

**Court of Justice EC, 29 June 1999, Butterfly Music v Cemed**

Mina



**COPYRIGHT LAW**

**Copyright term directive – transitional law**

- [Article 10\(3\) of Council Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights does not preclude a provision of national law which lays down a limited period in which sound-recording media may be distributed by persons who, by reason of the expiry of the rights relating to those media under the previous legislation, had been able to reproduce and market them before that Law entered into force.](#)

Reading these various provisions together, it is apparent that the Directive did provide for the possibility that copyright and related rights which had expired under the applicable legislation before the date of its implementation could be revived, without prejudice to acts of exploitation performed before that date, while leaving it to the Member States to adopt measures to protect acquired rights of third parties. In view of the wording of those provisions, such measures must be regarded as measures which the Member States are obliged to adopt, but whose detail is left to the discretion of the Member States, provided, however, that they do not have the overall effect of preventing the application of the new terms of protection on the date laid down by the Directive.

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**Court of Justice EC, 29 June 1999**

(G.C. Rodríguez Iglesias, P.J.G. Kapteyn, J.-P. Puissechet (Rapporteur), G. Hirsch and P. Jann, G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward and L. Sevón)

**JUDGMENT OF THE COURT**

29 June 1999 (1)

*(Copyright and related rights — Directive 93/98/EEC — Harmonisation of the term of protection)*

In Case C-60/98,

REFERENCE to the Court under Article 234 EC (ex Article 177) by the Tribunale Civile e Penale, Milan, Italy, for a preliminary ruling in the proceedings pending before that court between

Butterfly Music Srl  
and

Carosello Edizioni Musicali e Discografiche Srl (CEMED),

Intervener:

Federazione Industria Musicale Italiana (FIMI),  
on the interpretation of Article 10 of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissechet (Rapporteur), G. Hirsch and P. Jann (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward and L. Sevón, Judges,  
Advocate General: G. Cosmas,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Butterfly Music Srl, by Umberto Buttafava and Pierluigi Maini, of the Milan Bar, and Alfio Rapisardi, of the Piacenza Bar,

— Carosello Edizioni Musicali e Discografiche Srl (CEMED), by Gianpietro Quiriconi and Luigi Carlo Ubertazzi, of the Milan Bar,

— the Federazione Industria Musicale Italiana (FIMI), by Giorgio Mondini, of the Milan Bar,

— the Italian Government, by Professor Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and Oscar Fiumara, Avvocato dello Stato, and

— the Commission of the European Communities, by Karen Banks and Laura Pignataro, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Carosello Edizioni Musicali e Discografiche Srl (CEMED), the Federazione Industria Musicale Italiana (FIMI), the Italian Government and the Commission at the hearing on 9 February 1999,

after hearing the Opinion of the Advocate General at the sitting on 23 March 1999,

gives the following

**Judgment**

1. By order of 12 February 1998, received at the Court on 2 March 1998, the Tribunale Civile e Penale (Civil and Criminal District Court), Milan, referred to the Court for a preliminary ruling under Article 234 EC (ex Article 177) a question on the interpretation of Article 10 of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9; **the Directive**).

2. That question has been raised in proceedings between Butterfly Music Srl ('Butterfly') and Carosello Edizioni Musicali e Discografiche Srl ('CEMED'), supported by the Federazione Industria Musicale Italiana ('FIMI'), concerning the right to reproduce and exploit recordings which, after entering the public domain under the legislation previously in force, have again become protected as a result of the provisions transposing the Directive into national law.

3. The Directive is designed to put an end to the differences between national laws governing the terms of protection of copyright and related rights and to harmonise those laws by laying down identical terms of protection throughout the Community. Thus, under Article 3, the term of protection for rights of performers and of producers of phonograms was set at 50 years.

4. In accordance with Article 10(2) of the Directive, that term is to apply to all works and subject-matter protected in at least one Member State on the date laid down for implementation of the Directive, namely 1 July 1995 at the latest. However, Article 10(3) states that the 'Directive shall be without prejudice to any acts of exploitation performed' before that date and that the 'Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties'.

