JUDGMENT OF THE COURT (Third Chamber)

30 June 2011

(Directive 92/100/EEC – Copyright and related rights – Public lending – Remuneration of authors – Adequate income)

In Case C-271/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Raad van State (Belgium), made by decision of 17 May 2010, received at the Court on 31 May 2010, in the proceedings

Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA)

v

Belgische Staat,

THE COURT (Third Chamber),

composed of D. Šváby, President of the Seventh Chamber, acting for the President of the Third Chamber, R. Silva de Lapuerta, E. Juhász, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: V. Trstenjak,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 24 March 2011,

after considering the observations submitted on behalf of:

– the Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA), by Y. Nelissen Grade and S. Verbeke, advocaten,

– the Belgian Government, by T. Materne and J.-C. Halleux, acting as Agents, and by C. Doutrelepont and K. Lemmens, avocats,

– the Spanish Government, by N. Díaz Abad, acting as Agent,

– the European Commission, by M. van Beek and J. Samnadda, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling in the present case concerns the interpretation of the concept of 'remuneration' paid to copyright holders in respect of public lending, as set out in Article 5(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), now Article 6(1) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

2 The reference has been made in an action for annulment brought by the Vereniging van Educatieve en Wetenschappelijke Auteurs (Association of Educational and Scientific Authors) (VEWA) against the Belgische Staat concerning the Royal Decree of 25 April 2004 on remuneration rights for the public lending of authors, interpreting or performing artists, phonogram producers and producers of the first fixation of films ('the Royal Decree').

Legal context

European Union law

3 The 7th, 14th, 15th and 18th recitals in the preamble to Directive 92/100 are worded 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 [of] securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned;

…

… where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the

operating costs of the establishment, there is no direct or indirect economic or commercial advantage within the meaning of this Directive;

… it is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers …;

…

… it is also necessary to protect the rights at least of authors as regards public lending by providing for specific arrangements; … however, any measures based on Article 5 of this Directive have to comply with Community law, in particular with Article 7 of the Treaty'.

4 Article 1(1) to (3) of Directive 92/100 states:

'1. In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 5, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 2(1).

2. For the purposes of this Directive, "rental" means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage.

3. For the purposes of this Directive, "lending" means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.'

5 Article 4(1) of Directive 92/100 provides:

'Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.'

6 Article 5(1) to (3) of Directive 92/100 states:

'1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

2. When Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.

3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.'

7 According to Article 8(2) of Directive 92/100:

'Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. …'

National legislation

The Law of 30 June 1994

8 The Law of 30 June 1994 on copyright and related rights *(Belgisch Staatsblad* of 27 July 1994, p. 19297), in the version in force since 2005 ('the Law of 30 June 1994'), transposes Directive 92/100.

9 Article 23(1) of that Law is worded as follows:

'An author cannot prohibit the loan of literary works, databases, photographic works, scores of musical works, sound and audiovisual works in cases where that loan is organised for educational and cultural purposes by institutions which are recognised or officially organised for that purpose by public authorities.'

10 Article 47(1) of that Law states:

'Artists or performers and producers cannot prohibit the loan of phonograms or the first fixation of a film in cases where that loan is organised for educational and cultural purposes by institutions which are recognised or officially organised for that purpose by public authorities.'

11 Under Article 62(1) and (2) of the Law of 30 June 1994:

'1. In the event of the lending of literary works, databases, photographic works or scores of musical works under the conditions defined by Article 23, the author and editor shall be entitled to a remuneration.

2. In the event of the lending of sound or audiovisual works, in the circumstances defined in Articles 23 and 47, the author, performer and producer shall be entitled to a remuneration.'

12 The first and third paragraphs of Article 63 of that Law provide:

'After consultation with the copyright-management institutions and societies, the King shall determine the level of the remuneration referred to in Article 62. …

…

After consulting the Communities, and, where appropriate, at their initiative, the King shall fix, for certain categories of establishments recognised or organised by public authorities, an exemption or flat-rate amount per loan in order to determine the remuneration provided for in Article 62.'

The Royal Decree

13 The Royal Decree transposes Article 5 of Directive 92/100.

14 The first, second and third paragraphs of Article 4 of the Royal Decree are worded as follows:

'The amount of the remuneration referred to in Article 62 of the Law [of 30 June 1994] shall be fixed on a flat-rate basis at [EUR] 1 per year and per adult registered with the lending institutions referred to in Article 2, on condition that that person has borrowed at least once during the reference period.

The amount of remuneration referred to in Article 62 of the Law [of 30 June 1994] shall be fixed on a flat-rate basis at [EUR] 0.5 per year for each minor registered with the lending institutions referred to in Article 2, on condition that that minor has borrowed at least once during the reference period.

Where a person is registered with more than one lending institution, the amount of remuneration shall be payable only once in respect of that person.'

