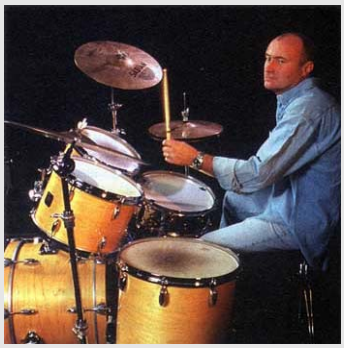
European Court of Justice, 20 October 1993, Phil Collins



COPYRIGHT – NEIGHBOURING RIGHTS

Principle of non-discrimination

- **Copyright and related rights fall within the scope of application of the principle of non-discrimination**

Copyright and related rights, which by reason in particular of their effects on intra-Community trade in goods and services, fall within the scope of application of the Treaty, are necessarily subject to the general principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty, without there even being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty.

- **The principle of non-discrimination precludes a Member State from making the grant of an exclusive right subject to the requirement that the person concerned be a national of that State**

The first paragraph of Article 7 of the Treaty must be interpreted as precluding legislation of a Member State from denying, in certain circumstances, to authors and performers from other Member States, and those claiming under them, the right, accorded by that legislation the nationals of that State, to prohibit the marketing, in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory.
In prohibiting "any discrimination on the grounds of nationality", Article 7 of the Treaty requires, on the contrary, that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State concerned. In so far as that principle is applicable, it therefore precludes a Member State from making the grant of an exclusive right subject to the requirement that the person concerned be a national of that State.

- **Direct effect**

The principle of non-discrimination may be directly relied upon before a national court by an author or performer from another Member State, or by those claiming under them, in order to claim the benefit of protection reserved to national authors and performers.

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European Court of Justice, 20 October 1993
(O. Due, F. Mancini, J.C. Moitinho de Almeida and D.A.O. Edward, R. Joliet, F.A. Schockweiler, F. Grévisse, M. Zuleeg and J.L. Murray)
In Joined Cases C-92/92 and C-326/92,
REFERENCE to the Court under Article 177 of the EEC Treaty by the Landgericht Munchen I and by the Bundesgerichtshof for a preliminary ruling in the proceedings pending before those courts between
Phil Collins
and
Imtrat Handelsgesellschaft mbH,
and between
Patricia Im- und Export Verwaltungsgesellschaft mbH
Leif Emanuel Kraul
and
EMI Electrola GmbH,
on the interpretation of the first paragraph of Article 7 of the EEC Treaty,
THE COURT,
composed of: O. Due, President, F. Mancini, J.C. Moitinho de Almeida and D.A.O. Edward (Presidents of Chambers), R. Joliet, F.A. Schockweiler, F. Grévisse, M. Zuleeg and J.L. Murray, Judges,
Advocate General: F.G. Jacobs,
Registrar: L. Hewlett,
after considering the written observations submitted
in Case C-92/92 on behalf of:
° Phil Collins, by Ulrike Hundt-Neumann, Rechtsanwalt, Hamburg,
° Imtrat, by Sabine Rojahn, Rechtsanwalt, Munich,
° the German Government, by Claus-Dieter Quassowski, Regierungsdirektor at the Federal Ministry of the Economy, assisted by Alfred Dittrich, Regierungsdirektor at the Federal Ministry of Justice, acting as Agents,
° the United Kingdom, by John E. Collins, of the Treasury Solicitor' s Department, and by Nicholas Paines, Barrister, acting as Agents,
° the Commission of the European Communities, by Henri Étienne, Principal Legal Adviser and Pieter van Nuffel, of its Legal Service, acting as Agents,
in Case C-326/92 on behalf of:
° EMI Electrola, by Hartwig Ahlberg, Rechtsanwalt, Hamburg,
° Patricia GmbH and Mr Kraul, by Rudolf Nirk, Rechtsanwalt before the Bundesgerichtshof,
° the German Government, by Claus-Dieter Quassowski, Regierungsdirektor at the Federal Ministry of the Economy and Alfred Dittrich, Regierungsdirektor at the Federal Ministry of Justice, acting as Agents,
° the Commission of the European Communities, by Henri Étienne, Principal Legal Adviser and Pieter van Nuffel, of its Legal Service, acting as Agents,
having regard to the Report for the Hearing,
after hearing the oral observations of Phil Collins, Imtrat, represented by Sabine Rojahn and Kukuk, Rechtsanwaelte, Munich, Patricia GmbH and Mr Kraul, represented by Daniel Marquard, Rechtsanwalt,

Hamburg, and of EMI Electrola and the Commission at the hearing on 19 May 1993,
after hearing the **Opinion of the Advocate General** at the sitting on 30 June 1993,
gives the following

Judgment

Grounds

1 By order of 4 March 1992, received at the Court on the following 23 March and registered under number C-92/92, the Landgericht Munchen I (Regional Court Munich I) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the first paragraph of Article 7 of the EEC Treaty.

2 By order of 30 April 1992, received at the Court on the following 30 July and registered under number C-326/92, the Bundesgerichtshof (Federal Supreme Court) also referred to the Court for a preliminary ruling under Article 177 of the Treaty two questions on the interpretation of that same provision.

3 The questions which the Landgericht Muenchen I submitted in Case C-92/92 were raised in proceedings between Phil Collins, singer and composer of British nationality, and a phonogram distributer, Imtrat Handelsgesellschaft mbH ("Imtrat"), relating to the marketing, in Germany, of a compact disk containing the recording, made without the singer' s consent, of a concert given in the United States.

