to pay remuneration, it does not authorise them to exempt from that obligation all, or virtually, all, establishments. An 'exemption' applied to all, or almost all, the establishments subject to the obligation to pay remuneration pursuant to Article 5(1) becomes a general rule. Moreover such an exemption cannot be regarded as applying solely to 'certain categories of establishments'. [5] As a derogation, Article 5(3) must be strictly interpreted. If the Member States could exempt all, or almost all, establishments which would otherwise be liable to pay remuneration, the obligation in Article 5(1) would be meaningless.

17. I consider that the Commission's action is well founded. In my view, it follows clearly from the scheme and objectives of the Directive and the wording of Article 5(3) that a Member State is not free to exempt in practical terms all categories of establishments which would otherwise fall within the scope of Article 5(1).

18. As the Commission correctly points out, one of the principal objectives of the Directive is to secure an adequate income for the creative work of authors. [6] In line with that objective, Article 5(1) requires that authors should still be remunerated for the lending of their works where a Member State has derogated from their exclusive right to authorise or prohibit such lending. Thus although Article 5(1) is described as a derogation, that provision in fact reflects the primary requirement of the whole Directive, namely the requirement that authors be remunerated, consistent with Articles 1 and 2 of the Directive.

19. Article 5(3) provides for a true derogation from that requirement for remuneration, by permitting Member States to exempt 'certain categories of establishments' from the payment of remuneration. As such, it falls to be construed strictly. The language of Article 5(3) strongly suggests that only a limited number of categories of establishments [7] potentially liable to pay remuneration pursuant to Article 5(1) may be

5 — The Commission cites Case C-433/02 *Commission* v *Belgium* [2003] ECR I-12191, paragraph 20.

6 — See the seventh recital in the preamble, set out in point 3 above.

7 — It appears that Article 5(3) was inserted in order to meet the concerns of two Member States which wished to be able to exclude libraries at educational establishments and public libraries from public lending right payments: see J. Reinbothe and S. von Lewinski, *The EC Directive on Rental and Lending Rights and on Piracy* (1993), p. 82.

exempted from that liability. That is the case not only in English but also in at least the Danish, Dutch, French, German, Greek, Italian, Portuguese and Spanish versions of the Directive, the languages in which it was adopted. [8]

20. It is true that the position is not unequivocal, since 'certain' can mean, as well as 'some but not all', also 'clearly defined'. A legislative provision authorising Member States to introduce special measures in order 'to prevent "certain" types of tax evasion or avoidance' can hardly mean that Member States may not prevent all types of tax evasion. [9]

21. The Court however has already made it clear that it interprets Article 5(3) in a limited way, stating that 'if the circumstances prevailing in the Member State in question do not enable a valid distinction to be drawn between categories of establishments, the obligation to pay the remuneration in question must be imposed on all the establishments concerned'. [10]

22. I agree with the Commission that an exemption from a liability which exempts essentially all those who would otherwise be liable is not an exemption but an annulment of the underlying obligation. In the present case, Spain does not seriously seek to deny that the scope of its exemption is effectively coterminous with the categories of establishments which would otherwise be liable to pay the remuneration. [11] Instead it puts forward a number of arguments which in its view validate its legislative choice.

23. Spain submits first that the Commission has not shown that the exemption in Article 37(2) of the LPI entails any distortion of competition in the internal market. Indeed the Commission stated in its 2002 Report on

8 — Respectively 'certain categories', 'bepaalde categorieën', 'visse kategorier', 'certaines catégories', 'bestimmte Kategorien', 'ορισμένες κατηγορίες', 'alcune categorie', 'determinadas categorias' and 'determinadas categorías'.

9 — See point 17 of the Opinion of Advocate General Jacobs in Case C-144/94 *Italittica* [1995] 3653.

10 — *Commission* v *Belgium*, cited in footnote 5, paragraph 20.

11 — Admittedly Spain asserts (without adducing any evidence) in its rejoinder that private companies frequently set up public lending libraries and that nothing prevents the bodies which own them from remunerating authors who request payment. At a later point in its rejoinder, however, it states that in Spain private initiative has not contributed significantly to the creation of establishments of general interest which are open to the public, so that public authorities have had to fill the gap.

the Public Lending Right in the European Union [12] that it had no clear indications, at least at the time of the Report, that the relatively low degree of harmonisation of the public lending right by the Directive had had a significantly negative impact either on the economic interests of rightholders or the proper functioning of the internal market. Nor has the Commission shown that the scope of the exemption in the LPI has led in Spain to insufficient income for authors which has prevented them from further creative work.

24. I agree with the Commission that, in order to prove the alleged infringement, it is not bound to prove that the exemption provided by Article 37(2) of the LPI either deprives authors of an adequate income or distorts competition in the internal market. Infringement proceedings are based on the objective finding that a Member State has failed to fulfil its obligations. [13] They do not require proof of actual harm. The obligation to pay remuneration imposed by Article 5(1) is always applicable, whether or not it is necessary in a given case in order to guarantee authors an 'adequate income' and regardless of the specific effects on competition which could flow from the absence of remuneration in a given case. [14] Similarly, the derogation in Article 5(3) always requires that the exemption from the obligation to pay remuneration be limited to 'certain establishments', whether or not that restriction is necessary in a given case in order to guarantee authors an 'adequate income' and regardless of the specific effects on competition which could flow from the absence of remuneration that would otherwise have been provided by a given establishment.

