OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 3 April 2003 [1]

1. The interpretation of Article 2 of the Trade Mark Directive [2] and the determination of the signs of which this form of industrial property may consist are no longer behind the scenes but have taken their place on the proscenium of the judicial stage.

2. The Court of Justice has recently ruled on the capacity of odours to be trade marks [3] and it will shortly have done so in respect of colours as such, with neither form nor shape. [4] The object of the present case is to dispel the mystery surrounding sounds.

3. The Hoge Raad der Nederlanden raises the question whether sensations induced by sound satisfy the requirements of the abovementioned provision which a sign must fulfil in order to be regarded as a trade mark and, if so, asks about the form which its registration must take.

I — Facts and main proceedings

4. Shield Mark BV ('Shield Mark') own 14 trade marks, registered at the Benelux office (Benelux-Merkenbureau). Eleven of these have as their theme the first, elegiac notes of the étude for piano 'Für Elise', [5] composed by Ludwig van Beethoven, [6] and three a cockcrow.

1 — Original language: Spanish.

2 — First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1; 'the trade mark directive' or 'the directive').

3 — Case C-273/00 *Sieckmann* [2002] ECR I-11737, in which I delivered my Opinion on 6 November 2001.

4 — Case C-104/01 *Libertel Groep*, in which Advocate General Léger delivered his Opinion on 12 November 2002.

5 — Bagatelle in A minor (WoO 59).

6 — The composer himself gave the piece the subtitle 'Memories of 27 April 1808', the date on which he was invited to a gathering at which he met various children of different ages. His attention was much drawn to a beautiful girl, called Elise, who, upon being informed who the visitor was, approached him and said that she, too, was an artist, since she could play the piano. Before leaving, Beethoven asked her to demonstrate her abilities and Elise interpreted works by various composers, but, when he suggested that she play one of his sonatas, the girl replied, in some distress, that she could not, because they were very difficult to play. The maestro promised that he would compose a simpler piece so that she would be able to play it on the piano (commentary by K. Groenewolf, cited in the review 'Ángulos', June 1994, p. 29). Other critics, such as A. Reverter (*Beethoven*, Ed. Península, Barcelona, 1996, 2nd Edition, p. 115), believe that the bagatelle was composed in 1810, as part of a quartet of various pieces under the name not of Elise but of Teresa Malfatti, one of the impossible loves of the musician from Bonn. The change in title was due to an unexplained error by the editor Noht, who published it in 1867. See, to the same effect, W. Kinderman, *Beethoven*, Oxford University Press, Oxford-New York, 1995, p. 146.

5. In the first group, the representation of four trade marks [7] represents a musical stave with the first nine notes of the piece in question. The third and fourth are accompanied by the following description: 'Sound mark. The mark is formed by the musical reproduction of the notes (graphically) represented on the stave'. In the first of the latter two marks it is stated that the music should be played 'on a piano'.

6. Two further trade marks [8] are word marks and their registration is described as follows: 'consists of the first nine notes of "Für Elise"'. Joined to these last trade marks are two more [9] which present the same description, but which were filed as sound marks; 'the mark consists of the musical reproduction of the notes described', plus, in the case of the first, to be 'played on a piano'.

7. There is a third group of three marks [10] with the description 'E, D#, E, D#, E, B, D, C, A'. However, the first is a word mark, while the last two are sound marks, consisting in the reproduction of the sequence of notes, on the piano, as stated in the second.

8. As regards the three remaining indications, two [11] are based on the denomination 'kukelekuuuuu', [12] and one of them has the following mention: 'sound mark consisting of an onomatopoeia representing a cockcrow'. The last, [13] which is also explained as 'the crowing of a cock', is an acoustic mark 'formed by the sound described'.

9. In October 1992, Shield Mark launched a radio advertising campaign, based on messages beginning with a jingle consisting of the first nine notes of 'Für Elise'. From February of the following year, it began to publish a news sheet devoted to its activities, on sale on stands located at the cash desks of book shops and kiosks. Each time a copy is taken out, the melody is heard.

