

## European Court of Justice, 6 June 2002, Ricordi



## COPYRIGHT

## EEC Treaty and the prohibition of discrimination

- [The prohibition of discrimination is also applicable to the protection of copyright in cases where the author had died when the EEC Treaty entered into force in the Member State of which he was a national](#)

It should be noted that first paragraph of Article 6 of the EC Treaty. Copyright may be relied on not only by an author, but also by those claiming under him (see *Phil Collins and Others*, cited above, paragraph 35). It is not disputed that the copyright concerned in the main proceedings was still producing its effects as regards the persons claiming under Giacomo Puccini when the EEC Treaty entered into force.

- [The prohibition of discrimination precludes the term of protection granted by the legislation of a Member State to the works of an author who is a national of another Member State being shorter than the term granted to the works of its own nationals.](#)

Although it is undisputed that the first paragraph of Article 6 of the EC Treaty 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 the persons subject to them, in accordance with objective criteria and without direct or indirect regard to nationality, it does prohibit 'any discrimination on grounds of nationality'. Consequently, that provision requires each Member State to ensure that nationals of other Member States in a situation governed by Community law are placed on a completely equal footing with its own nationals (see, to that effect, *Phil Collins and Others*, cited above, paragraphs 30 and 32). Clearly, Paragraphs 120(1) and 121(1) of the *UrhG* discriminate directly on grounds of nationality. Moreover, since Article 7(8) of the Berne

Convention permits the Federal Republic of Germany to extend to the rights of a foreign author the 70-year term of protection prescribed by German law, the mechanism of comparison of the terms of protection provided for in that provision cannot justify the difference of treatment as regards the term of protection, which is established by the abovementioned provisions of the *UrhG*, between the rights of a German author and those of an author who is a national of another Member State.

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## European Court of Justice, 6 June 2002

(P. Jann, S. von Bahr, A. La Pergola, M. Wathelet and C.W.A. Timmermans)

## JUDGMENT OF THE COURT (Fifth Chamber)

6 June 2002 (1)

*(Term of copyright protection - Principle of non-discrimination on grounds of nationality - Applicability to copyright which arose prior to the entry into force of the EEC Treaty)*

In Case C-360/00,

REFERENCE to the Court under Article 234 EC by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between Land Hessen

and

G. Ricordi & Co. Bühnen- und Musikverlag GmbH, on the interpretation of the first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Land Hessen, by H.L. Bauer, Rechtsanwalt,
  - G. Ricordi & Co. Bühnen- und Musikverlag GmbH, by O. Brändel, Rechtsanwalt,
  - the German Government, by A. Dittrich and W.-D. Plessing, acting as Agents,
  - the Commission of the European Communities, by K. Banks, acting as Agent, and W. Berg, Rechtsanwalt, having regard to the report of the Judge-Rapporteur, after hearing the [Opinion of the Advocate General](#) at the sitting on 28 February 2002,
- gives the following

**Judgment**

1. By order of 30 March 2000, received at the Court on 28 September 2000, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of the first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC).

2. That question was raised in proceedings between the Land Hessen and G. Ricordi & Co. Bühnen- und Musikverlag GmbH (hereinafter 'Ricordi'), a firm publishing musical and dramatic works, concerning the right to have the opera *La Bohème* by the Italian composer Giacomo Puccini performed in the 1993/1994 and 1994/1995 seasons.

### **Legal background**

#### **National laws**

3. At the material time, artistic and intellectual works were protected in Germany under the 1965 version of the *Gezetz über Urheberrecht und verwandte Schutzrechte* (Law on copyright and related rights, hereinafter 'the UrhG'; *Bundesgesetzblatt* 1965 I, p. 1273). That legislation distinguished between the protection of the works of German nationals and that of the works of foreign authors.

4. Whilst the former enjoyed protection for all their works, whether published or not and regardless of where they were first published (Paragraph 120(1) of the UrhG), the latter were entitled to protection only for works published in Germany for the first time or within 30 days of their being first published (Paragraph 121(1) of the UrhG).

5. In other cases, foreign authors enjoyed the protection afforded to their rights by international treaties (Paragraph 121(4) of the UrhG).

6. The copyright protection granted by German legislation expires 70 years after the 1 January following the author's death (Paragraphs 64 and 69 of the UrhG).

7. Under Italian law, Article 25 of Law No 633 of 22 April 1941 on the protection of copyright and other rights relating to its exercise (GURI No 166 of 16 July 1941) and Article 1 of Legislative Decree No 440 of 20 July 1945 (GURI No 98 of 16 August 1945) provide that the term of copyright protection is 56 years from the time of the author's death.