25. Moreover Spain appears to be assuming that the requirement for remuneration could somehow be set aside if it were shown that authors already received sufficient income, so that the lack of remuneration did not prevent them from engaging in further creative work. That argument however is based on a misconception as to the nature and objective of the public lending right. While it is true that authors will already have received income from their reproduction and distribution rights, that income will not reflect books which have been lent rather than sold. [15] It is of course true that not every person who borrows books from a public

12 — Report of 12 September 2002 to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, COM(2002) 502 final, paragraph 5.1.

13 — See for example Case C-140/00 *Commission* v *United Kingdom* [2002] ECR I-10379, paragraph 34 and the case-law there cited.

14 — See points 46 and 47 of my Opinion in Cases C-53/05 and C-61/05 *Commission* v *Portugal*, delivered on 4 April 2006, for an explanation of the possible impact on the internal market of failure to provide for a public lending right.

15 — I use the example of books: obviously the public lending right may apply also to phonograms and videograms which are recordings of performances or copies of films or other audiovisual works (although videograms are perhaps more frequently rented than lent).

library (or consults them in situ) would, in the absence of that facility, buy each book borrowed. There is however a general pattern.[16] In any event, the Directive represents a clear policy decision to confer both an exclusive lending right and an entitlement to remuneration where Member States have derogated from that right.

26. Second, Spain submits that the Commission misunderstands the scope of the exemption in Article 37(2) of the LPI, which refers not to whether lending is or is not profit-making, but to whether the lending establishment *belongs to* a non-profit-making cultural, scientific or educational body of general interest. Spain asserts that it is possible that certain public lending establishments are not exempted from the obligation to pay remuneration, and that it is possible to find a private profit-making body which owns a non-profit-making lending establishment.

27. Again, I agree with the Commission that the existence of the obligation to remunerate should not depend on the legal form chosen by the lender. In any event, Spain adduces no evidence corroborating its suggestions.

28. Finally, Spain refers to the Commission's statement in its 2002 Report[17] that 'Article 5 reflects the compromise found at the time between complying with the Internal Market needs on the one hand and taking account of the different traditions of Member States in this area on the other'. It follows, according to Spain, that the exceptions permitted by Article 5(3) are as broad as necessary to maintain or improve a cultural tradition. The Member States' broad freedom may lead them to recognise only a very limited or symbolic remuneration, or even none at all. Indeed, Spain notes that the Commission stated in its 2002 Report 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'.[18] In the present case, Spain claims, the realisation of cultural objectives prevails over the objective of seeking to guarantee authors an adequate

16 — See further paragraph 44 of the Explanatory Memorandum to the original Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright, 24 January 1991, COM(90) 586 final, set out in point 46 of my Opinion in *Commission* v *Portugal*, cited in footnote 14. See also the Commission's 2002 Report, cited in footnote 12, section 2.

17 — Cited in footnote 12, paragraph 3.3.

18 — Ibid.

income. The Spanish legislator took account of the fact that the use of public libraries in Spain is well below the EU average.

29. In my view, however, the obligation to remunerate authors imposed by the first sentence of Article 5(1) of the Directive would be meaningless if, pursuant to the second sentence, Member States could set that remuneration at nil. The second sentence of Article 5(1) permits Member States to modify the level of the remuneration required by the first sentence 'taking account' of their cultural promotion objectives. It does not, however, authorise them to set a 'zero' remuneration. The concept of remuneration implies that the payments received by authors must be adequate compensation for their creative efforts.

30. Similarly, if the Member States could fix nil remuneration for all categories of lending establishments, it would have been pointless to stipulate in Article 5(3) that they could exempt only 'certain' establishments from the obligation to pay remuneration. Although Article 5(3) leaves the Member States a broad margin of discretion, the discretion is to determine the categories of establishments to be exempted. As discussed above, those categories cannot comprise effectively all establishments that are potentially liable.

31. With regard to the reference in the Commission's 2002 Report that the Member States may 'even not ... provide for any remuneration at all', the context of that statement makes it clear that it refers precisely to the possibility afforded to Member States by Article 5(3) to 'exempt certain categories of establishments from the payment of the remuneration'. Categories of establishments so exempted will (by definition) not pay any remuneration at all. The current issue, however, is how the derogation in Article 5(3) is to be interpreted. I do not therefore see how the Commission's statement in its 2002 Report advances Spain's argument. It is moreover to be seen in the context of the Commission's comments on Article 5(3) in paragraph 3.4 of the Report. [19] In any event, even if the Commission's statement appeared to shed some light on the issue before the Court in the present case, it would be no more than an expression of how the Commission considers that the provision should be interpreted. As such, it is not binding on the Court.

19 — 'Whilst Article 5 gives Member States much flexibility in derogating from the exclusive lending right, a remuneration must at least be provided for authors. Member States may define the amount of the remuneration, but it must correspond to the underlying objectives of the Directive and of copyright protection in general. Member States may exempt certain, but not all, establishments within the meaning of Article 5(3) from paying the remuneration.'

Conclusion

32. I am therefore of the view that the Court should:

(1) rule that 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 and lending rights and on certain rights relating to copyright in the field of intellectual property;

(2) order the Kingdom of Spain to bear the costs.