7 — Those identified by numbers 517166, 835113, 931683 and 931688, the purpose of which is to distinguish goods and services in classes 35 and 41 (the first trade mark), 9 and 16 (the second) and 16, 41 and 42 (the third and fourth) of the International Trade Mark Nomenclature.

8 — Numbers 535083 and 835115. The first represents services in classes 35 and 41, while the second distinguishes goods in classes 9 and 16.

9 — Trade marks numbers 931687 and 931689, both for classes 16, 41 and 42.

10 — With numbers 839419 (classes 9, 16, 35 and 41), 931684 (classes 16, 41 and 42) and 931686 (classes 16, 41 and 42).

11 — Those registered with numbers 835114 (classes 9, 16, 35 and 41) and 931685 (classes 9, 41 and 42).

12 — The onomatopoeia of a cockcrow in the various official languages of the European Union is as follows: *kikiriki*, in German; *kikeli-ki* in Danish; *quiquiriquí*, in Spanish; *kukkokiekuu*, in Finnish; *cocorico*, in French; *kokoriko*, in Greek; *cock-a-doodle-doo*, in English; *chichirichi*, in Italian; *kukeleku*, in Dutch; *cocorocócó*, in Portuguese; and *kukeliku*, in Swedish.

13 — Number 931682, for products in class 9 and services in classes 41 and 42.

10. Shield Mark also developed a computer program for lawyers and marketing specialists, which provided them with information on choosing and protecting a trade mark. When the program is run, a strident cockcrow is heard.

11. Mr Kist, who trades under the name 'Memex', provides a legal consultancy specialising in advertising law, trade mark law, copyright and, generally, the law on commercial communications. He also organises seminars and publishes a review dealing with those matters. On 1 January 1995 he launched an advertising campaign, using the same sound signs and the same marketing techniques as Shield Mark. [14]

12. Shield Mark brought proceedings against Mr Kist before the Gerechtshofte's-Gravenhage (Trade Marks Court, The Hague), seeking an injunction, under pain of coercive fines, on the use by him in Benelux of the trade marks of which it was the owner, in connection with the goods and services in respect of which they were registered. In a judgment of 27 May 1999, the Gerechtshof te 'sGravenhage dismissed the claim in so far as it was based on trade mark law and upheld the claims based on the defendant's unfair conduct.

14 — The first nine notes of 'Für Elise' are heard when its telephone rings and when news sheets are taken from the stands in bookshops and kiosks. It also offers a computer program which, when activated, reproduces the sound of a cockcrow.

II — The questions referred to the Court

13. Shield Mark appealed on a point of law to the Hoge Raad, which decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions on the interpretation of Article 2 of the Trade Mark Directive:

'1. (a) Must Article 2 of the Directive be interpreted as precluding sounds or noises from being regarded as trade marks?

1 (b) If the answer to question 1(a) is in the negative, does the system established by the Directive require that sounds or noises must be capable of being regarded as trade marks?

2 (a) If the answer to question 1(a) is in the negative, what requirements does the Directive lay down for

sound marks as regards the reference in Article 2 to the need for the sign to be capable of being represented graphically and, in conjunction therewith, as regards the way in which the registration of such a trade mark must take place?

2 (b) In particular, are the requirements referred to in (a) satisfied if the sound or the noise is registered in one of the following forms:

— musical notes;

— a written description in the form of an onomatopoeia;

— a written description in some other form;

— a graphical representation such as a sonogram;

— a sound recording annexed to the registration form;

— a digital recording accessible via the internet;

— a combination of those methods;

— some other form and, if so, which?'

III — Examination of the questions

A. *Sounds as trade marks*

14. 'May' sounds be trade marks? Or, indeed, 'should' they be trade marks? Those are the questions which the Hoge Raad raises in the two parts of its first question, which refers to Article 2 of the Directive, which provides that 'any sign capable of being represented graphically' may constitute a trade mark, 'provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings'.

15. The legal concept of a trade mark therefore consists of two elements: ability to distinguish and capacity to be represented graphically. In order to be capable of being used as a trade mark, a sign must combine both qualities.