#### **International law**

8. The principal international agreement governing copyright protection is the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971) which applies to the main proceedings in the version as amended on 28 September 1979 ('the Berne Convention').

9. Under Article 7(1) of the Berne Convention, the term of protection granted thereby is to be the life of the author and 50 years after his death. Article 7(5) provides that the 50-year term is to be deemed to begin on 1 January of the year following the death. Under Article 7(6), the contracting parties may, however, grant a longer term of protection.

10. Article 7(8) of the Berne Convention institutes a scheme known as 'comparison of the terms of protection'. Under that provision, the term of protection is, in any case, to be governed by the legislation of the country where protection is claimed. However, unless the legislation of that country otherwise provides, which German legislation has not, the term is not to exceed the term fixed in the country of origin of the work.

11. The limitations permitted under Article 7(8) of the Berne Convention were reproduced in Article 3(1) of

the Agreement on trade-related aspects of intellectual property rights contained in Annex 1 C to the Agreement establishing the World Trade Organisation approved on behalf of the European Community as regards matters within its competence by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1). Article 9 of that agreement also provides that the signatory States are to comply with Articles 1 to 21 of the Berne Convention and the Appendix thereto.

#### **Community law**

12. The first paragraph of Article 6 of the EC Treaty states:

'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.'

#### **The main proceedings and the question referred for a preliminary ruling**

13. Ricordi holds the rights of performance in the opera *La Bohème* by Puccini, who died on 29 November 1924 (see point 13 et seq. of the Opinion of the Advocate General). The Land Hessen operates the Staatstheater (State theatre) in Wiesbaden (Germany).

14. During the 1993/1994 and 1994/1995 seasons, the Staatstheater in Wiesbaden staged a number of performances of that opera without Ricordi's consent.

15. Ricordi argued before a Landgericht (Regional Court, Germany) that, in the light of the prohibition of discrimination on grounds of nationality in the EC Treaty, Puccini's works were necessarily protected in Germany until the expiry of the 70-year term prescribed by German law, that is, until 31 December 1994.

16. The Land Hessen contended that the opera *La Bohème* was covered by the term of protection of 56 years prescribed by Italian law, so that the copyright in that work had expired on 31 December 1980.

17. The Landgericht seised allowed Ricordi's application. The appeal brought by the Land Hessen was unsuccessful. The Land thus brought an appeal on points of law (Revision).

18. In the order for reference, the Bundesgerichtshof points out that since, according to the findings made, the opera *La Bohème* was first published in Italy and not in Germany, it was, at the material time, protected in Germany solely to the extent provided by international treaties, pursuant to Paragraph 121(4) of the UrhG.

19. Accordingly, in the light of Article 7(8) of the Berne Convention and the fact that German law does not contain any provision derogating from the principle according to which the term of protection must not exceed the term fixed in the country of origin of the work, the term of protection in Germany for the opera *La Bohème* was restricted by the term of protection prescribed by Italian law and thus expired in 1980.

20. According to the Bundesgerichtshof, the outcome of the main proceedings depends on the applicability to the facts of the case of the prohibition of discrimination on grounds of nationality in the first paragraph of Article 6 of the EC Treaty.

21. In that regard, the national court expresses some doubt as to whether the prohibition of discrimination in the first paragraph of Article 6 of the EC Treaty is applicable to the protection of copyright in cases where the author had died when the Community prohibition of discrimination on grounds of nationality entered into force. That prohibition has applied to both the Federal Republic of Germany and the Italian Republic since 1 January 1958, whereas Puccini died in 1924.

22. In those circumstances, the Bundesgerichtshof stayed proceedings and referred the following question to the Court for a preliminary ruling:

the prohibition of discrimination in the first paragraph of Article 12 EC be applied in cases where a foreign author had already died when the Treaty entered into force in the State of which he was a national, if otherwise the consequence, under national law, would be unequal treatment as regards the term of protection of the foreign author's works and of those of a national author who also died before the entry into force of the Treaty?'

**The question referred for a preliminary ruling**

23. By its question, the national court seeks in essence to ascertain whether the prohibition of discrimination in the first paragraph of Article 6 of the EC Treaty is also applicable to the protection of copyright in cases where the author had died when the EEC Treaty entered into force in the Member State of which he was a national and, if so, whether it precludes the term of protection granted by the legislation of a Member State to the works of an author who is a national of another Member State being shorter than the term granted to the works of its own nationals.

24. First of all, it must be recalled that, by reason in particular of their effects on intra-Community trade in goods and services, copyright and related rights fall within the scope of application of the EC Treaty (see, to that effect, [Joined Cases C-92/92 and C-326/92 Phil Collins and Others \[1993\] ECR I-5145, paragraph 27](#)).