The dispute in the main proceedings and the question referred for a preliminary ruling

15 VEWA is a Belgian copyright management society.

16 On 7 July 2004, VEWA brought an action before the Raad van State (Belgian Council of State) in which it sought annulment of the Royal Decree.

17 In support of its action, VEWA submits, in particular, that, by fixing a flat rate of remuneration of 1 euro per person per year, Article 4 of the Royal Decree infringes the provisions of Directive 92/100 which require that 'equitable remuneration' be paid in respect of a loan or rental.

18 The referring court notes that Articles 4(1) and 8(2) of Directive 92/100 refer to 'equitable remuneration', whereas Article 5(1) thereof simply mentions 'remuneration'. It adds that, although the Court has already had occasion to

interpret the concept of 'equitable remuneration' in Article 8(2) of that directive (Case C-245/00 *SENA* [2003] ECR I-1251) and to give a ruling on Article 5(3) of Directive 92/100 relating to the possibility of exempting certain categories of establishments from the obligation to pay remuneration (Case C-36/05 *Commission* v *Spain* [2006] ECR I-10313), it has not yet given a ruling on the concept of 'remuneration' contained in Article 5(1) thereof.

19 In those circumstances, the Raad van State decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 5(1) of [Directive 92/100], now Article 6(1) of [Directive [2006/115], …, preclude a national provision which sets the remuneration at a flat rate of [EUR] 1 per adult per year and of [EUR] 0.5 per minor per year?'

The question referred for a preliminary ruling

20 By its question, the referring court asks essentially whether Article 5(1) of Directive 92/100 precludes legislation, such as that at issue in the main proceedings, which establishes a system under which the remuneration payable to authors in the event of public lending is calculated exclusively according to the number of borrowers registered with public establishments, on the basis of a fixed flat-rate amount per borrower per year.

21 It must be noted at the outset that, under Article 1(1) of Directive 92/100, authors have an exclusive right to authorise or prohibit lending. However, with regard more specifically to public lending, Article 5(1) of Directive 92/100 allows the Member States to derogate from that exclusive right.

22 Inasmuch as the implementation of that optional derogation adversely affects the exclusive right of authors, the latter being deprived of their right to authorise or prohibit a specific form of lending, that option is conditional on receipt by the authors of remuneration in respect of that loan.

23 In order to determine, first of all, who are responsible for paying the remuneration due to authors in the case of public lending, it must be stressed that lending is defined by Article 1(3) of Directive 92/100 as the 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. It may be concluded from that definition and from the purpose of that directive that it is the making available of works by the public establishments, thereby rendering possible their loan, and not the actual loan of certain works by the persons registered with such establishments, that constitutes the activity which forms the basis for the obligation to pay the remuneration due to authors. In principle, therefore, the onus is on the bodies which make those works available to pay the remuneration due to authors.

24 That finding is implicitly substantiated by Article 5(3) of Directive 92/100, which allows the Member States to exempt certain categories of lending establishments from payment of remuneration.

25 Next, as regards the concept of remuneration, the Court has already held that the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (see, inter alia, Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26, and *SENA*, paragraph 23).

26 The same applies in respect of the concept of 'remuneration' in Article 5(1) of Directive 92/100, which is not defined by the latter (concerning the concept of 'equitable remuneration', see, by analogy, *SENA*, paragraph 24).

27 With regard to the context in which the concept of remuneration arises, it must be observed that Directive 92/100 is not the only instrument in the field of intellectual property and that, regard being had for the requirements deriving from the unity and coherence of the legal order of the European Union, that concept of remuneration must be interpreted in the light of the rules and principles established by all of the directives on intellectual property, as interpreted by the Court.

28 In that connection, the Court has already held, when it interpreted the concept of 'fair compensation' in relation to reproduction for private use under article 5(2)(b) 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 (OJ 2001 L 167, p. 10), that the purpose of fair compensation is to compensate authors 'adequately' for the use made of their protected works without their authorisation, with the result that it must be regarded as recompense for the harm suffered by the author as a consequence of the act of reproduction (see, to that effect, Case C-467/08 *Padawan* [2010] ECR I-0000, paragraphs 39 and 40).

29 It is true, in the context of Directive 92/100, that, when there is a derogation from the exclusive right of authors, the Community legislature used the word 'remuneration' instead of 'compensation' provided for in Directive 2001/29. However, that concept of 'remuneration' is also designed to establish recompense for authors, arising as it does in a comparable situation in which the fact that the works are being used in the context of public lending without the authorisation of the authors result in harm to the latter.

30 Furthermore, it must be observed that Article 5(1) of Directive 92/100 refers only to 'remuneration', whereas Article 4(1) thereof, relating to rental, refers systematically to 'equitable remuneration'. The concept of equitable remuneration also appears in Article 8(2) of that directive, relating to broadcasting and communication to the public. That difference in drafting already implies that the two concepts mentioned must not be interpreted in the same way.