16. In my Opinion in *Sieckmann*, cited above, I stated that human beings perceive and recognise messages, i.e communicate by means of senses other than sight, [15] so that they can be used in a trade mark, [16] because they are capable of having 'some distinctive character'. [17]

17. Although it is true that that case concerned olfactory trade marks, the considerations which I set out concerning odours are applicable to messages received by hearing. The Court of Justice itself so stated in its judgment of 12 December 2002, when it ruled that Article 2 of the Directive allows signs not capable of being perceived visually to constitute a trade mark. [18]

The ability of sounds and, in particular, music to identify derives from its evocative intensity, which converts sounds into a specific language. Marcel Proust was able to capture it in a decisive passage in *In search of lost time*, where the narrator asks 'whether music is not the only example of what — had language, the formation of words, the analysis of ideas not been invented — might have been the communication between souls. It is a possibility which was not subsequently developed; humanity followed other routes, the way of spoken and written expression'. [19] This idea is based on the philosophy of Schopenhauer, expressed in his work *The world as will and representation*, in which he assigns to music the same revelatory and transcendent function as that subsequently attributed to it by Proust's work, avoiding the poetic explanations and with the same attention to time. [20]

In short, Proust literally paraphrased Schopenhauer's text, in particular, in relation to the capacity of music to interpret the intimate essence of things, [21] since the novel relies on a metaphysical aesthetic from which it translates the abstract and theoretical content into the attitudes experienced, into the actions, into the sentiments which constitute the substance of an artistic work, [22] taking into account above all that music imitates life and prefigures the work on which the novelist must embark in order

15 — W. Benzov, *Beethoven's Anvil, Music in Mind and Culture*, Ed. Basic books, New York, 2001, p. XI et seq., contains a fascinating study of the idea that music connects the human being with the social world.

16 — See point 21 et seq.

17 — Point 28 of my Opinion of 24 October 2002 in Joined Cases C-53/01 to C-55/01 *Linde and Others*, in which judgment has not yet been delivered.

18 — See paragraph 42 and the first paragraph of the operative part.

19 — M. Proust, *À la recherche du temps perdu, La prisonnière*, Ed. Gallimard, La Pléiade, Paris, 1988, Vol. III, pp. 762 and 763.

20 — A. Schopenhauer, *Le monde comme volonté et comme représentation*, Ed. P.U.F., translated by A. Burdeau (1888), revised and corrected by R. Roos, Paris, 1966, p. 340.

21 — A. Henry, *Marcel Proust, Théories pour une esthétique*, Ed. Klienсksieck, Paris, 1981, p. 303.

22 — J.J Nattiez, *Proust musicien*, Ed. Christian Bourgois, Paris, 1975, p. 162.

to combine the strands in a single and organised whole, since he functions as the involuntary memory: the reappearance of a melody already heard brings to mind the first hearing, as the flagstones of the pavement, in Proust's work, bring to the narrator's mind the episode of the madeleine. [23]

18. Thus, because they have the capacity to distinguish, auditory messages may, in principle, be trade marks. [24] However, the doubts expressed by the Hoge Raad go much further and, once it is accepted that that provision envisages, without expressly referring to them, [25] other signs distinct from visual signs, asks whether the Member States are free to preclude sounds as indications capable of constituting that class of property.

19. The answer must be in the negative. The Trade Marks Directive is a harmonisation measure and its purpose is to approximate the trade mark laws of the Member States in order to remove disparities which may impede on trade marks, with the aim of abolishing the disparities which hinder the free movement of goods and freedom to provide services or distort competition within the common market. [26] It is true that it is not intended to achieve full-scale approximation, since it only concerns certain aspects relating to trade marks acquired by registration, [27] but the matters on which harmonisation must be reached include the list of signs of which a trade mark may consist. [28]

20. The single market, without barriers to the free movement of goods and freedom to provide services, requires that the protection given to a trade mark in one Member State be equal to that afforded in another Member State, and for that reason it is essential that throughout the entire territory of the European Union the same trade mark be regarded and protected as such. In short, as the French Government states in its written observations, there are no differences from one Member State to another on the nature of the indications capable of distinguishing the goods of some undertakings from those of other undertakings.