25. Next, it should be noted that the fact that the author had died when the EEC Treaty entered into force in the Member State of which he was a national does not preclude the application of the first paragraph of Article 6 of the EC Treaty.

26. Copyright may be relied on not only by an author, but also by those claiming under him (see *Phil Collins and Others*, cited above, paragraph 35). It is not disputed that the copyright concerned in the main proceedings was still producing its effects as regards the persons claiming under Giacomo Puccini when the EEC Treaty entered into force (see *Case C-162/00 Pokrzeptowicz-Meyer [2002] ECR I-0000, paragraphs 49 and 50*).

27. Lastly, it must be determined whether the difference of treatment at issue in the main proceedings, established by the UrhG between German and foreign authors, is contrary to Community law.

28. The Land Hessen contends that this difference of treatment is due to the disparity between the laws of the Member States.

29. It argues that comparison of the terms of protection, provided for in Article 7(8) of the Berne Convention, does not use nationality, but country of origin, as a criterion. The term of protection is fixed by each Member State, which remains free to extend the term of protection applicable under its legislation and thereby, by virtue of that provision, the term applicable in respect of its nationals living abroad. In those circumstances, the national legal situation constitutes a criterion of differentiation which is not arbitrary, but objective. The term of protection is only indirectly related to the nationality of the author.

30. That interpretation cannot be accepted.

31. Although it is undisputed that the first paragraph of Article 6 of the EC Treaty 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 the persons subject to them, in accordance with objective criteria and without direct or indirect regard to nationality, it does prohibit 'any discrimination on grounds of nationality'. Consequently, that provision requires each Member State to ensure that nationals of other Member States in a situation governed by Community law are placed on a completely equal footing with its own nationals (see, to that effect, *Phil Collins and Others*, cited above, paragraphs 30 and 32).

32. Clearly, Paragraphs 120(1) and 121(1) of the UrhG discriminate directly on grounds of nationality.

33. Moreover, since Article 7(8) of the Berne Convention permits the Federal Republic of Germany to extend to the rights of a foreign author the 70-year term of protection prescribed by German law, the mechanism of comparison of the terms of protection provided for in that provision cannot justify the difference of treatment as regards the term of protection, which is established by the abovementioned provisions of the UrhG, between the rights of a German author and those of an author who is a national of another Member State.

34. In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling must be that the prohibition of discrimination in the first paragraph of Article 6 of the EC Treaty is also applicable to the protection of copyright in cases where the author had died when the EEC Treaty entered into force in the Member State of which he was a national and it precludes the term of protection granted by the legislation of a Member State to the works of an author who is a national of another Member State being shorter than the term granted to the works of its own nationals.

**Costs**

35. The costs incurred by the German Government and by 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 (Fifth Chamber),  
in answer to the question referred to it by the Bundesgerichtshof by order of 30 March 2000, hereby rules:  
The prohibition of discrimination in the first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC) is also applicable to the protection of copyright in cases where the author had died when the EEC Treaty entered into force in the Member State of which he was a national. It precludes the term of protection granted by the legislation of a Member State to the works of an author who is a national of another Member State being shorter than the term granted to the works of its own nationals.

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OPINION OF ADVOCATE GENERAL  
RUIZ-JARABO COLOMER

delivered on 28 February 2002 (1)

Case C-360/00

Land Hessen

v

G. Ricordi & Co. Bühnen- und Musikverlag GmbH  
(Reference for a preliminary ruling from the Bundesgerichtshof (Germany))

(Term of copyright protection - Principle of non-discrimination on the ground of nationality - Applicability where copyright was created prior to the entry into force of the Treaty of Rome)

**Introduction**

1. The aim of the question referred for a preliminary ruling in these proceedings is to resolve the issue of whether the provisions of the Treaties, in particular the prohibition of discrimination on the ground of nationality, may be relied upon by - or, rather, in favour of - a person who died more than thirty years prior to the establishment of the European Community. That very simplistic summary has the advantage of drawing attention to the specific nature of the laws governing rights in artistic and intellectual works. In the absence of harmonised international legislation, attempts have been made to reduce the unpredictable nature of such legal devices by assigning to them - to a certain extent - a specific nationality which is, in general, the same as that of the author.

**The legal framework**

**National law**

2. At the time when the main dispute arose, artistic and intellectual works in Germany were protected under the 1965 version of the Law on copyright and related rights (Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz); 'UrhG'). (2) That legislation created a distinction between the protection available to works by German nationals and that available to works by foreign authors.