4 According to Paragraphs 96(1) and 125(1) of the German Copyright Act of 9 September 1965 (Urheberrechtsgesetz, hereinafter "the UrhG") performing artists who have German nationality enjoy the protection granted by Paragraphs 73 to 84 of the UrhG in respect of all their performances. In particular, they may prohibit the distribution of those performances which are reproduced without their permission, irrespective of the place of performance. In contrast, the effect of the provisions of Paragraph 125(2) to (6) of the UrhG, relating to foreign performers, as interpreted by the Bundesgerichtshof and the Bundesverfassungsgericht (Federal Constitutional Court), is that those performers cannot avail themselves of the provisions of Paragraph 96(1), where the performance was given outside Germany.

5 Phil Collins applied to the Landgericht Muenchen I for an interim injunction prohibiting the marketing of the compact disk in question. The national court considered that the provisions of Paragraph 125 of the UrhG were applicable to the proceedings, to the exclusion, in particular, of the terms of the international Rome Convention of 26 October 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Treaties Series, volume 496, No 7247), to which the United States, where the performance had taken place, had not acceded. It questioned, however, the conformity of those national provisions with the principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty.

6 In those circumstances, the Landgericht Muenchen I stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

"1. Is copyright law subject to the prohibition of discrimination laid down in the first Paragraph of Article 7 of the EEC Treaty?

2. If so: does that have the (directly applicable) effect that a Member State which accords protection to its nationals for all their artistic performances, irrespective of the place of performance, also has to accord that protection to nationals of other Member States, or is it compatible with the first paragraph of Article 7 to attach further conditions (i.e. Paragraph 125(2) to (6) of the German Urheberrechtsgesetz of 9 September 1965) to the grant of protection to nationals of other Member States?"

7 In **Case C-326/92 the questions were submitted by the Bundesgerichtshof in proceedings between EMI Electrola GmbH ("EMI Electrola") and Patricia Im- und Export Verwaltungsgesellschaft mbH** ("Patricia") and its managing director, Mr Kraul, relating to the marketing, in Germany, of phonograms containing recordings of shows given in Great Britain by Cliff Richard, a singer of British nationality, in 1958 and 1959.

8 EMI Electrola is the holder, in Germany, of exclusive rights to exploit the recordings of those shows. It maintains that Patricia infringed its exclusive rights by marketing phonograms reproducing those recordings without its consent.

9 The Bundesgerichtshof, before which the matter had come by way of an appeal on a point of law, considered that the proceedings fell within the provisions of Paragraph 125(2) to (6) of the UrhG, to the exclusion, in particular, of the terms of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as last revised by the Paris Act of 24 July 1971 (WIPO, vol. 287), which concerns copyright in the strict sense, and not related performers' rights, and of the terms of the Rome Convention, which in its view could not be applied retroactively to performances given in 1958 and 1959.

10 In the grounds for its order for reference the Bundesgerichtshof, which was aware of the questions referred to the Court by the Landgericht Muenchen I, states that, in the absence of Community legislation and, save on certain points, of harmonization of national laws, it did not appear to it that copyright and related rights fell within the scope of application of Community law, and more particularly of Article 7 of the Treaty.

11 In those circumstances, the Bundesgerichtshof stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

"1. Is the national copyright law of a Member State subject to the prohibition of discrimination laid down in the first paragraph of Article 7 of the EEC Treaty?

2. If so, are the provisions operating in a Member State for the protection of artistic performances (Paragraph 125(2) to (6) of the Urheberrechtsgesetz) compatible with the first paragraph of Article 7 of the EEC Treaty

if they do not confer on nationals of another Member State the same standard of protection (national treatment) as they do on national performers?"

12 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The subject-matter of the references for a preliminary ruling

13 In proceedings under Article 177 of the Treaty the Court may rule neither on the interpretation of national laws or regulations nor on the conformity of such measures with Community law. Consequently, it may neither interpret the provisions of the UrhG nor may it assess their conformity with Community law. The Court may only provide the national court with criteria for interpretation based on Community law which will enable that court to solve the legal problem with which it is faced (judgment in Joined Cases 91 and 127/83 Heineken Brouwerijen v Inspecteurs der Vennootschapsbelasting, Amsterdam and Utrechts [1984] ECR 3435, paragraph 10).

14 The orders for reference mention the national rules applicable to copyright, and also Paragraph 125 of the UrhG which governs the rights of performers, known as "rights related to copyright". It is not for the Court to determine within which of those two categories of rights the disputes in the main proceedings fall. As the Commission has proposed, the questions referred to the Court should be regarded as relating to the rules which apply to both of those categories of rights.

15 Those questions concern the first paragraph of Article 7 of the Treaty which lays down the general principle of non-discrimination on the grounds of nationality. As is expressly provided in that paragraph, the prohibition of discrimination contained in it applies only within the scope of application of the Treaty.

16 The questions referred to the Court must accordingly be regarded as seeking, essentially, to ascertain:

° whether copyright and related rights fall within the scope of application of the Treaty within the meaning of the first paragraph of Article 7, and consequently, if the general principle of non-discrimination laid down by that article applies to those rights;

° if so, whether the first paragraph of Article 7 of the Treaty precludes the legislation of a Member State from denying to authors or performers from other Member States, and those claiming under them, the right, accorded by that legislation to the nationals of that State, to prohibit the marketing, in its national territory, of a phonogram manufactured without their consent, where the performance was given outside its national territory;

° whether the first paragraph of Article 7 of the Treaty may be directly relied upon before a national court by an author or performer from another Member State, or by those claiming under them, in order to claim the benefit of the protection reserved to nationals.