23 — J.J. Nattiez, ibid., p. 121.

24 — The French and Netherlands Governments, and also Shield Mark, stated in their written observations that in the joint statements made by the Council and the Commission on the occasion of the adoption of the Directive on trade marks (Declaration 9142/88) and the Regulation on the Community trade mark (Council Regulation (EC) No 40/94 of 20 December 1993 (OJ 1994 L 11, p. 1) (Declaration 5865/88), acknowledged that sounds are signs capable of constituting that form of intangible property. The claimant in the main proceedings also states that, in the debates of the European Parliament corresponding to the Sitting of 24 October 1988, it was confirmed that that Regulation would not prevent acoustic messages from constituting trade marks.

25 — In reality, it does mention sound messages. When it refers to 'words', it is referring to a sound capable of being represented graphically. The 'word' is, above all, oral communication. Not insignificantly, the first meaning of that signifier in Spanish is 'sonido o conjunto de sonidos articulados que expresan una idea' (*Diccionario de la Real Academia de la Lengua*). In French, *mot* means, primarily, *chacun des sons ou groupe de sons correspondant à un sens, entre lesquels se distribue le langage* (*Le Petit Robert*). The same meaning applies in English, where *word* means 'a sound or combination of sounds forming a meaningful element of speech' (*The Concise Oxford Dictionary*). In German, *wort* is '*kleinste selbständige sprachliche Einheit von Lautung und Inhalt beziehungsweise Bedeutung*' (*Duden, Deutsches Universal Wörterbuch*).

26 — See the first and third recitals.

27 — See the fourth and fifth recitals.

28 — '... attainment of the objectives at which this approximation of laws is aiming requires that the conditions for obtaining and continuing to hold a registered trade mark are, in general, identical in all Member States;... to this end, it is necessary to list examples of signs which may constitute a trade mark, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings;...' (seventh recital).

21. In so far as the Directive has not precluded sounds, no Member State can prevent a message of that type from being registered as a trade mark, on the clear understanding that it satisfies the mandatory requirements: capacity to distinguish and capability of being represented graphically.

22. The legal orders of many Member States expressly state that sounds are signs capable of constituting or forming part of a trade mark. That is so in Germany,[29] Austria,[30] Spain,[31] France,[32] Greece,[33] Italy[34] and Portugal.[35] Other systems, like the Directive, make no reference to sounds: these are the three States forming the Benelux Economic Union,[36] Denmark,[37] Finland,[38] Ireland,[39] the United Kingdom[40] and Sweden.[41] However, none of them expressly precludes sounds; furthermore, all the relevant provisions, like Article 2 of the Trade Marks Directive, expressly state that the list which they include is open and incomplete.

23. In some of the legal systems in which sounds are not mentioned by name, administrative practice, by accepting them, has undertaken to dispel the claims of those who maintain that acoustic signs cannot constitute that form of industrial property.[42]

24. By reason of the foregoing reflections, I propose that the Court of Justice should rule, in answer to the first question referred by the Hoge Raad, that Article 2 of the Directive not only does not preclude sound signs from being trade marks but prevents the national legal orders from precluding them from that condition *a priori*.

29 — Article 3(1) of the Gesetz über den Schutz von Marken und sonstigen Kennezeichnungen (German Law on the protection of trade marks and other signs) of 25 October 1994 (BGBl. 1994, I, p. 3082).

30 — Article 16(2) of the Markenschutzgesetz (Law on the protection of trade marks) of 1970 (BGBl. 260), as amended by Laws BGBl. I 111/1999 and BGBl. I 191/1999.

31 — Article 4(2)(b) of Ley 17/2001 de Marcas (Law on Trade Marks), 7 December 2001 (BOE, 8 December 2001, p. 45579).

32 — Article 711-1(b) of the Code de la Propriété Intellectuelle, as amended by the Law of 4 January 1991.