3. Whereas German nationals were protected under German law in respect of all their published and unpublished works, regardless of where they were first published (Article 120(1) of the UrhG), foreign authors only benefited from that privilege for works which had been published, for the first time, (3) in German territory (Article 121(1) of the UrhG).

In all other respects, the rights of foreign authors were safeguarded under international treaties.

4. The protection granted to German nationals expires seventy years after the death of the author, with effect from 1 January of the ensuing year following death (Articles 64 and 69 of the UrhG).

5. Under Italian law, Article 25 of the Law of 22 April 1944 (4) and Article 1 of the Legislative Decree of 20 July 1945 (5) provided that copyright was to last for a term of fifty-six years following death.

**International law**

6. The principal international agreement governing copyright protection is the Berne Convention for the Protection of Literary and Artistic Works of 19 September 1886, the version applicable to these proceedings being the Paris Act of 24 July 1971, as amended on 28 September 1979 ('the Berne Convention').

7. Under Article 7 of the Berne Convention, the term of protection granted is the life of the author and fifty years after his death (paragraph 1), which is deemed to commence on 1 January of the ensuing year (paragraph 5). The contracting parties may, however, grant longer terms of protection (paragraph 6).

In any case, the term is that laid down in the legislation of the country in which protection is claimed. However, unless the legislation of that country otherwise provides, the term must not exceed the term fixed in the country of origin of the work (paragraph 8). In abbreviated form this scheme is customarily designated 'comparison of the terms of protection' for short.

German legislation 'has not otherwise provided', for the purposes of Article 7(8) of the Berne Convention.

8. The limitations laid down in Article 7(8) were confirmed in Article 3(1) of the Agreement on trade-related aspects of intellectual property rights (TRIPS). (6) That agreement also provides that signatory states are to comply with the provisions of Articles 1 to 21 of the Berne Convention and the Appendix thereto (Article 9).

**Community law**

**The prohibition of discrimination on the ground of nationality**

9. The first paragraph of Article 12 EC (formerly Article 6 of the EC Treaty) provides that:

'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.'

**Harmonisation of copyright protection**

10. On 29 October 1993, the Council adopted Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights ('Directive 93/98'). (7) The Member States were required to transpose the directive into national law by 1 July 1995.

11. In accordance with Article 10(2) of Directive 93/98, the terms of protection provided for therein apply to all works and subject-matter which were protected in at least one Member State at the deadline for transposition.

12. The works of Puccini were not protected in any of the Member States on 1 July 1995.

#### **The facts and the main proceedings**

13. The applicant in the main proceedings, G. Ricordi & Co. Bühnen- und Musikverlag GmbH ('Ricordi'), is part of a well-known publishing firm specialising in the publication of musical scores and librettos. It holds the rights of performance in the opera *La Bohème* by the Italian composer Giacomo Puccini, who died in 1924.

14. *La Bohème* was first performed at the Teatro Regio, Turin, on 1 February 1896, under the musical direction of Arturo Toscanini. The libretto, written by Luigi Illica and Giuseppe Giacosa, is based on the novel *Scènes de la vie de bohème* by Henri Murger, which was published in 1847 to great acclaim. The same work was also the inspiration for an opera of the same title by Leoncavallo, which was first staged at La Fenice, Venice, on 5 May 1897. (8)

15. Despite the fact that it was an instant success, there was scepticism about *La Bohème* on the part of certain critics who had reservations about its durability; (9) it has, however, gone from success to success in every theatre in the world. Thomas A. Edison was not mistaken when he wrote that 'men die and governments change, but the arias of *La Bohème* will live for ever'. (10) Ernst Krause considers *La Bohème*, with its intuitive mix of spirit, passion and colour, to be Puccini's masterpiece, (11) and he draws particular attention to the orchestration and magnificent instrumental technique of the composer, which Verdi was the first to appreciate. (12)

16. After it first opened, *La Bohème* went on to be performed worldwide: first in Palermo; then in Manchester and at the Hofoper, Berlin; in 1898, at the Opéra Comique, Paris, the Liceo, Barcelona, and the Teatro Príncipe Alfonso, Madrid; and, in 1900, at the Metropolitan Opera House, New York. On 5 April 1925, it became the last work to be staged at the Teatro Real, Madrid, before the latter's closure, which was to last until the 1960s. The soloists in that production were Miguel Fleta and Matilde Revenga, and the conductor was Saco de Valle. (13)

17. The dissemination of the opera (14) gives an idea of the importance of the copyright and of the financial consequences which the interpretation sought by the national court could entail.