The application of the provisions of the Treaty to copyright and related rights

17 The Commission, the German Government, the United Kingdom, Phil Collins and EMI Electrola maintain that copyright and related rights, inasmuch as they constitute, in particular, economic rights which determine the conditions in which an artist' s works and performances may be exploited in return for payment, fall within the scope of application of the Treaty; this, they maintain, is apparent, moreover, from the judgments of the Court in which Articles 30, 36, 59, 85 and 86 of the Treaty were applied to those rights, and also from the intense legislative activity of which those rights are the subject within the Communities. On the rare occasions where a specific provision of the Treaty does not apply, the general principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty, must, in any event, do so.

18 Imtrat maintains, to the contrary, that the conditions for the grant of copyright and related rights, which concern the existence, and not the exercise, of those rights, do not, according to Article 222 of the Treaty and well-established case law of the Court, fall within the scope of application of the Treaty. Taking up the findings of the Bundesgerichtshof on that point, Patricia and Mr Kraul submit in particular that at the material time in the main proceedings copyright and related rights were not, in the absence of Community rules or harmonization measures, governed by Community law.

19 As Community law now stands, and in the absence of Community provisions harmonizing national laws, it is for the Member States to establish the conditions and detailed rules for the protection of literary and artistic property, subject to observance of the applicable international conventions (see **the judgment in Case 341/87 EMI Electrola v Patricia Im- und Export and Others [1989] ECR 79, paragraph 11**).

20 The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. Copyright and related rights are also economic in nature, in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties (see **the judgment in Joined Cases 55/80 and 57/80 Musik-Vertrieb membran v GEMA [1981] ECR 147, paragraph 12**).

21 As the Court pointed out in the last-mentioned judgment (paragraph 13), whilst the commercial exploitation of copyright is a source of remuneration for the owner, it also constitutes a form of control of marketing, exercisable by the owner, the copyright management societies and the grantees of licences. From this point of view, the commercial exploitation of copyright raises the same problems as does the

commercial exploitation of any other industrial and commercial property right.
22 Like the other industrial and commercial property rights, the exclusive rights conferred by literary and artistic property are by their nature such as to affect trade in goods and services and also competitive relationships within the Community. For that reason, and as the Court has consistently held, those rights, although governed by national legislation, are subject to the requirements of the Treaty and therefore fall within its scope of application.
23 Thus they are subject, for example, to the provisions of Articles 30 and 36 of the Treaty relating to the free movement of goods. According to the case-law of the Court, musical works are incorporated into phonograms which constitute goods the trade in which, within the Community, is governed by the above provisions (see, to that effect, the judgment in Musik-Vertrieb membran, cited above, paragraph 8).
24 Furthermore, the activities of copyright management societies are subject to the provisions of Articles 59 and 66 of the Treaty relating to the freedom to provide services. As the Court stated in its judgment in Case 7/82 GVL v Commission [1983] ECR 483, paragraph 39, those activities should not be conducted in such a way as to impede the free movement of services, and particularly the exploitation of performers' rights, to the extent of partitioning the common market.
25 Finally, the exclusive rights conferred by literary and artistic property are subject to the provisions of the Treaty relating to competition (see **judgment in Case 78/70 Deutsche Grammophon v Metro [1971] ECR 487**).
26 It is, moreover, precisely in order to avoid the risk of hindrances to trade and the distortion of competition that the Council has, since the disputes in the main proceedings arose, adopted 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, on the basis of Article 57(2) and Articles 66 and 100a of the Treaty (OJ 1992 L 346, p. 61).
27 It follows that copyright and related rights, which by reason in particular of their effects on intra-Community trade in goods and services, fall within the scope of application of the Treaty, are necessarily subject to the general principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty, without there even being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty.
28 Accordingly, it should be stated in reply to the question put to the Court that copyright and related rights fall within the scope of application of the Treaty within the meaning of the first paragraph of Article 7; the general principle of non-discrimination laid down by that article therefore applies to those rights.
Discrimination within the meaning of the first paragraph of Article 7 of the Treaty
29 Imtrat and Patricia maintain that the differentiation which is made between German nationals and nationals of the other Member States in the cases referred to it by the national courts is objectively justified by the disparities which exist between national laws and by the fact that not all Member States have yet acceded to the Rome Convention. That differentiation is not, in those circumstances, contrary to the first paragraph of Article 7 of the Treaty.
30 It is undisputed that Article 7 is not concerned with any disparities in treatment or the distortions which may result, for the persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various Member States, so long as those laws affect all persons subject to them, in accordance with objective criteria and without regard to their nationality (judgment in Case 14/68 Wilhelm v Bundeskartellamt [1969] ECR 1, paragraph 13).
31 Thus, contrary to what Imtrat and Patricia maintain, neither the disparities between the national laws relating to the protection of copyright and related rights nor the fact that not all Member States have yet acceded to the Rome Convention can justify a breach of the principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty.
32 In prohibiting "any discrimination on the grounds of nationality", Article 7 of the Treaty requires, on the contrary, that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State concerned (judgment in Case 186/87 Cowan v Trésor Public [1989] ECR 195, paragraph 10). In so far as that principle is applicable, it therefore precludes a Member State from making the grant of an exclusive right subject to the requirement that the person concerned be a national of that State.
33 Accordingly, it should be stated in reply to the question put to the Court that the first paragraph of Article 7 of the Treaty must be interpreted as precluding legislation of a Member State from denying, in certain circumstances, to authors and performers from other Member States, and those claiming under them, the right, accorded by that legislation the nationals of that State, to prohibit the marketing, in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory.
The effects of the first paragraph of Article 7 of the Treaty
34 The Court has consistently held that the right to equal treatment laid down by the first paragraph of Article 7 of the Treaty, is conferred directly by Community law (judgment in Cowan, cited above, paragraph 11). That right may, therefore, be relied upon before a national court as the basis for a request that it disapply the discriminatory provisions of a national law which denies to nationals of other Member States the protection which they accord to nationals of the State concerned.
35 Accordingly, it should be stated in reply to the question put to the Court that the first paragraph of Article 7 of the Treaty should be interpreted as

meaning that the principle of non-discrimination which it lays down may be directly relied upon before a national court by an author or performer from another Member State, or by those claiming under them, in order to claim the benefit of protection reserved to national authors and performers.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landgericht Munchen I, by order of 4 March 1992 and by the Bundesgerichtshof by order of 30 April 1992, hereby rules:

1. Copyright and related rights fall within the scope of application of the Treaty, within the meaning of the first paragraph of Article 7; the general principle of non-discrimination laid down by that article is, therefore, applicable to them.

2. The first paragraph of Article 7 of the Treaty must be interpreted as precluding the legislation of a Member State from denying to authors and performers from other Member States, and those claiming under them, the right, accorded by that legislation to the nationals of that State, to prohibit the marketing in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory.

3. The first paragraph of Article 7 of the Treaty must be interpreted as meaning that the principle of non-discrimination which it lays down may be directly relied upon before a national court by an author or performer from another Member State, or by those claiming under them, in order to claim the benefits of protection reserved to national authors and performers.

Opinion of the Advocate-General

My Lords,

1. Two German courts have requested preliminary rulings on the questions whether copyright and related rights fall within the ambit of the EEC Treaty and whether a Member State which allows its own nationals to oppose the unauthorized reproduction of their musical performances must grant identical protection to nationals of other Member States, in accordance with the prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty.

Case C-92/92

2. The plaintiff in Case C-92/92 is Phil Collins, a singer and composer of British nationality. The defendant - Imtrat Handelsgesellschaft mbH ("Imtrat") - is a producer of phonograms. (1) In 1983 Mr Collins gave a concert in California which was recorded without his consent. Reproductions of the recording were sold in Germany by Imtrat on compact disc under the title "Live and Alive". Mr Collins applied to the Landgericht Muenchen I for an injunction restraining Imtrat from marketing such recordings in Germany and requiring it to deliver copies in its possession to a court bailiff.

3. It appears that if Mr Collins were a German national his application would undoubtedly have succeeded. Paragraph 75 of the Gesetz ueber Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights, hereafter "Urheberrechtsgesetz", BGBl. 1965 I, p. 1273) provides that a performing artist' s performance may not be recorded without his consent and recordings may not be reproduced without his consent. Paragraph 125(1) of the Urheberrechtsgesetz provides that German nationals enjoy the protection of Paragraph 75, amongst other provisions, for all their performances regardless of the place of performance. However, foreign nationals have less extensive rights under the Urheberrechtsgesetz. Under Paragraph 125(2) they enjoy protection in respect of performances which take place in Germany, and under Paragraph 125(5) they enjoy protection in accordance with international treaties. The Landgericht Muenchen I refers to the Rome Convention of 26 October 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, but deduces from its terms that Germany is required to grant foreign performing artists the same treatment as its own nationals only in respect of performances that take place within the territory of a Contracting State; since the United States has not acceded to the Rome Convention, Paragraph 125(5) of the Urheberrechtsgesetz is of no avail to Mr Collins in the circumstances of the present case. However, Mr Collins argued that he was entitled to the same treatment as a German national by virtue of Article 7 of the EEC Treaty. The Landgericht Muenchen I therefore decided to refer the following questions to the Court:

"1. Is copyright law subject to the prohibition of discrimination laid down in the first paragraph of Article 7 of the EEC Treaty?

2. If so: does that have the (directly applicable) effect that a Member State which accords protection to its nationals for all their artistic performances, irrespective of the place of performance, also has to accord that protection to nationals of other Member States, or is it compatible with the first paragraph of Article 7 to attach further conditions (i.e. Paragraph 125(2) to (6) of the German Urheberrechtsgesetz of 9 September 1965) to the grant of protection to nationals of other Member States?"

Case C-326/92

4. The plaintiff and respondent in Case C-326/92 - EMI Electrola GmbH ("EMI Electrola") - produces and distributes phonograms. It owns the exclusive right to exploit in Germany recordings of certain works performed by Cliff Richard, a singer of British nationality. The defendants and appellants are Patricia Im- und Export Verwaltungsgesellschaft mbH ("Patricia"), a company which distributes phonograms,

and Mr L.E. Kraul, its managing director. EMI Electrola applied for an injunction restraining Patricia and Mr Kraul (together with other persons) from infringing its exclusive rights in recordings of certain performances by Cliff Richard. The recordings were first published in the United Kingdom in 1958 and 1959, apparently by a British phonogram producer to which Cliff Richard had assigned his performer' s rights in the recordings. That company subsequently assigned the rights to EMI Electrola.

5. The Landgericht granted EMI Electrola' s application and that decision was confirmed on appeal. Patricia and Mr Kraul appealed on a point of law to the Bundesgerichtshof, which considers that, under German law, EMI Electrola would be entitled to an injunction if Cliff Richard were of German nationality but is not so entitled because he is British. It is not entirely clear from the order for reference how or why the Bundesgerichtshof arrived at the view that German law provides for such a difference of treatment. The reason appears to be that the performances in question took place before 21 October 1966, on which date the Rome Convention came into force in Germany, and that Germany is only required to grant "national treatment" to foreign performers, under the Rome Convention, in respect of performances that take place after that date. (2)

6. It is in any event common ground that a difference in treatment, depending on the nationality of the performer, exists in German law. The Bundesgerichtshof therefore referred the following questions to the Court:

"Is the national copyright law of a Member State subject to the prohibition of discrimination laid down in the first paragraph of Article 7 of the EEC Treaty?