31 It is also clear from the 18th recital in the preamble to Directive 92/100 that it is necessary to provide for specific arrangements for public lending in order to protect the rights of authors. Consequently, the arrangements for public lending are deemed to be distinguishable from the other arrangements described in that directive. The same must be true as regards the various elements of those arrangements, including those relating to the compensation of authors.

32 Lastly, as regards the amount of remuneration, it must be observed that the Court has already held, in connection with the concept of 'equitable remuneration' in Article 8(2) of Directive 92/100, that the question whether that remuneration is equitable in character has to be assessed, in particular, in the light of the value of the use of a protected work in trade (see, to that effect, *SENA*, paragraph 37).

33 However, as has been pointed out in paragraph 23 of the present judgment, in accordance with Article 1(3) of Directive 92/100, lending does not have a direct or indirect economic or commercial character. In those circumstances, the use of a protected work in the event of public lending cannot be assessed in the light of its value in trade. Consequently, the amount of the remuneration will necessarily be less than that which corresponds to equitable remuneration or may even be fixed on a flat-rate basis in order to compensate for the act of making available all the protected works concerned.

34 That being the case, the remuneration to be fixed must, in accordance with what is set out in the 7th recital in the preamble to Directive 92/100, be capable of allowing authors to receive an adequate income. Its amount cannot therefore be purely symbolic.

35 As regards, more specifically, the criteria for determining the amount of the remuneration due to authors in the event of public lending, it must be recalled that there is no objective reason justifying the imposition by the Community judicature of specific methods for determining what constitutes uniform equitable remuneration, which would necessarily entail the Court's acting in the place of the Member States, which are not bound by any particular criteria under Directive 92/100. It is thus for the Member States alone to determine, within their own territory, what are the most relevant criteria for ensuring, within the limits imposed by Community law, and in particular by Directive 92/100, compliance with that Community concept (see, by analogy, *SENA*, paragraph 34).

36 In that regard, the wording of Article 5(1) of Directive 92/100 reserves a wide margin of discretion to the Member States. The latter may determine the amount of the remuneration due to authors in the event of public lending in accordance with their own cultural promotion objectives.

37 However, given that remuneration constitutes, as has been stated in paragraphs 28 and 29 of the present judgment, consideration for the harm caused to authors by reason of the use of their works without their authorisation, the determination of the amount of that remuneration cannot be completely dissociated from the elements which constitute that harm. As that harm is the result of public lending, that is to say, the making available of protected works by establishments accessible to the public, the amount of the remuneration due should take account of the extent to which those works are made available.

38 Thus, the higher the number of protected works made available by a public lending establishment, the greater will be the prejudice to copyright. It follows that the amount of remuneration to be paid by such an establishment should take account of the number of works made available to the public and, consequently, that large public lending establishments should pay a greater level of remuneration than smaller establishments.

39 Furthermore, the relevant public, namely the number of borrowers registered with a lending establishment, is also equally relevant. The greater the number of persons having access to the protected works, the greater will be the prejudice to authors' rights. It follows that the amount of remuneration to be paid to authors should be determined by also taking into account the number of borrowers registered with that establishment.

40 In the case in the main proceedings, it is common ground that the system established by the Royal Decree takes into account the number of borrowers registered with public lending establishments, but not the number of works made available to the public. Such a taking into account does not therefore have sufficient regard for the extent of the harm suffered by authors, or for the principle that those authors must receive remuneration that is equivalent to an adequate income, as set out in the 7th recital in the preamble to Directive 92/100.

41 Furthermore, Article 4(3) of that decree provides that, where a person is registered with a number of establishments, the remuneration is payable only once in respect of that person. In that connection, VEWA submitted, in the course of the public hearing, that 80% of the establishments in the French Community in Belgium declare that a large number of their readers are also registered with other lending establishments and, consequently, that those readers are not taken into account for payment of the remuneration of the author concerned.

42 In those circumstances, that system may have the result that many establishments are, in effect, almost exempted from the obligation to pay any remuneration. Such a *de facto* exemption is, however, at variance with Article 5(3) of Directive 92/100, as interpreted by the Court, according to which only a limited number of categories of establishments potentially required to pay remuneration pursuant to Article 5(1) are capable of being exempt from that payment (Case C-36/05 *Commission* v *Spain*, paragraph 32).

43 Consequently, having regard to the foregoing, the answer to the question referred is that Article 5(1) of Directive 92/100 precludes legislation, such as that at issue in the main proceedings, which establishes a system under which the remuneration payable to authors in the event of public lending is calculated exclusively according to the number of borrowers registered with public establishments, on the basis of a flat-rate amount fixed per borrower and per year.

Costs

44 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 5(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 precludes legislation, such as that at issue in the main proceedings, which establishes a system under which the remuneration payable to authors in the event of public lending is calculated exclusively according to the number of borrowers registered with public establishments, on the basis of a flat-rate amount fixed per borrower and per year.

[Signatures]

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* Language of the case: Dutch.