

JUDGMENT OF THE COURT

20 October 1993 ²⁰

In Joined Cases C-92/92 and C-326/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landgericht Munchen I and by the Bundesgerichtshof for a preliminary ruling in the proceedings pending before those courts between

Phil Collins

and

Imtrat Handelsgesellschaft mbH,

and between

Patricia Im-und Export Verwaltungsgesellschaft mbH

Leif Emanuel Kraul

and

EMI Electrola GmbH,

on the interpretation of the first paragraph of Article 7 of the EEC Treaty,

²⁰ Language of the case: German.

THE COURT,

composed of: O. Due, President, F. Mancini, J. C. Moitinho de Almeida and D. A. O. Edward (Presidents of Chambers), R. Joliet, F. A. Schockweiler, F. Grévisse, M. Zuleeg and J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett,

after considering the written observations submitted
in Case C-92/92 on behalf of:

- Phil Collins, by Ulrike Hundt-Neumann, Rechtsanwalt, Hamburg,
- Imtrat, by Sabine Rojahn, Rechtsanwalt, Munich,
- the German Government, by Claus-Dieter Quassowski, Regierungsdirektor at the Federal Ministry of the Economy, assisted by Alfred Dittrich, Regierungsdirektor at the Federal Ministry of Justice, acting as Agents,
- the United Kingdom, by John E. Collins, of the Treasury Solicitor's Department, and by Nicholas Paines, Barrister, acting as Agents,
- the Commission of the European Communities, by Henri Étienne, Principal Legal Adviser and Pieter van Nuffel, of its Legal Service, acting as Agents, in Case C-326/92 on behalf of:
- EMI Electrola, by Hartwig Ahlberg, Rechtsanwalt, Hamburg,
- Patricia GmbH and Mr Kraul, by Rudolf Nirk, Rechtsanwalt before the Bundesgerichtshof,

- the German Government, by Claus-Dieter Quassowski, Regierungsdirektor at the Federal Ministry of the Economy and Alfred Dittrich, Regierungsdirektor at the Federal Ministry of Justice, acting as Agents,
- the Commission of the European Communities, by Henri Étienne, Principal Legal Adviser and Pieter van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Phil Collins, Imtrat, represented by Sabine Rojahn and Kukuk, Rechtsanwälte, Munich, Patricia GmbH and Mr Kraul, represented by Daniel Marquard, Rechtsanwalt, Hamburg, and of EMI Electrola and the Commission at the hearing on 19 May 1993,

after hearing the Opinion of the Advocate General at the sitting on 30 June 1993,

gives the following

Judgment

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

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

- 3 The questions which the Landgericht München I submitted in Case C-92/92 were raised in proceedings between Phil Collins, singer and composer of British nationality, and a phonogram distributor, Imtrat Handelsgesellschaft mbH ('Imtrat'), relating to the marketing, in Germany, of a compact disk containing the recording, made without the singer's consent, of a concert given in the United States.
- 4 According to Paragraphs 96(1) and 125(1) of the German Copyright Act of 9 September 1965 (Urheberrechtsgesetz, hereinafter 'the UrhG') performing artists who have German nationality enjoy the protection granted by Paragraphs 73 to 84 of the UrhG in respect of all their performances. In particular, they may prohibit the distribution of those performances which are reproduced without their permission, irrespective of the place of performance. In contrast, the effect of the provisions of Paragraph 125(2) to (6) of the UrhG, relating to foreign performers, as interpreted by the Bundesgerichtshof and the Bundesverfassungsgericht (Federal Constitutional Court), is that those performers cannot avail themselves of the provisions of Paragraph 96(1), where the performance was given outside Germany.
- 5 Phil Collins applied to the Landgericht München I for an interim injunction prohibiting the marketing of the compact disk in question. The national court considered that the provisions of Paragraph 125 of the UrhG were applicable to the proceedings, to the exclusion, in particular, of the terms of the international Rome Convention of 26 October 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Treaties Series, volume 496, No 7247), to which the United States, where the performance had taken place, had not acceded. It questioned, however, the conformity of those national provisions with the principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty.
- 6 In those circumstances, the Landgericht München I stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

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

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

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

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

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

10 In the grounds for its order for reference the Bundesgerichtshof, which was aware of the questions referred to the Court by the Landgericht München I, states that,

in the absence of Community legislation and, save on certain points, of harmonization of national laws, it did not appear to it that copyright and related rights fell within the scope of application of Community law, and more particularly of Article 7 of the Treaty.