33 — Article 1(2) of Law 2239/1994 (ΦΕΚ A' 152).

34 — Article 16 of the Testo delle dispozicioni legislative in materia di marchi registrati (Law on trade marks), approved by Royal Decree 929 of 21 June 1942 (GURI 203, 29 August 1942), as subsequently amended.

35 — Article 165 of the Código da Propriedade Industrial.

36 — Article 1 of the Benelux Uniform Law on trade marks (Nederlands Traktatenblad 1962, No 58, pp. 11 to 39), as amended, with effect from 1 January 1996, by the Protocol of 2 December 1992 (Nederlands Traktatenbland 1993, No 12, pp. 1 to 12).

37 — Article 2(1) of the Varemaerkeloven (Law 162 of 21 February 1997 on trade marks).

38 — Article 1(2) of the Tavaramerkkilaki 7/1964 (Law on trade marks).

39 — Section 6(2) of the Trade Marks Act 1996.

40 — Section 1(1) of the Trade Marks Act 1994.

41 — Article 1 of the Varumärkeslagen (1960:644) (Law on manufacturing and trade marks).

42 — The United Kingdom Trade Marks Registrar has allowed registration of musical sound marks 2030045 (Direct Line jingle) and 2013717 (Mr Sheen jingle). At the end of 2002, the Office for Harmonisation in the Internal Market had registered nine sound marks.

B. *The graphical representation of the sound messages*

25. As I have stated, the capacity of sound signs to distinguish is an essential but not a sufficient condition of acceptance as trade marks. They must, in addition, be capable of being represented graphically, in the words of Article 2 of the Directive, a requirement which is also present in most of the legal orders of the Member States. [43]

1. The purpose of the requirement and the qualities of the representation

26. This requirement is not unimportant and has its *raison d'être* in the system of registration central to the Directive, [44] in which the exclusive rights conferred by ownership of a trade mark are acquired by means of its entry on the register. [45] 'If an undertaking reserves certain signs and references for itself in order to distinguish its goods and services from those of other undertakings, the symbols so claimed must be known very precisely.' [46]

27. The principle of legal certainty thus makes the requirement necessary. [47] The authorities responsible for the registration institution, other traders and consumers in general must be able to know precisely the object on which protection is conferred: the first group, in order to carry out their responsibilities properly; the second, in order to exercise their rights without encroaching on those of the owner of the trademarks; and the third, in order to select the products and services on the basis of their provenance in a system of open competition. [48]

28. Consequently, '[s]igns comprising a trade mark are represented graphically in order to protect and publicise their appropriation by an undertaking, which has reserved the signs for itself with the aim of individualising the goods or services it offers'. [49]

43 — See footnote 50 of my Opinion in *Sieckmann*. The Spanish Trade Marks Bill, to which that footnote refers, is now Law 17/2001, cited above.

44 — See the fourth recital and Article 1.

45 — See Article 5 of the Directive. The sixth recital of the Regulation on the Community trade mark clearly expresses that idea: 'the rights in a Community trade mark may not be obtained otherwise than by registration'. Advocate General Léger, in his Opinion in *Libertel Groep*, cited above, states that 'it is the graphical representation of the sign set out in the application for registration that allows an assessment to be carried out of whether all the conditions relating to the acquisition of rights to the trade mark are complied with and that determines the rights and obligations conferred by its registration' (point 65).

46 — Point 36 of my Opinion in *Sieckmann*, cited above.

47 — See point 36 of my Opinion in *Sieckmann* and paragraph 37 of the judgment in that case.

48 — See paragraph 48 et seq. of the judgment in *Sieckmann*.

49 — Point 38, *in fine*, of my Opinion in *Sieckmann*.

29. That objective is not attained by every figure perceptible by sight, since the representation must be 'clear, precise, self-contained, easily accessible, intelligible, durable and objective'.[50] It must be easily accessible and intelligible so that virtually all those interested in consulting the register, consisting of other producers and consumers, are able to understand it. It must be clear, precise and complete so that the indication which is used may be known beyond doubt. It must be durable and objective so that neither the passing of time nor the change in the addressee will affect the identification or the perception of the sign.

