OPINION OF ADVOCATE GENERAL COSMAS

delivered on 23 March 1999 *

I — Introduction

1. In the present case, the Court is asked to give a preliminary ruling on a question referred by the Tribunale Ordinario (District Court), Milan, relating to the interpretation of Article 10 of Council Directive 93/98/EEC of 29 October 1993. [1] The central issue is the protection of acquired rights of third parties in cases where the transposition of that directive into national law has resulted in the revival of a right related to copyright in respect of a musical work which previously fell within the public domain.

II — Facts

2. The legal issue raised by the question submitted for a preliminary ruling has resulted from a dispute between the companies Butterfly Srl (hereinafter 'Butterfly') and Carosello Srl (hereinafter 'Carosello') concerning the exploitation of sound recordings of certain works of the Italian singer Mina. In 1992 Butterfly released a compact disc entitled 'Briciole di Baci' containing 16 songs by Mina which had originally been recorded in the period from 1958 to 1962. Before doing so, it obtained permission to exploit the sound recordings from Carosello which at that time held the related rights over the works in question. Under the national legislation then in force, rights of producers and performers of musical works were protected for 30 years. Subsequently the Community legislature, by Directive 93/98, extended the term of protection of those rights to 50 years. After the time-limit for transposition of that directive, namely 30 June 1995, had passed, the competent Italian authorities drafted a series of laws and regulations which provide that the rights of producers of phonograms expire 50 years after the fixation is made and that the rights of performers correspondingly end 50 years after the date of the performance.

3. On the basis of that change in the law, Carosello sent Butterfly a letter of formal notice requiring it to refrain from further use of the sound recordings to which the original agreement of 1992 related; it relied on the revival of the related rights over those sound recordings which it considered had occurred by virtue of the amendment of national law which was being under-

* Original language: Greek.

1 — Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9).

taken and of the implementation of Directive 93/98.

4. Butterfly brought proceedings against Carosello before the Tribunale Ordinario, Milan, for a declaration, first, that its letter of formal notice was unlawful and, second, that Butterfly permanently retained the right to exploitation of the sound recordings in question and to phonographic reproduction of the CD 'Briciole di Baci'. Carosello contended that the application should be dismissed and counterclaimed for an order prohibiting Butterfly from exploiting in the future the aforementioned musical works, whose protection had to be considered to have revived after the change in the legislative regime governing copyright and related rights. Carosello's position was also adopted by the intervener, Federazione Industria Musicale Italiana (hereinafter 'FIMI').

5. The national court considers that it is clear from Article 10(3) of the directive that rights which had expired at the end of the 30-year period originally laid down by Italian Law revived following the extension of the term of protection under the directive. However, it expresses doubts as to whether the applicable national legislation is compatible with the provisions of the directive which refer to the need to protect acquired rights of third parties, a need created by the extension of protection from 30 to 50 years.

III — Question referred for a preliminary ruling

6. In view of the foregoing, the national court referred the following question to the Court for a preliminary ruling:

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

IV — Relevant Community legislation

7. Directive 93/98 has the objective of harmonising national legislation relating to the term of protection of copyright and certain related rights.

Article 3 of the directive provides:

'1. The rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

...'

8. The directive also broaches the question of the protection of acquired rights of third parties.

According to the 26th recital in its preamble:

'... Member States should remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the exploitation of protected works and other subject-matter which were concluded before the extension of the term of protection resulting from this directive'.

The 27th recital in its preamble states:

'... respect of acquired rights and legitimate expectations is part of the Community legal order;... Member States may provide in particular that in certain circumstances the copyright and related rights which are revived pursuant to this directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works lay within the public domain'.

In view of the above, Article 10 of the directive, which contains provisions relating to the application in time of the rights in question, states:

'1. Where a term of protection, which is longer than the corresponding term provided for by this directive, is already running in a Member State on the date referred to in Article 13(1), this directive shall not have the effect of shortening that term of protection in that Member State.

2. The terms of protection provided for in this directive shall apply to all works and subject-matter which are protected in at least one Member State, on the date referred to in Article 13(1), pursuant to national provisions on copyright or related rights or which meet the criteria for protection under Directive 92/100/EEC.

3. This directive *shall be without prejudice to any acts of exploitation performed before the date referred to in Article 13(1). Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties.* [2]

...'