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

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

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

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

The subject-matter of the references for a preliminary ruling

13 In proceedings under Article 177 of the Treaty the Court may rule neither on the interpretation of national laws or regulations nor on the conformity of such measures with Community law. Consequently, it may neither interpret the provisions of the UrhG nor may it assess their conformity with Community law. The Court may only provide the national court with criteria for interpretation based on Community law which will enable that court to solve the legal problem with

which it is faced (judgment in Joined Cases 91 and 127/83 *Heineken Brouwerijen v Inspecteurs der Vennootschapsbelasting, Amsterdam and Utrechts* [1984] ECR 3435, paragraph 10).

- 14 The orders for reference mention the national rules applicable to copyright, and also Paragraph 125 of the *UrhG* which governs the rights of performers, known as 'rights related to copyright'. It is not for the Court to determine within which of those two categories of rights the disputes in the main proceedings fall. As the Commission has proposed, the questions referred to the Court should be regarded as relating to the rules which apply to both of those categories of rights.
- 15 Those questions concern the first paragraph of Article 7 of the Treaty which lays down the general principle of non-discrimination on the grounds of nationality. As is expressly provided in that paragraph, the prohibition of discrimination contained in it applies only within the scope of application of the Treaty.
- 16 The questions referred to the Court must accordingly be regarded as seeking, essentially, to ascertain:
- whether copyright and related rights fall within the scope of application of the Treaty within the meaning of the first paragraph of Article 7, and consequently, if the general principle of non-discrimination laid down by that article applies to those rights;
 - if so, whether the first paragraph of Article 7 of the Treaty precludes the legislation of a Member State from denying to authors or performers from other Member States, and those claiming under them, the right, accorded by that legislation to the nationals of that State, to prohibit the marketing, in its national territory, of a phonogram manufactured without their consent, where the performance was given outside its national territory;

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

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

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

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

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

- 20 The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. Copyright and related rights are also economic in nature, in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties (see the judgment in Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran v GEMA* [1981] ECR 147, paragraph 12).
- 21 As the Court pointed out in the last-mentioned judgment (paragraph 13), whilst the commercial exploitation of copyright is a source of remuneration for the owner, it also constitutes a form of control of marketing, exercisable by the owner, the copyright management societies and the grantees of licences. From this point of view, the commercial exploitation of copyright raises the same problems as does the commercial exploitation of any other industrial and commercial property right.
- 22 Like the other industrial and commercial property rights, the exclusive rights conferred by literary and artistic property are by their nature such as to affect trade in goods and services and also competitive relationships within the Community. For that reason, and as the Court has consistently held, those rights, although governed by national legislation, are subject to the requirements of the Treaty and therefore fall within its scope of application.
- 23 Thus they are subject, for example, to the provisions of Articles 30 and 36 of the Treaty relating to the free movement of goods. According to the case-law of the Court, musical works are incorporated into phonograms which constitute goods the trade in which, within the Community, is governed by the above provisions (see, to that effect, the judgment in *Musik-Vertrieb membran*, cited above, paragraph 8).

24 Furthermore, the activities of copyright management societies are subject to the provisions of Articles 59 and 66 of the Treaty relating to the freedom to provide services. As the Court stated in its judgment in Case 7/82 *GVL v Commission* [1983] ECR 483, paragraph 39, those activities should not be conducted in such a way as to impede the free movement of services, and particularly the exploitation of performers' rights, to the extent of partitioning the common market.