If so, are the provisions operating in a Member State for the protection of artistic performances (Paragraph 125(2) to (6) of the Urheberrechtsgesetz) compatible with the first paragraph of Article 7 of the EEC Treaty if they do not confer on nationals of another Member State the same standard of protection (national treatment) as they do on national performers?"

The issues raised by the two cases

7. Both cases raise essentially the same issues: (a) whether it is compatible with Community law, in particular Article 7 of the EEC Treaty, for a Member State to grant more extensive protection in respect of performances by its own nationals than in respect of performances by nationals of other Member States and (b) if such a difference in treatment is not compatible with Community law, whether the relevant provisions of Community law produce direct effect, in the sense that a performer who has the nationality of another Member State is entitled to claim, in proceedings against a person who markets unauthorized recordings of his performances, the same rights as a national of the Member State in question.

8. I note in passing that, although both the national courts refer to copyright, the cases are in fact concerned not with copyright in the strict sense but with certain related rights known as performers' rights.

The prohibition of discrimination on grounds of nationality

9. The prohibition of discrimination on grounds of nationality is the single most important principle of Community law. It is the leitmotiv of the EEC Treaty. It is laid down in general terms in Article 7 of the Treaty, the first paragraph of which provides:

"Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

That general prohibition of discrimination is elaborated upon in other, more specific provisions of the Treaty. Thus Article 36 permits certain restrictions on the free movement of goods, provided that they do not constitute "arbitrary discrimination" or a disguised restriction on trade. Article 48(2) requires the "abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work". Under Article 52, second paragraph, nationals of one Member State may work in a self-employed capacity in another Member State "under the conditions laid down for its own nationals". Under Article 60, third paragraph, a person providing a service may temporarily pursue his activity in the State where the service is provided "under the same conditions as are imposed by that State on its own nationals".

10. It is not difficult to see why the authors of the Treaty attached so much importance to the prohibition of discrimination. The fundamental purpose of the Treaty is to achieve an integrated economy in which the factors of production, as well as the fruits of production, may move freely and without distortion, thus bringing about a more efficient allocation of resources and a more perfect division of labour. The greatest obstacle to the realization of that objective was the host of discriminatory rules and practices whereby the national governments traditionally protected their own producers and workers from foreign competition. Although the abolition of discriminatory rules and practices may not be sufficient in itself to achieve the high level of economic integration envisaged by the Treaty, it is clearly an essential prerequisite.

11. The prohibition of discrimination on grounds of nationality is also of great symbolic importance, inasmuch as it demonstrates that the Community is not just a commercial arrangement between the governments of the Member States but is a common enterprise in which all the citizens of Europe are able to participate as individuals. The nationals of each Member State are entitled to live, work and do business in other Member States on the same terms as the local population. They must not simply be tolerated as aliens, but welcomed by the authorities of the host State as Community nationals who are entitled, "within the scope of application of the Treaty", to all the privileges and advantages enjoyed by the nationals of the host State. No other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared destiny without