5. In Italy, the term of protection for phonograph records and analogous media and for performers was set at 30 years by Law No 633 of 22 April 1941 on Copyright (GURI No 166 of 16 July 1941). That Law was amended by a series of Decree-Laws promulgated in 1994 and 1995, which were not converted into Laws, and by Law No 52 of 6 February 1996 (GURI No 34 of 10 February 1996, ordinary supplement No 24; 'Law No 52/96'), itself amended by Law No 650 of 23 December 1996 (GURI No 300 of 23 December 1996), which preserved the effects of the abovementioned Decree-Laws.

6. Under Article 17(1) of Law No 52/96, the term of protection for the rights of the abovementioned persons was extended from 30 to 50 years. Article 17(2) of Law No 52/96, as amended, specifies that that term of protection also applies to works and rights no longer protected under the periods of protection previously in force provided that, under the new periods, they are protected afresh as at 29 June 1995. However, under Article 17(4) of Law No 52/96, as amended, those provisions are to apply without prejudice to instruments and contracts predating 29 June 1995 and to rights lawfully acquired and exercised by third parties thereunder. In particular, the following are not affected:

(a) the distribution and reproduction of works which have entered the public domain under the previous legislation, within the limits of the graphic composition and editorial presentation in which publication has taken place, by the persons who have undertaken the distribution and reproduction of the works before the date of entry into force of this Law. Future updates required by the nature of the works may also be distributed and reproduced without payment;

(b) the distribution, for three months following the date of entry into force of this Law, of phonograph records and analogous media in respect of which rights of use have expired under the previous legislation, by the persons who have reproduced and marketed the said media before the date of entry into force of this Law'.

7. Butterfly, which is engaged in the production and distribution of music media, produced in November 1992, with the agreement of CEMED, a phonogram producer which held the rights over the original recordings, and with authorisation from the Società

Italiana Autori e Editori (Italian Society of Authors and Publishers; 'SIAE'), a compact disc entitled 'Briciole di Baci' ('the CD') containing 16 songs interpreted by the singer Mina, which had been recorded in the period from 1958 to 1962.

8. Those recordings entered the public domain at the end of 1992, but subsequently, in accordance with the Directive, the Decree-Laws referred to in paragraph 5 above and Law No 52/96 increased the term of protection for rights of producers of phonograms and of performers from 30 to 50 years.

9. At the end of 1995 and the beginning of 1996, CEMED, relying on the 'revival' of its rights which resulted from the term of protection laid down by the Directive, sent Butterfly a letter of formal notice calling on it to cease the reproduction and distribution of the CD. Butterfly then brought an action, on 10 May 1996, before the Tribunale Civile e Penale, Milan, for a declaration that it was entitled to reproduce the recordings on the CD.

10. Before the national court, Butterfly contended in particular that the Directive implicitly precluded the renewal of rights which had expired and that, even if the 'revival' of those rights were recognised, Law No 52/96, as amended, did not comply with the obligation to protect acquired rights of third parties expressly laid down in Article 10(3) of the Directive. CEMED, supported by FIMI, a trade association representing Italian record producers, counterclaimed for an order prohibiting Butterfly from making any further use of the works covered by the new period of protection.

11. The Tribunale Civile e Penale considered that it was clear from Article 10(2) of the Directive that the protection of rights could be revived following the extension of the periods which was required in certain Member States by harmonisation of the terms of protection. However, having regard to the obligation to protect acquired rights of third parties, it questioned the lawfulness of Article 17(4) of Law No 52/96, as amended, which provides only a limited possibility for sound-recording media in respect of which rights of exploitation entered the public domain before the date on which the Law entered into force to be distributed by third parties who, before that date, had acquired the right to reproduce and market them. It therefore decided to refer the following question to the Court for a preliminary ruling:

'Is the interpretation of Article 10 of Directive 93/98/EEC of 29 October 1993, particularly where it provides for the adoption of "the necessary provisions to protect in particular acquired rights of third parties", compatible with Article 17(4) of Law No 52 of 6 February 1996, as amended by Law No 650 of 23 December 1996?'

#### **Admissibility**

12. CEMED takes the view that the question referred for a preliminary ruling is inadmissible because it is irrelevant to the circumstances of the main proceedings. It relies, first, on the contract by which Butterfly agreed not to reproduce the recordings at issue after 31 July 1993, second, on the wording of the grounds of the or-

der for reference, which refers to the 'distribution of stocks', when all the copies of the CD pressed by Butterfly were sold before the end of 1995, and, finally, on Butterfly's lack of locus standi, having failed to obtain a copyright licence from the SIAE and authorisation from the singer Mina.