30. Since, as I have stated, the indications of which a trade mark consists need not necessarily be visual, those qualities of the representation must be adapted to the particular nature of those indications, in such a way that they are identified accurately.

2. The different forms of graphical representation of the sounds

31. As regards the signs which are perceived by hearing, I must therefore ask myself the same questions as in my Opinion in *Sieckmann* concerning olfactory messages: Can a sound be 'drawn'? Can an auditory signal be graphically represented in a way which is precise and clear for everyone?

50 — Paragraph 55 of the judgment in *Sieckmann*.

32. The answer must be more nuanced than in the case of smells, where I said that such a class of signs is not capable of being represented in the manner required by Article 2 of the Directive.[51]

33. Where sounds are concerned, the solution does not have to be so categorical. First of all, as I have already stated,[52] oral language is merely communication by sound and writing is its graphical representation. In the abstract, the capacity of sounds to be reproduced in writing is undeniable.

34. It is for the courts of the Member States to determine, in each case, whether the 'drawing' of a specific acoustic sign satisfies the objectives which the Community legislature pursues by means of the requirement for representation. That view is shared by Shield Mark, the Netherlands and Italian Governments and the Commission. The Hoge Raad's request that, irrespective of the facts of the case[53] and in the abstract, the Court of Justice should rule on different forms of representation of a sound ignores the nature of the judicial process, the purpose of which is to provide an answer

51 — Concerning the difficulties in graphically representing olfactory trade marks, see point 39 et seq. of my Opinion in *Sieckmann*.

52 — See footnote 25.

53 — It will be recalled that the trade marks in the main proceedings — only some — are sound signs represented by musical notation or a description, or by a sequence of notes, or by an onomatopoeia.

which will be useful to the determination of the dispute. Furthermore, the very nature of that procedure and the absence of expert evidence would make it difficult to rule on questions of a highly technical content.

35. The Court of Justice must therefore remain silent on the capacity to satisfy that requirement of sonograms and spectrograms, and also certain sound and digital recordings, which have no connection with the distinctive signs on which Shield Mark relies as against Mr Kist in the main proceedings.

36. As the Commission observes, there is nothing to prevent the Court of Justice, without interfering in the facts of the case and for the purposes of the interpretation sought, from providing some general rules about the forms of graphical expression which, proposed by the Hoge Raad in its second question, concern the trade marks relied on in the dispute which it is hearing and the resolution of which prompted the question referred to the Court: the representation by musical notes and the descriptions using written language.

37. Concerning the capacity to be represented graphically, in the universe of messages which are perceived by hearing it is necessary to distinguish two categories, one consisting of sounds capable of being expressed by musical notes and the other consisting of all other sounds.

(a) Musical notation

38. Musical notes are the signs whereby sounds are represented. However, a sequence of such notes, without more, does not identify a melody and distinguish it from others. The repetition in writing of the names of the first nine notes of 'Für Elise' says nothing. It does not identify the sound with the clarity and precision demanded by the requirement for graphical representation.

39. In order to attain that objective, it is essential to reflect the sounds by means of their musical notation, so that they are perfectly recognisable and leave no room for doubt. And there is only one way of doing that: by setting them out on a musical stave. With that universal language, the diffused drawing consisting of the sequence of notes, called by name, seems to be clear, with its precise contours to identify it, differentiating it from others. The notes written on the stave, together with the key, which determines the tonality, the time signature, which determines the rhythm, and the relative value of each note, and also an indication of the instruments which are to interpret them, are a faithful 'photograph' of the sequence of sounds which are represented; if I may say so, they are their 'fingerprint'.

40. That form of representation of sounds fulfils the requirements indicated by the Court of Justice in *Sieckmann*. It is clear, precise, self-contained, durable, objective and easily accessible. It is true that it is not

intelligible to everyone, but there is no reason to require that perception be immediate. Account being taken of the *raison d'être* of the requirement, it is sufficient that, by means of objective and reliable instruments of interpretation, of execution or reproduction, anyone seeing the entry on the register acquire precise knowledge of the distinctive sign which the owner monopolises.