which the "ever closer union among the peoples of Europe", proclaimed by the preamble to the Treaty, would be an empty slogan.
12. Much has been written about the relationship between Article 7 and the other provisions of the Treaty which lay down more specific prohibitions of discrimination on grounds of nationality (e.g. Articles 48(2), 52, second paragraph, and 60, third paragraph). There is also a substantial body of case-law on that relationship. The generally accepted position seems to be that recourse is to be had to Article 7 only when none of the more specific provisions prohibiting discrimination is applicable. (3) Thus one of the main functions of Article 7 is to close any gaps left by the more specific provisions of the Treaty. (4)
13. It is sometimes said that, where rules are compatible with the specific Treaty articles prohibiting discrimination, they are also compatible with Article 7. (5) It would perhaps be more accurate to say that, if a national provision discriminates in a manner that is positively permitted by one of the more specific Treaty articles, it cannot be contrary to Article 7. Thus, since Article 48(4) of the Treaty allows nationals of other Member States to be excluded from employment in the public service in certain circumstances, such a practice cannot be contrary to Article 7 notwithstanding its manifestly discriminatory nature. It would, however, be wrong to say that a rule discriminating against nationals of other Member States cannot be contrary to Article 7 simply because it is not caught by the specific provisions of Articles 48, 52, 59 and 60 of the Treaty. Otherwise Article 7 would cease to perform its gap-closing function.
14. In the circumstances of the present cases I do not think that it is necessary to explore more fully the relationship between the general prohibition of Article 7 and the more specific prohibitions laid down elsewhere. There cannot be any doubt that Article 7, either alone or in conjunction with other provisions of the Treaty, has the effect that nationals of a Member State are entitled to pursue any legitimate form of economic activity in another Member State on the same terms as the latter State' s own nationals.
15. That simple observation is probably sufficient in itself to resolve the fundamental issues raised by the present cases. In so far as intellectual property rights assist the proprietor thereof to pursue the economic freedoms granted by the Treaty, in particular by Articles 30, 52 and 59, a Member State must accord the nationals of other Member States the same level of protection as it accords its own nationals. If, for example, a Member State granted patents only to its own nationals and refused to grant patents to the nationals of other Member States, it could not seriously be argued that such a practice was compatible with the Treaty.
16. Indeed, such discrimination was specifically identified by the Council in 1961 in the General Programme for the Abolition of Restrictions on Freedom to Provide Services (6) and in the General Programme for the Abolition of Restrictions on Freedom of Establishment. (7) Both those programmes call for the abolition of "provisions and practices which, in respect of foreign nationals only, exclude, limit or impose conditions on the power to exercise rights normally attaching to the provision of services [or to an activity as a self-employed person] and in particular the power ... to acquire, use or dispose of intellectual property and all rights deriving therefrom". (8) It may be noted that the General Programmes provide "useful guidance for the implementation of the relevant provisions of the Treaty". (9)
17. There are many ways in which the proprietor of intellectual property rights may seek to exercise those rights in pursuit of the economic freedoms guaranteed by the Treaty. A performer may for example have phonograms embodying his performance manufactured in his own country and export those goods to another Member State, in which case he is in a situation covered by Article 30. Or he may set up a company or branch in that other Member State and have phonograms manufactured there for sale in that country, in which case he is exercising his right of establishment under Article 52. Or again - and this is no doubt the commonest method of exploiting performers' rights and is the method used in the present cases - he may license another person to manufacture and sell phonograms embodying his performance in the other Member State; in that case he will doubtless receive a royalty for each sale and will be able to obtain further royalties by licensing a copyright management society (or, more accurately, a performers' rights management society) to authorize public performances of his recordings. Such licensing activities will constitute services which are provided across national frontiers and are as such covered by Article 59 of the Treaty.
18. Whichever way a performing artist chooses to exploit his performances for commercial gain in another Member State, he will be in a situation covered by Community law. As such, he will be "within the scope of application of the Treaty" and will be entitled to invoke the prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty. Indeed the Court has gone much further than that. It has held that a tourist who travels to another Member State may, as a recipient of services, benefit from a scheme for compensating the victims of violent crime on the same terms as nationals of that Member State; (10) that a person who goes to another Member State for the purpose of receiving vocational training may not be required to pay a registration fee if no such fee is payable by nationals of that Member State; (11) and that a migrant worker who is prosecuted in a criminal court is entitled to the same treatment, with regard to the use of languages in judicial proceedings, as a national of the host country. (12) It would be extraordinary if those who exercise the fundamental freedoms guaranteed by the Treaty were entitled to equality of treatment in relation to matters that are - while not without importance - peripheral and essentially non-economic in nature, but were to be

denied equality of treatment in the field of intellectual property rights, the economic importance of which is considerable.

19. Certainly there can be no doubt about the economic importance of the performing artist' s exclusive right to authorize the reproduction and distribution of recordings embodying his performance. The exercise of that right is essential to the commercial exploitation of a performance. The sale of unauthorized recordings damages the performing artist in two ways: first, because he earns no royalties on such recordings, the sale of which must inevitably reduce the demand for his authorized recordings, since the spending power of even the most avid record collector is finite; secondly, because he loses the power to control the quality of the recordings, which may, if technically inferior, adversely affect his reputation. The latter point was argued forcefully, but to no avail, by the "world-famous Austrian conductor" who was unable to prevent the sale of unauthorized recordings in the "Zauberfloete" case referred to above (in paragraph 5).

20. Performers' rights also play a role in the field of consumer protection: the consumer doubtless assumes that recordings made by well-known, living performers are not released without the performer' s authorization and that such persons would not jeopardize their reputation by authorizing the distribution of low-quality recordings; that limited guarantee of quality is lost entirely if recordings may be distributed without the performer' s consent. It may thus be seen that performers' rights operate in much the same way as trade marks, the economic significance of which was recognized by the Court in the Hag II case. (13)

21. The defendants in both the present cases advance a number of arguments purporting to show that the contested German legislation is not contrary to the prohibition of discrimination on grounds of nationality. I shall briefly summarize the main arguments and state why, in my view, none of them is convincing.

22. Both defendants contend that the discrimination lies outside the scope of application of the Treaty. Imtrat reaches that conclusion on the grounds that the performance in question took place outside the territory of a Member State and that the existence of intellectual property rights is a matter for national law by virtue of Article 222 of the Treaty. That cannot be correct. The place where the original performance took place is irrelevant; what matters is that Phil Collins and his licensees are denied protection, in an overtly discriminatory manner, when they attempt to exploit - or prevent others from exploiting - the performance in a Member State. (14) The argument based on Article 222 of the Treaty is equally untenable. That article, which, it will be recalled, provides that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership, clearly does not authorize Member States to grant intellectual property rights on a discriminatory basis. It might just as well be argued that a Member State could prohibit the nationals of other Member States from buying land for business use.

23. It is contended on behalf of Patricia and Mr Kraul that the absence of Community legislation harmonizing the laws of Member States on copyright and related rights removes such matters from the scope of the Treaty entirely. That argument is of course doomed to failure. The application of the principle of non-discrimination is not dependent on the harmonization of national law; on the contrary, it is precisely in areas where harmonization has not been achieved that the principle of national treatment assumes special importance.

24. It is true that the Court has several times held that in the absence of harmonization it is for national law to determine the conditions governing the grant of intellectual property rights; see, for example, Thetford v Fiamma. (15) But that does not mean that Member States are free to lay down discriminatory conditions for the grant of such rights. That much is clear from the Thetford judgment itself (at paragraph 17), in which the Court attached importance to the non-discriminatory nature of a provision of United Kingdom law relating to the grant of patents, there being "no discrimination based on the nationality of applicants for patents"; the Court clearly implied that a patent granted on the basis of a discriminatory provision could not be relied on to justify a restriction on trade between Member States under Article 36 of the Treaty. Moreover, the Council has also recognized, in the General Programmes referred to above (in paragraph 16), that the grant and exercise of intellectual property rights are matters falling within the scope of the Treaty and are therefore subject to the prohibition of discrimination.