18. The Land Hessen, which is the defendant in the main proceedings, runs the Staatstheater (state theatre) in Wiesbaden.

19. In the 1993/1994 and the 1994/1995 seasons, the Wiesbaden Staatstheater staged a number of performances of the opera *La Bohème*, by Giacomo Puccini, without the consent of Ricordi.

20. Whereas Ricordi asserted that the works of Puccini continued to enjoy protection in Germany until 31 December 1994, that being the date on which the term of seventy years post mortem auctoris expired as a result of the non-discriminatory application of national legislation (Articles 120 and 121 of the UrhG), (15) the Land Hessen claimed that, under Article 7 of the Berne Convention, (16) *La Bohème* was only entitled to the

fifty-six years of protection provided for under Italian law, and that, accordingly, such protection had expired on 31 December 1980.

21. That was the basis upon which Ricordi brought its action, which was upheld by the Landgericht (Regional Court), the court of first instance with jurisdiction in civil proceedings in which the sum at stake is considerable and the civil liability of the administration is at issue.

22. The appeal brought by the defendant before the Oberlandesgericht (Higher Regional Court), Frankfurt am Main, was unsuccessful.

23. The Land Hessen then brought an appeal on a point of law (Revision) before the Bundesgerichtshof (Federal Court of Justice), in which it reasserted its claim that the initial action should be dismissed.

#### **The question referred for a preliminary ruling**

24. During the course of that appeal, the First Chamber for Civil Matters of the Bundesgerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling under the first and third paragraphs of Article 234 EC:

'Must the prohibition of discrimination in the first paragraph of Article 12 EC be applied in cases where a foreign author had already died when the Treaty entered into force in the State of which he was a national if, otherwise, the consequence, under national law, would be unequal treatment as regards the term of protection of the foreign author's works and of those of a national author who also died before the entry into force of the Treaty?'

#### **Procedure before the Court of Justice and observations of the parties**

25. In addition to the parties to the main proceedings, the Government of the Federal Republic of Germany and the Commission participated in the proceedings. The Land Hessen is alone in proposing that the question should be answered in the negative.

26. The Land Hessen claims that the unequal treatment at issue in these proceedings stems not from the author's nationality but rather from disparities in national systems of protection. In its view only the scope of that protection is indirectly related to the author's nationality.

27. In addition, the Land Hessen takes the view that the prohibition laid down in Article 12 EC does not apply, since the first performance of the work and the death of the author both occurred before the Treaty entered into force.

28. Ricordi agrees with the German Government and the Commission in asserting that the prohibition of discrimination on the ground of nationality applies also to the outcome of situations occurring prior to the entry into force of the Treaty of Rome. There is support for that view in the case-law of the Court and in the legislative work of the Council, namely Directive 93/98. That instrument established the principle that Article 12 EC is fully applicable to situations arising prior to 1958.

29. The Commission also contends that the German legislation is incompatible with Community law in

providing for indirect discrimination against those claiming under an author, since they would normally hold the same nationality as the author, as is the case with a person's heirs.

#### **Analysis of the question referred for a preliminary ruling**

30. The referring court and the parties all start from the premiss that applying German law to this case could result in discrimination of the type prohibited by Article 12 EC. It is worth considering, however, whether it might be appropriate to approach the legal question differently.

31. In so far as the author himself must be taken into consideration in determining the scope of copyright, different treatment not justified on objective grounds may be said to constitute a form of direct discrimination on the ground of nationality.

32. It is also clear that, in this case, copyright is being claimed by a company holding German nationality, since it is constituted under German law. Despite the fact that it is possible to assign copyright, the different treatment which it is afforded under German law could be regarded as constituting indirect discrimination based on nationality, since, statistically, that treatment affects citizens of other Member States far more than German nationals.

33. It falls therefore to analyse the matter in more depth and to ask whether it is appropriate to assess the difference in treatment as a barrier to the free movement of goods and services. Such doubts arise concerning the combined personal and financial, or economic, nature of, and the fame and fortune associated with, copyright. (17) As a result, the restrictions permitted under Article 30 EC and the prohibition of discrimination on the ground of nationality might both apply, and it would be necessary to analyse the unequal treatment separately in the light of each principle.

34. Nevertheless, it is my view that, as it currently stands, the case-law of the Court renders such questions superfluous, making it possible to proceed to an examination of the substantive issue straightaway.

35. The starting point for an analysis of whether the prohibition of Article 12 EC applies specifically to copyright is, as all the parties agree, the judgment in *Phil Collins and Others*. (18)

36. The disputes which gave rise to that preliminary ruling concerned the application of other provisions of the German law which form the basis of these proceedings. The Court was there required to determine whether it was compatible with Community law for a Member State to grant a national author the right to prohibit the marketing of an unauthorised recording, of a show held abroad, while denying that right to an author of another Member State in the same situation.