41. Most persons seeing the sign are not familiar with musical notation, which is the technique intended to enable musical texts to be sung correctly, but when the score is read by an expert the uninformed are able to understand the sound sign without risk of confusion as to its identity. [54]

(b) The descriptions of the sounds

42. In order to be registered as a trade mark, a sign must therefore be capable of being represented graphically; 'describe' is not the same as 'represent', which evokes the idea of 'reproduction'.

43. Any description of a sound suffers from vagueness and lacks clarity and precision. [55] I have already stated that, as regards musical notes, to state that the trade mark consists of a specific sequence (for example: 'E, D#, E, D#, E, B, D, C, A') is meaningless.

44. The position is even less certain if the description constitutes an onomatopoeia. That is illustrated by the case before the national court. In the official languages of the European Union, the written reproduction of the sounds which imitate a cockcrow is in reality varied and diverse. [56] It would be difficult for the average British, Spanish, Portuguese or Italian citizen to realise that *kukeleku* represents a cockcrow. However, there may be circumstances in which that form of graphical representation would be sufficiently expressive and satisfy the purpose of the provision. That is a matter to be determined by the national courts in each case. [57]

45. A description by written language of a sound, like that of a smell, and in general of non-figurative signs, is burdened with subjectivity and relativity, which is inimical to precision and clarity. [58]

54 — Shield Mark states that the fact that a score cannot be interpreted by someone with no knowledge of music does not prevent that form of graphical representation of sounds from being accepted. It states that word trade marks can be relied on as against the illiterate and that trade marks composed of colours are valid as against the colour blind (see paragraph 39 of its written observations).

55 — In e-filing, which is the system of on-line application for Community trade marks, the Office for Harmonisation in the Internal Market states that it does not accept the graphical representation of a sound mark by a description.

56 — See footnote 12.

57 — The Office for Harmonisation in the Internal Market, by resolution of 7 October 1998 (Case R-1/1998-2), rejected the registration of a sound mark consisting of the sound of a click (*déclic*).

58 — See point 41 of my Opinion in *Sieckmann*.

46. I can see no other way of describing with words a sound sign or a sequence of signs, unless, in the case of a musical composition, there is a reference to its title, to the composer or to any other factor allowing it to be identified. However, this 'drawing' implies, as the United Kingdom Government observes in its written observations, a certain familiarity, a prior knowledge of the sign, a situation which is not admissible in a system such as that of the Directive, where ownership of a trade mark is acquired by registration and not by use. [59]

47. On the basis of the foregoing reasoning, I propose that the answer to the second question referred by the Hoge Raad be:

— the graphical representation of sound marks must be clear, precise, self-contained, easily accessible, intelligible, durable and objective;

— it is for the competent national court to determine in each case, on the basis of the relevant facts, whether such requirements are satisfied;

— generally, such conditions are satisfied by representation on a musical stave;

— on the other hand, descriptions using the written language, including onomatopoeia and a word sequence of musical notes, are generally insufficient.

C. *A final brief digression*

48. In preliminary ruling proceedings, the Court of Justice must provide the court of referral with the appropriate answer according to the parameters imposed by the law. The facts of the main proceedings place the question in its context and make its impact easier to understand, so that the solution, given in general terms owing to its role in arriving at a uniform interpretation, may prove most useful to the resolution of the dispute before the national court.