13. As to that, according to settled case-law (see, in particular, [Case C-415/93 Union Royal Belge des Sociétés de Football Association and Others v Bosman and Others \[1995\]](#) ECR I-4921, paragraphs 59, 60 and 61), it is solely for the national court hearing the case, which must assume responsibility for the subsequent judicial decision, to determine, in particular, the need for a preliminary ruling in order to enable it to deliver judgment. The Court of Justice may refuse a request made by such a court only where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main proceedings or their purpose, or where it does not have before it the factual or legal material necessary to give a useful answer to the questions submitted (see, in particular, *Bosman*, paragraph 61). Since that is not the position in the present case, the question referred for a preliminary ruling cannot be declared inadmissible for a reason relating to its lack of relevance to the circumstances of the case.

14. It is accordingly necessary to examine the question submitted.

#### **The question submitted**

15. By its question, the national court asks the Court whether Article 10(3) of the Directive precludes a provision of national law such as the provision which, in Law No 52/96, as amended, lays down a limited period in which sound-recording media may be distributed by persons who, by reason of the expiry of the rights relating to those media under the previous legislation, had been able to reproduce and market them before that Law entered into force.

16. Butterfly suggests that the Court should rule that Law No 52/96, as amended, is inconsistent with Article 10 of the Directive in that it does not confer suitable protection for record producers who have undertaken in good faith the exploitation of works whose protection is revived following the extension of the term of protection of copyright and related rights. It maintains, in particular, that the three-month limit, laid down in Article 17(4)(b), as amended, of Law No 52/96, on the right to distribute records granted to persons who reproduced and marketed them before Law No 52/96 entered into force, is unreasonable and conflicts with the absence, under Article 17(4)(a), as amended, of that Law, of a limit for the distribution of literary works which entered the public domain.

17. CEMED, FIMI, the Italian Government and the Commission, on the other hand, suggest that the Court should rule that Article 10 of the Directive does not preclude national legislation such as Law No 52/96, as amended. They contend, in particular, that rules which restrict copyright and related rights must be interpreted restrictively. FIMI and the Italian Government maintain, furthermore, that the more favourable treatment

accorded by Law No 52/96, as amended, to publishers of literary works which have entered the public domain is justified by the high investment costs which they must bear. Finally, while the Commission does not share that last view, it considers that the period laid down for the distribution of stocks of phonographic media, which in fact lasted nearly a year taking account of the Decree-Laws promulgated in 1994 and 1995, is sufficient to comply with the obligation under the Directive to protect acquired rights of third parties.

18. As the national court has observed, it is clear from Article 10(2) of the Directive that application of the terms of protection laid down by the Directive may have the effect, in the Member States which had a shorter term of protection under their legislation, of protecting afresh works or subject-matter which had entered the public domain.

19. This consequence results from the express will of the Community legislature. While the Commission's original proposal for the Directive provided that its provisions would apply 'to rights which have not expired on or before 31 December 1994', the European Parliament amended that proposal by introducing new wording which was, in essence, taken up in the final version of the Directive.

20. That solution was adopted in order to achieve as rapidly as possible the objective, formulated, in particular, in the second recital in the preamble to the Directive, of harmonising the national laws governing the terms of protection of copyright and related rights and to avoid the situation where rights have expired in some Member States but are protected in others.

21. However, Article 10(3) makes it clear that the Directive is without prejudice to any acts of exploitation performed before the date laid down for its implementation, that is to say 1 July 1995 at the latest, and that the Member States are to lay down the necessary provisions to protect in particular acquired rights of third parties.

22. Guidance on that provision is provided by the final two recitals in the preamble to the Directive. The 26th recital states that 'Member States should remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the exploitation of protected works and other subject-matter which were concluded before the extension of the term of protection resulting from this Directive'. According to the 27th recital, 'respect of acquired rights and legitimate expectations is part of the Community legal order ... Member States may provide in particular that in certain circumstances the copyright and related rights which are revived pursuant to this Directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works lay within the public domain'.