25. Also relevant in this context is the Court' s judgment in GVL v Commission, (16) in which the Court held that a performers' rights management society abused its dominant position, in breach of Article 86 of the Treaty, by refusing to manage the rights of foreign performers not resident in Germany. The decision (17) in issue in that case was based partly on Article 7 of the Treaty. As the Commission has pointed out, it would be very strange if undertakings were prohibited from discriminating on grounds of nationality, in the field of intellectual property, but Member States were allowed to maintain in force discriminatory legislation. The United Kingdom also cites GVL v Commission and submits, rightly in my view, that that judgment clearly shows that the management and enforcement of performers' rights are matters falling within the scope of the Treaty.

26. It is in any event not true to say that the Community legislature has been completely inactive in the field of copyright and related rights. Several measures have been adopted; notably, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (18) and 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. (19) It is interesting to note that the 18th recital in the preamble to the latter Directive states that measures based on Article 5 of the Directive, which permits derogations from the exclusive lending

right created by Article 1 of the Directive, must comply with Article 7 of the Treaty. Mention may also be made of the Council Resolution of 14 May 1992 on increased protection for copyright and neighbouring rights. (20) Article 1 of that Resolution notes that the Member States undertake to become parties to the Berne Convention for the Protection of Literary and Artistic Works of 24 July 1971 (Paris Act) and to the 1961 Rome Convention. In the circumstances, the view that copyright and related rights lie outside the scope of the Treaty is clearly untenable.

27. The only argument advanced by either of the defendants that has some plausibility is the one based on the Rome Convention, on which great reliance is placed by Imtrat. According to that argument, all questions concerning the level of protection to be granted to foreign performers are to be resolved in the context of the Rome Convention, which has established a delicate balance based on considerations of reciprocity. The connecting factor, under the Rome Convention, is not nationality - which would be unworkable because many performances are given by groups of performers who may have different nationalities - but place of performance. Imtrat points out further that both Germany and the United Kingdom were bound by the Rome Convention before they became mutually bound by the EEC Treaty (presumably on 1 January 1973, when the United Kingdom acceded to the Communities) and argues that the Rome Convention should therefore take precedence over the EEC Treaty by virtue of Article 234 of the latter. Imtrat suggests that dire consequences would ensue if Article 7 of the Treaty were applied in the field of copyright and related rights: authors from other Member States would, for example, be able to claim in Germany the long term of protection (70 years after the author' s death) provided for in German law, whereas under Article 7(8) of the Berne Convention Germany is not required to grant them a longer term of protection than the term fixed in the country of origin of the work.

28. In response to those arguments the following points may be made. First, even if the Rome Convention had been concluded before the EEC Treaty, Article 234 of the latter would not give precedence to the Convention as regards relations between Member States. Article 234 is concerned solely with relations between Member States and non-member States. (21)

29. Secondly, there is in any event no conflict between Community law and the Rome Convention. That Convention merely lays down a minimum standard of protection and does not prevent the Contracting States from granting more extensive protection to their own nationals or to nationals of other States. That much is clear from Articles 21 and 22 of the Convention. Article 21 provides:

"The protection provided for in this Convention shall not prejudice any protection otherwise secured to performers, producers of phonograms and broadcasting organisations."

Article 22 provides:

"Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention."

The Rome Convention does not prevent Germany from granting performers more extensive protection than the minimum provided for in the Convention. However, Article 7 of the Treaty requires that, if more extensive protection is granted to German performers, the same level of protection should be available to nationals of other Member States.

30. Thirdly, if nationality is unworkable as a connecting factor on account of the problem of multinational ensembles, it may well be asked why German law uses nationality as a connecting factor at all, as of course it clearly does since it grants differing levels of protection depending on whether the performer is German or of some other nationality. Moreover, even if only one member of an ensemble has German nationality, it seems that the performance is protected. (22) That constitutes a very simple criterion for resolving the difficulties supposedly caused by multinational ensembles; it would be equally workable where one member of an ensemble had the nationality of another Member State.

31. Fourthly, as regards the consequences of applying the principle of non-discrimination to copyright law in general and to the question of the term of protection, it may well be the case that Article 7 of the Treaty requires each Member State to grant all Community nationals the same term of protection as its own nationals, even though the latter receive a shorter term of protection in other Member States. Clearly, the prohibition of discrimination will often have the effect, in the absence of complete harmonization, that nationals of Member State A will be better protected in Member State B than vice versa. But the issue does not fall to be decided in these cases and it is clear that no serious consequence would ensue (except for the manufacturers of unauthorized recordings) if the protection granted to German performers, in respect of performances given in the territory of a State that is not a party to the Rome Convention or in respect of performances given before that Convention' s entry into force, were extended to performers who are nationals of other Member States.