49. In a case such as the present, in order to carry out its interpretative task, the Court of Justice only needs to know that some of the trade marks at issue before the Hoge Raad are distinctive acoustic sounds. However, it must not be overlooked that the sound signs which Shield Mark claims as being in its exclusive ownership are a cockcrow and the first notes of what is

59 — That is the case of Time Warner, who, in July 2001, registered as a sound mark the 'Merry Melodies' jingle, which for 50 years has accompanied the animated cartoons of Hanna & Barbera. Another example is Tarzan's cry, registered as a trade mark, also in the United States of America, by Edgar Rice Burroughs.

perhaps the best-known piece for piano in the history of music, a work by one of the great composers, whose genius was quickly recognised by the other composers of his day, [60] although Beethoven himself always regarded Handel as the greatest. [61]

50. Registration of a trade mark confers a monopoly on its owner, so that, in principle and as a general rule, he is able to prevent its use by others. In my Opinion in *Arsenal*, [62] I stated that any extension of the catalogue of signs capable of constituting this form of industrial property must be accompanied by a precise delimitation of the rights which registration confers on the owner. [63] The time seems to have come to add that particular care must also be exercised when a person is granted the exclusive use on the market of a sign, whatever sense it is perceived by.

51. Two points must be made. First, there are considerations of public interest that militate in favour of limiting the registrability of certain signs to enable them to be freely used by all traders. The theory of the need to keep certain signs available has been evaluated by the Court of Justice in its judgments in *Windsurfing Chiemsee* [64] and *Philips*. [65] I find it difficult to accept that individuals may, by means of a trade mark, perpetuate exclusive rights in natural indications and signs or those that are a direct manifestation of nature. [66]

52. I find it more difficult to accept, and this is the second refinement, that a creation of the mind, which forms part of the universal cultural heritage, should be appropriated indefinitely by a person to be used on the market in order to distinguish the goods he produces or the services he provides with an exclusivity which not even its author's estate enjoys. [67]

60 — A. Orga, *Beethoven*, Ed. Robinbook, translated by Imma Guardia, Barcelona, 2001, p. 24, refers to the admiration of Mendelssohn, Schumann, Liszt and Bizet for Beethoven, and also to that of Wagner, Bruckner, Mahler and Debussy. W. Kinderman, op. cit., p. 1, recognises that no composer occupies such a central position in musical life as Beethoven.

61 — M. Steinitzer, *Beethoven*, Ed. Fondo de Cultura Económico, México, 1953, p. 51, describes how on various occasions Beethoven called Handel the greatest of all the masters of music. See also F. Kerst, *Beethoven, The Man and the Artist as Revealed in his Own Words*, Dover Publications Inc., English translation by Henry Edward Krehbiel, New York, 1964, p. 54.

62 — Case C-206/01 *Arsenal* [2002] ECR I-10273.

63 — See point 61.

64 — Joined Cases C-108/97 and C-109/97 [1999] ECR I-2779.

65 — Case C-299/99 [2002] ECR I-5475.

66 — See point 19 et seq. of my Opinion in *Linde*, cited above.

67 — It will be recalled that, under Article 1(1) of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, the rights of an author of an artistic work, such as Beethoven's 'Für Elise', are to run for the life of the author and for 70 years after his death.
Copyright protects the work itself. Trade marks, on the other hand, do not claim to protect original creations: their purpose is to allow the goods or services offered by undertakings to be distinguished on the market. It may happen, however, that a sign is an original work protected by copyright at the same time, in which case it is necessary to regulate their reciprocal interrelations. A. Bercovitz has analysed them in his work 'Marcas y derecho de autor', published in *Revista de Derecho Mercantil*, No 240 (2001), pp. 405-419.

Conclusion

53. In the light of the foregoing reasoning, I propose that the Court of Justice, in answer to the questions referred by the Hoge Raad der Nederlanden, should rule as follows:

(1) Article 2 of Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks not only does not preclude sound signs from being trade marks but also precludes the legal orders of the Member States from precluding that condition *a priori*.

(2) In order for a sound to be capable of being a trade mark, in addition to being distinctive, must be capable of being represented graphically in a way that is clear, precise, self-contained, easily accessible, intelligible, durable and objective.

(3) It is for the competent national court to determine in each case, on the basis of the relevant facts, whether such requirements are satisfied.

(4) However, those requirements are generally satisfied where the representation takes the form of a musical stave.

(5) On the other hand, descriptions using written language, including onomatopoeia and the word sequence of musical notes, are normally insufficient.