37. Before answering that question directly, the Court considered in general terms whether copyright and related rights fell within the scope of application of the Treaty, pursuant to the first paragraph of Article 7, now the first paragraph of Article 12 EC.

38. The reasoning of the Court of Justice is convincing in its simplicity. Whilst not failing to acknowledge the

absence of harmonisation in the field, and the fact that legislative competence remained at national level, the Court highlighted the essentially economic nature of copyright, in so far as the commercial exploitation of copyright is a source of income for the owner. Accordingly, such rights, although governed by national legislation, remain subject to the requirements of the Treaty and therefore fall within its scope.

39. The Court also held that copyright, like other exclusive rights conferred by literary and artistic property, is capable of affecting trade in goods and services and also competition within the Community. Such rights are therefore subject to the provisions of Articles 28 EC and 30 EC governing the free movement of goods, (19) to Articles 49 EC and 55 EC as regards the provision of services by copyright management societies, (20) and finally to Community competition rules. (21)

40. From all of the foregoing considerations the Court was unable to conclude that copyright which, owing to its effects on intra-Community trade in goods and services, falls within the scope of the Treaty, is 'necessarily subject to the general principle of non-discrimination laid down by the first paragraph of Article [12 EC], without there even being any need to connect [it] with the specific provisions of Articles [28 EC, 30 EC, 49 EC and 55 EC].' (22)

41. That important declaration, stated in completely categorical and unconditional terms, serves as a basis for resolving the doubts which led the *Bundesgerichtshof* to make this reference.

42. The factor which differentiates the present case from the case-law cited is that, unlike the British citizens *Phil Collins* and *Cliff Richard*, the Italian composer *Giacomo Puccini* had already been dead for many decades when on 1 January 1958 the Treaty establishing the European Community, and with it the prohibition of discrimination on grounds of nationality, entered into force. It is appropriate to inquire whether that circumstance may lead to a solution other than the one proposed.

43. I can say at the outset that I do not believe that it does. For it to do so, the prohibition of Article 12 EC would have to be construed as being conditional upon there being an individual capable of invoking it. Such a requirement cannot be inferred from the provision itself, or from the case-law of the Court, or, less still, from the spirit informing the Treaties.

44. The first paragraph of Article 12 EC states, in particularly unambiguous terms, that any discrimination on the ground of nationality is prohibited.

45. That means that, unless it is justified on objective grounds and is proportionate to the aim pursued, any unequal treatment based essentially on nationality is contrary to the Treaty, irrespective of whether it is alleged by the victim in person or by a third party who is able to demonstrate a legitimate interest.

46. The establishment of a single market does not merely require recognition of the right of the nationals of one Member State to carry on any form of legitimate economic activity in another Member State under the same conditions as nationals of that state. Instead, it

also requires, within the spheres covered by the Treaty, a complete renunciation of nationality as a legitimate ground for subjecting economic relationships to legal restrictions and regulating their progress. That, to my mind, is the principal added value of Article 12 EC in relation to the many other provisions of the Treaty whose purpose is similar.

47. It is important to emphasise that the removal of the nationality criterion is a direct result of the prohibition in Article 12 EC. In other words, there is no need to carry out the statistical evaluation or the assessment based on probability which are required for indirect discrimination. Furthermore, the German legislation in question cannot be said to be subsumed within the Court's definition of that concept. Direct discrimination also includes covert unequal treatment which, by the application of differentiating criteria other than nationality, leads in fact to the same result. (23) That is not the case here since the discrimination is linked to nationality. (24)

Thus, a provision of a Member State which restricts the enjoyment of certain economic rights to nationals alone would be in direct contravention of Article 12 EC. So, also, would a rule which, for example, granted certain advantages to the great-grandchildren of Italian nationals, or to the parents of Danish children. It would not be necessary to ascertain whether, statistically, the majority of great-grandchildren of Italian nationals are Italians, or whether the parents of Danish children are, as a general rule, Danish. The prohibited discrimination would be caused by the unlawful point of reference used, while the harm suffered would not be of primary importance.

48. There is support for that view, albeit by implication, in the case-law of the Court.

49. It may be inferred from the facts of Case C-326/92, one of the cases which gave rise to the Phil Collins judgment, that the artist whose rights were in issue was no longer the proprietor of those rights when the dispute arose, since he had assigned them to a British company which had, in turn, assigned them to a German company.

the subjective definition of discrimination on the ground of nationality prevailed, the Court would have had to hold either that the direct discrimination consisted of a reduction in the economic expectations arising from the assignment of rights by the author, as a result of the less favourable treatment which he was afforded under national law, or that there had been indirect discrimination in that, in percentage terms, the assignees of rights from foreign authors also tend to be foreign.