The direct effect of Article 7, first paragraph

32. I turn now to the issue of direct effect. In my view, it is clear from the considerations set out above that the Treaty provisions which prohibit discrimination must be capable of being invoked by performers in the circumstances of the present cases. There is of course no doubt that the prohibition of discrimination laid down in Articles 52, second paragraph, and 60, third paragraph, produces direct effect: see as regards the former Reyners v Belgium (23) and as regards the latter Van Binsbergen v Bedrijfsvereniging Metaalnijverheid. (24) Those cases show that the adoption of legislative

measures was superfluous, as far as concerns the prohibition of discrimination on grounds of nationality, in view of the direct effect of the Treaty provisions. (25)

33. The Court' s case-law also suggests that the first paragraph of Article 7 has direct effect in so far as it prohibits discrimination within the scope of application of the Treaty. In Kenny v Insurance Officer (26) the Court described that provision as being "directly applicable" (meaning, presumably, that it has direct effect), while in Blaizot v University of Liège (27) the Court referred expressly to the direct effect of Article 7. More importantly, it is clear from a number of judgments, including Cowan, (28) Barra v Belgium (29) and Raulin, (30) that national courts are under a duty to disapply national provisions that are contrary to Article 7. It is equally clear that that duty arises not only in proceedings against the State but also in litigation between individuals. (31)

A factual difference between Case C-92/92 and Case C-326/92

34. A final issue that remains to be explored is whether any significance attaches to an obvious factual difference between Case C-92/92 and Case C-326/92: in the former case the performer, Phil Collins, has remained the proprietor of the performer' s rights and has granted an exclusive licence to a producer of phonograms to exploit those rights in Germany; in the latter case the performer, Cliff Richard, has assigned his rights to a British company, which has reassigned them to a German company. I am satisfied that that difference is not relevant to the issue of discrimination. Although in Case C-326/92 the direct victim of the discriminatory German legislation is a German company, the indirect victim will, on the assumption that royalties are paid to the performer by EMI Electrola, be Cliff Richard himself. Even in the case of an outright assignment without any provision for the payment of royalties, it would be wrong in principle to discriminate on the basis of the nationality of the performer and original right-holder. If such discrimination were permitted, it would mean that the exclusive right granted to a German performer would be an assignable asset, potentially of considerable value, while a British performer' s exclusive right would have virtually no assignable value, since it would be extinguished on assignment. Thus the indirect victim of the discrimination would always be the performer himself. It would in any case be illogical, in the circumstances of the present cases, to distinguish between a performer' s right which has been the subject of an exclusive licence and a performer' s right which has been the subject of an assignment.

Conclusion

35. I am therefore of the opinion that the questions referred to the Court by the Landgericht Muenchen I in Case C-92/92 and the Bundesgerichtshof in Case C-326/92 should be answered as follows:

By virtue of the first paragraph of Article 7 of the Treaty, the courts of a Member State must allow performing artists who are nationals of other Member States to oppose the unauthorized reproduction of their performances on the same terms as the nationals of the first Member State.

(*) Original language: English.

(1) - Phonogram is a generic term covering vinyl records, compact discs and audio cassettes. It is defined by Article 3(b) of the Rome Convention of 26 October 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations as meaning any exclusively aural fixation of sounds of a performance or of other sounds .

(2) - See the judgment of the Bundesgerichtshof of 20 November 1986 (Die Zauberfloete), GRUR 1987, p. 814.

(3) - See for example Grabitz, in Kommentar zum EWG-Vertrag, by E. Grabitz (ed.), paragraph 20 on Article 7; see also Case 305/87 Commission v Greece [1989] ECR 1461, at paragraph 13.

(4) - See B. Sundberg-Weitman, Discrimination on Grounds of Nationality, 1977, p. 14.

(5) - See, for example, Case C-41/90 Hoefner and Elser v Macrotron [1991] ECR I-1979, at paragraph 36.

(6) - OJ, English Special Edition, Second Series IX, p. 3.

(7) - OJ, English Special Edition, Second Series IX, p. 7.

(8) - Title III.A, third paragraph, indent (e).

(9) - Case 71/76 Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris [1977] ECR 765, at paragraph 14.

(10) - Case 186/87 Cowan v Trésor Public [1989] ECR 195.

(11) - Case 293/83 Gravier v City of Liège [1985] ECR 593.

(12) - Case 137/84 Ministère Public v Mutsch [1985] ECR 2681, at paragraph 12 in particular.

(13) - Case C-10/89 CNL-Sucal v HAG GF [1990] ECR I-3711.

(14) - In Case 36/74 Walrave v Union Cycliste Internationale [1974] ECR 1405, at paragraph 28, the Court stated that the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community .

(15) - Case 35/87 [1988] ECR 3585, at paragraph 12.

(16) - Case 7/82 [1983] ECR 483.

(17) - Commission Decision 81/1030/EEC (OJ 1981 L 370, p. 49); see, in particular, paragraph 46 of the decision.

(18) - OJ 1991 L 122, p. 42.

(19) - OJ 1992 L 346, p. 61.

(20) - OJ 1992 C 138, p. 1.

(21) - See, for example, Case 121/85 Conegate v HM Customs and Excise [1986] ECR 1007, at paragraph 24.

(22) - See Moehring-Nicolini, Urheberrechtsgesetz, commentary on Paragraph 125, at pp. 694 and 695.

(23) - Case 2/74 [1974] ECR 631, at paragraphs 24 and 25.
(24) - Case 33/74 [1974] ECR 1299, at paragraph 27.
(25) - See paragraph 30 of Reyners and paragraph 26 of Van Binsbergen.
(26) - Case 1/78 [1978] ECR 1489, at paragraph 12.
(27) - Case 24/86 [1988] ECR 379, at paragraph 35.
(28) - See note 10.
(29) - Case 309/85 [1988] ECR 355, at paragraphs 19 and 20 in particular.
(30) - Case C-357/89 [1992] ECR I-1027, at paragraphs 42 and 43.
(31) - See Case 13/76 Donà v Mantero [1976] ECR 1333, at paragraphs 17 to 19; see also A. Arnull, The General Principles of EEC Law and the Individual, 1990, p. 18.