25 Finally, the exclusive rights conferred by literary and artistic property are subject to the provisions of the Treaty relating to competition (see judgment in Case 78/70 *Deutsche Grammophon v Metro* [1971] ECR 487).

26 It is, moreover, precisely in order to avoid the risk of hindrances to trade and the distortion of competition that the Council has, since the disputes in the main proceedings arose, adopted Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, on the basis of Article 57(2) and Articles 66 and 100a of the Treaty (OJ 1992 L 346, p. 61).

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

28 Accordingly, it should be stated in reply to the question put to the Court that copyright and related rights fall within the scope of application of the Treaty within the meaning of the first paragraph of Article 7; the general principle of non-discrimination laid down by that article therefore applies to those rights.

Discrimination within the meaning of the first paragraph of Article 7 of the Treaty

- 29 Imtrat and Patricia maintain that the differentiation which is made between German nationals and nationals of the other Member States in the cases referred to it by the national courts is objectively justified by the disparities which exist between national laws and by the fact that not all Member States have yet acceded to the Rome Convention. That differentiation is not, in those circumstances, contrary to the first paragraph of Article 7 of the Treaty.
- 30 It is undisputed that Article 7 is not concerned with any disparities in treatment or the distortions which may result, for the persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various Member States, so long as those laws affect all persons subject to them, in accordance with objective criteria and without regard to their nationality (judgment in Case 14/68 *Wilhelm v Bundeskartellamt* [1969] ECR 1, paragraph 13).
- 31 Thus, contrary to what Imtrat and Patricia maintain, neither the disparities between the national laws relating to the protection of copyright and related rights nor the fact that not all Member States have yet acceded to the Rome Convention can justify a breach of the principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty.
- 32 In prohibiting 'any discrimination on the grounds of nationality', Article 7 of the Treaty requires, on the contrary, that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State concerned (judgment in Case 186/87 *Cowan v Trésor Public* [1989] ECR 195, paragraph 10). In so far as that principle is applicable, it therefore precludes a Member State from making the grant of an exclusive right subject to the requirement that the person concerned be a national of that State.
- 33 Accordingly, it should be stated in reply to the question put to the Court that the first paragraph of Article 7 of the Treaty must be interpreted as precluding

legislation of a Member State from denying, in certain circumstances, to authors and performers from other Member States, and those claiming under them, the right, accorded by that legislation the nationals of that State, to prohibit the marketing, in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory.

The effects of the first paragraph of Article 7 of the Treaty

34 The Court has consistently held that the right to equal treatment laid down by the first paragraph of Article 7 of the Treaty, is conferred directly by Community law (judgment in *Cowan*, cited above, paragraph 11). That right may, therefore, be relied upon before a national court as the basis for a request that it disapply the discriminatory provisions of a national law which denies to nationals of other Member States the protection which they accord to nationals of the State concerned.

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

Costs

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

On those grounds,

THE COURT,

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

1. Copyright and related rights fall within the scope of application of the Treaty, within the meaning of the first paragraph of Article 7; the general principle of non-discrimination laid down by that article is, therefore, applicable to them.
2. The first paragraph of Article 7 of the Treaty must be interpreted as precluding the legislation of a Member State from denying to authors and performers from other Member States, and those claiming under them, the right, accorded by that legislation to the nationals of that State, to prohibit the marketing in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory.
3. The first paragraph of Article 7 of the Treaty must be interpreted as meaning that the principle of non-discrimination which it lays down may be directly relied upon before a national court by an author or performer from another Member State, or by those claiming under them, in order to claim the benefits of protection reserved to national authors and performers.

Duc	Mancini	Moitinho de Almeida	Edward	
Joliet	Schockweiler	Grévisse	Zulceeg	Murray

Delivered in open court in Luxembourg on 20 October 1993.

J.-G. Giraud	O. Duc
Registrar	President