50. The Court did not go down either route, choosing instead to pass over the issue and delivering the same judgment in that case as in Case C-92/92, where the direct victim had been the author himself. (25) The Court confined itself to stating that the prohibition of discrimination on the ground of nationality precludes the legislation of a Member State from denying to authors from other Member States, and those claiming under them, the right, accorded to nationals of that

Member State, to prohibit the marketing in its national territory of a phonogram manufactured without their consent.

51. From all the foregoing I conclude that the first paragraph of Article 12 EC must be construed as precluding or discriminatory the criterion of nationality from being taken into consideration in order to define - unfavourably - the content of a legal relationship of an economic nature governed by the Treaty.

52. The Land Hessen maintains that the unequal treatment derives from legislative disparities between the Member States and that it is only incidentally related to the nationality of the author.

That assertion may be countered by the fact that the implementation, in Germany, of the mechanism for comparing of terms of protection, laid down in Article 7(8) of the Berne Convention, not only reproduces, by reference, the inequalities stemming from the legislative differences between the Member States but also clearly discriminates in favour of national authors, who are not entitled to protection greater than that granted to German authors. In addition, in the likely event that the protection available in the Member State of origin is lower, that shorter term is to be taken into consideration. On the supposition that all the Member States were to implement a similar system, German authors would be entitled to the longest term of protection permitted in practice in each Member State, whereas, in Germany, no author would be able to claim greater protection. The protectionist effect inherent in the measure is patently obvious.

53. It therefore appears, from the objective definition of discrimination on the ground of nationality which I have just set out, that the issue of whether the person in question, rather than the victim of the discrimination, had or had not died, either before or after entry into force, of the Treaty is wholly immaterial, since the only yardstick for judging whether the unequal treatment is compatible with Community law is one comprising objective considerations independent of nationality and proportionate to the aim legitimately pursued.

54. One of the parties proposed a possible justification of the discriminatory measure. The sole explanation advanced is that, since the system under Article 7(8) of the Berne Convention permits lesser protection under the national law of the author, it therefore encourages the legislature of each Member State to strengthen that protection, which is beneficial to the interests of all authors.

55. That reasoning, while being legitimate in the sphere of relationships governed by international agreements, cannot be upheld in a scheme of integration such as the European Union, which is characterised by an obligation of solidarity between the Member States, thereby precluding a practice which entails the unilateral imposition of legislative choices by national legislatures. Indeed, in the absence of sufficient harmonisation, it cannot be assessed without more that the German term of protection of seventy years is automatically preferable to the reduced term provided for in Italy.

Furthermore, the interests of authors are not the only ones at stake.

56. For similar reasons, no valid argument may be inferred from the Agreement on trade-related aspects of intellectual property rights (TRIPS), which enshrines the comparative method provided for in Article 7(8) of the Berne Convention. (26) That agreement does not form part of the Community scheme of integration and solidarity and may instead only be relied upon vis-à-vis non-Member States.

57. Finally, the Land Hessen refers to the solution adopted in Directive 93/98, which harmonises the terms of protection solely in relation to works which as at 1 July 1995 were protected in at least one Member State.

58. In addition, Directive 93/98 does not adopt the test of whether the author was alive when the Treaty of Rome entered into force. In the light of the date actually chosen, numerous works will fall within the scope of the directive, notwithstanding the fact that their authors did not become Community citizens, which precludes the establishment of any interpretative guidelines on the scope of the prohibition of Article 12 EC. The efficacy of a provision of founding legislation, and of one of the guiding principles of Community law, may not be abridged by secondary legislation.

59. In the absence of any other possible justification for the discriminatory measure, the contested national provision must be regarded as contrary to Community law.

60. Since no hearing was held in these proceedings, I have been unable to inquire into the possible impact of a ruling given by the Court in the terms which I propose. The Court could, however, having examined the information at its disposal, in particular the widespread acceptance at the material time of the principle comparison of terms in the Member States, (27) determine whether there are considerations of legal certainty which are sufficiently pressing to warrant limiting the retroactive effect of its case-law.

### Conclusion

61. In the light of all of the foregoing, I propose that the Court of Justice should reply as follows to the question referred for a preliminary ruling by the Bundesgerichtshof:

‘A national provision which leads to lesser protection being afforded to a literary or artistic work by reason of the nationality of its author is contrary to the prohibition of discrimination on the ground of nationality in the first paragraph of Article 12 EC.’