23. Reading these various provisions together, it is apparent that the Directive did provide for the possibility that copyright and related rights which had expired under the applicable legislation before the date of its implementation could be revived, without prejudice to acts of exploitation performed before that date, while



leaving it to the Member States to adopt measures to protect acquired rights of third parties. In view of the wording of those provisions, such measures must be regarded as measures which the Member States are obliged to adopt, but whose detail is left to the discretion of the Member States, provided, however, that they do not have the overall effect of preventing the application of the new terms of protection on the date laid down by the Directive.

24. As the Advocate General has stated in point 25 of his Opinion, that solution is, moreover, consistent with the principle that amending legislation applies, unless otherwise provided, to the future consequences of situations which arose under the previous legislation (see, in particular, Case 68/69 *Bundesknappschaft v Brock* [1970] ECR 171, paragraph 6, and Case 270/84 *Licata v Economic and Social Committee* [1986] ECR 2305, paragraph 31). Since the revival of copyright and related rights has no effect on acts of exploitation definitively performed by a third party before the date on which revival occurred, it cannot be considered to have retroactive effect. Its application to the future consequences of situations which are not definitively settled means, on the other hand, that it has an effect on a third party's rights to continue the exploitation of a sound recording where the copies already manufactured have not yet been marketed and sold on that date.

25. Furthermore, while the principle of the protection of legitimate expectations is one of the fundamental principles of the Community, it is settled case-law that this principle cannot be extended to the point of generally preventing new rules from applying to the future consequences of situations which arose under the earlier rules (see, in particular, Case 278/84 *Germany v Commission* [1987] ECR I, paragraph 36, Case 203/86 *Spain v Council* [1988] ECR 4563, paragraph 19, and Case C-221/88 *European Coal and Steel Community v Busseni* [1990] ECR I-495, paragraph 35).

26. In view of those considerations, national legislation, such as Law No 52/96, as amended, which permits persons, who were reproducing and marketing sound-recording media in respect of which the rights of use had expired under the previous legislation, to distribute those media for a limited period from its entry into force, meets the requirements of the Directive.

27. First, such legislation satisfies the obligation imposed on the Member States to adopt measures to protect acquired rights of third parties. It is true that Law No 52/96, as amended, allowed only a limited period of three months for the distribution of sound-recording media. However, such a period may be considered to be reasonable having regard to the objective pursued and, in particular, since, as the Commission has pointed out, under the circumstances in which the Directive was transposed, by means of the Decree-Laws referred to in paragraph 5 above and Law No 52/96, the period actually ended nearly a year after the date of implementation of the Law.

28. Second, such legislation, by limiting in that way the protection of acquired rights of third parties with regard to the distribution of sound-recording media,

meets the need to circumscribe a provision of that kind, which must necessarily be transitional in order not to prevent the application of the new terms of protection of copyright and related rights on the date laid down by the Directive, that being the Directive's principal objective.

29. That interpretation is not affected by the fact that another provision of Law No 52/96, as amended, which does not apply in the main proceedings, lays down different protective rules for acquired rights of third parties with regard to the distribution of literary works. This second provision is for the benefit of a distinct class of persons, who are not in the same situation as the persons concerned by the first provision. Irrespective of whether the protective rules covering that class meet the requirements of the Directive, they cannot have any bearing on the assessment of a measure which governs an objectively different situation.

30. The answer to be given to the question referred for a preliminary ruling must therefore be that Article 10(3) of the Directive does not preclude a provision of national law such as the provision which, in Law No 52/96, as amended, lays down a limited period in which sound-recording media may be distributed by persons who, by reason of the expiry of the rights relating to those media under the previous legislation, had been able to reproduce and market them before that Law entered into force.

#### Costs

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

#### On those grounds, THE COURT,

in answer to the question referred to it by the Tribunale Civile e Penale, Milan, by order of 12 February 1998, hereby rules:

Article 10(3) of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights does not preclude a provision of national law such as the provision which, in Italian Law No 52 of 6 February 1996, as amended by Italian Law No 650 of 23 December 1996, lays down a limited period in which sound-recording media may be distributed by persons who, by reason of the expiry of the rights relating to those media under the previous legislation, had been able to reproduce and market them before that Law entered into force.

Delivered in open court in Luxembourg on 29 June 1999.

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#### Opinion Advocate General<sup>1</sup>

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<sup>1</sup> No English version available, Editor IPPT.