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- 1: - Original language: Spanish.
  - 2: - Bundesgesetzblatt 1965 I, p. 1273.
  - 3: - Or within thirty days of their first publication.
  - 4: - Gazzetta ufficiale della Repubblica italiana (GURI) of 16 July 1941, No 166.
  - 5: - GURI of 16 August 1945, No 98.
  - 6: - Annexed to the Agreement establishing the World Trade Organisation, signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as

regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

7: - OJ 1993 L 290, p. 9.

8: - Fraccaroli, A., in Giacomo Puccini se confía y cuenta, Ed. Ricordi, Buenos Aires, 1957, trans Nicolás Olivare, pp. 102 and 103, describes the meeting which took place between Puccini and Leoncavallo on a cold autumn night in 1893, at the De Cristofolis Gallery, Milan, where they discovered that they were both composing operas on the same theme. Leoncavallo rushed to the office of the newspaper *Il Secolo* to announce his version of *La Bohème* first. Puccini, following the advice of his editor, Ricordi, did likewise in *Corriere della Sera*.

9: - The day after its first performance, the critic, Carlos Bersezio, wrote in *La Stampa* that ‘*La Bohème* is not an artistic success. The music is superficial, too superficial, not only in the allegro movements but also in the dramatic and passionate movements. Since it fails to make an impression in the minds of the audience, it will not leave an indelible mark on the history of lyrical theatre.’

10: - Martínez, O., *El sentido humano en la obra de Puccini*, Ed. Ricordi Americana, Buenos Aires, 1958, p. 127.

11: - Krause, E., Puccini, Ed. Alianza, Madrid, 1985, trans Jacob Mir Mercader, p. 72.

12: - *Ibid.*, pp. 89 and 90: *La Bohème* must be conducted with a delicate, flexible and energetic hand. De Sabato, Beecham, Serafin, Karajan, Solti, Maazel, Kleiber, Levine and Suitner have set certain standards in that connection.

13: - Although opera was not performed at the Teatro Real again until the end of the 1990s, *La Bohème* was staged at the Teatro de la Zarzuela in 1964; in 1967, with Pilar Lorengar and Gianni Raimondi; in 1970, with Mirella Freni, Luciano Pavarotti, María Orán and Giuseppe Tadei, and conducted by Nino Sanzogano; in 1974, again with Pavarotti; in 1980, with Ileana Cotrubas and José Carreras; and, in 1986, with Plácido Domingo.

14: - Thomas Mann appears to have been captivated by the beauty of the love duet at the end of the first scene (‘*O soave fanciulla*’), to which he alludes in the chapter entitled ‘*Fullness of Harmony*’ in *The Magic Mountain*, referring to the melodic phrase: ‘*Dami il braccio, mia piccina*.’

15: - See point 3 above.

16: - See point 7 above.

17: - De Gaulle, L. and others, *Droit d'auteur et droits voisins*, Éditions Francis Lefebvre, Levallois, 1996, p. 35 et seq.

18: - Joined Cases C-92/92 and C-326/92 [1993] ECR I-5145 (‘the Phil Collins judgment’).

19: - Judgment in Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran* [1981] ECR 147, paragraph 8.

20: - Judgment in Case 7/82 *GVL v Commission* [1983] ECR 483, paragraph 39.



21: - Judgment in Case 78/70 Deutsche Grammophon [1971] ECR 487, paragraph 10.

22: - The Phil Collins judgment, paragraph 27.

23: - See, inter alia, the judgments in Case 152/73 Sotgiu [1974] ECR 153, paragraph 11, in Case C-151/94 Commission v Luxembourg [1995] ECR I-3685, paragraph 14, and in Case C-411/98 Ferlini [2000] ECR I-8081, paragraph 57.

24: - It would be the case, though, if the scheme of protection were determined by reference to the country in which the work was first published (*lex primae publicationis*), as was the case under Greek law prior to Community harmonisation.

25: - However, in his Opinion of 30 July 1993, Advocate General Jacobs did deal specifically with the factual differences. He concluded that, both where the assignee paid royalties to the performer and where such an obligation had not been entered into, the author would be an indirect victim of the discrimination, since, otherwise, the unequal treatment would amount to a reduction in the potential value of his rights *vis-à-vis* a German artist.

26: - See point 8 above.

27: - All the Member States were parties to the Berne Convention by that time and the comparison of terms mechanism was recognised under German, Austrian, Belgian, Danish, Spanish, Finnish, French, Italian, Irish and Swedish law.

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