9. Finally, Article 13(1) of the directive requires the Member States to bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 11 of the directive before 1 July 1995.

V — Relevant national provisions

10. The original Law governing copyright, Law No 633 of 22 April 1941, [3] has recently been amended, principally by the 'Community Law', that is to say Law No 52 of 6 February 1996 (hereinafter 'Law No 52/96'). [4] Law No 52/96 has in turn been amended by Law No 650 of 23 December 1996. [5]

11. Under Article 17(1) of Law No 52/96, the term of protection for the rights of phonograph producers and of performers was extended from 30 to 50 years.

12. Article 17(2), as amended by Law No 650 of 23 December 1996, expressly provides that the term of protection of 50 years also applies to works or rights whose protection had expired under the former legislative regime, but not under the new regime, on the relevant date of 29 June 1995.

13. In accordance with Article 17(4), the above provisions concerning the revival of protection of the rights in question are to apply without prejudice to instruments and contracts predating 29 June 1995 and to rights lawfully acquired and exercised by third parties thereunder. In particular, the Italian legislature draws a distinction as regards the protection of acquired rights according to the nature of the work in

2 — Emphasis added.

3 — GURI No 166 of 16 July 1941.

4 — GURI No 34 of 10 February 1996, ordinary supplement No 24.

5 — GURI No 300 of 23 December 1996.

respect of which rights revive. Article 17(4) is worded as follows:

'Instruments effected and contracts entered into before 29 June 1995 and, in derogation from Article 119(3) of Law No 633 of 22 April 1941, contracts entered into after 30 June 1990, together with rights lawfully acquired and exercised by third parties which arise under those instruments and contracts, shall be fully safeguarded and unaffected.

In particular, the following are not affected:

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

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

VI — Formulation of the question submitted

14. It should be noted at the outset that, as the Commission correctly points out in its observations, the question referred for a preliminary ruling in this case needs to be reformulated. The Court's jurisdiction under Article 177 of the Treaty does not extend to its answering the question put by the national court. More specifically, the latter raises directly whether the national provision is consistent with the corresponding Community legislation, an issue which cannot constitute the subject-matter of a reference for a preliminary ruling. I therefore consider that the proper approach is to reformulate the question submitted and proceed to examine whether Directive 93/98 and also Community law generally in relation to the protection of acquired rights of third parties and of legitimate expectations preclude a national rule which, for the protection of acquired rights of third parties against the revival of rights related to copyright which are over musical works, merely grants third parties the opportunity to dispose of their stocks for a period not exceeding three months

from the entry into force of the relevant national provision.

VII — Admissibility of the question submitted

15. Carosello raises the issue of admissibility and maintains that an answer to the question referred for a preliminary ruling will be of no benefit for the purpose of disposing of the main proceedings. It relies in that regard on the following points. First, the main proceedings are concerned with the interpretation of a contract concluded between Butterfly and Carosello on 16 July 1990 and interpretation of Directive 93/98 is not necessary for that purpose. Second, as is apparent from the order of the national court, Butterfly had already disposed of all its stocks of the CD 'Briciole di Baci' before the end of 1995; therefore, according to Carosello, the question referred for a preliminary ruling, which relates to the Italian legislative provisions under which third parties are given the opportunity to dispose of their stocks within a specified period, is clearly hypothetical. Third, Butterfly's claim in the main proceedings for a declaration that it is entitled to reissue the CD in question notwithstanding Carosello's refusal is irrelevant; since Butterfly did not apply for (nor was it possible for it to obtain) the relevant licence from the Società Italiana Autori e Editori (Italian Society of Authors and Publishers; 'SIAE'), a licence which is essential for reissuing the CD, the subject-matter of the main proceedings is without practical relevance.

16. I take the view that the above argument as to the question's inadmissibility cannot be accepted. It should be noted first of all that the scope for refusing to examine a question referred for a preliminary ruling on the ground of inadmissibility is particularly narrow. The Court has consistently held that '... it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court...'. [6] Consequently, where the questions submitted by the national court concern the interpretation of Community law, '... the Court of Justice is, in principle, bound to give a ruling'. [7] In exceptional circumstances, however, the Court has also taken the view that it fell to itself, in order to confirm its own jurisdiction, to examine the conditions in which the case had been referred to it by the national court. [8] Nevertheless, 'a request from a national court may be refused only where it is *manifest* that the interpretation of Community law sought by that court has no relation to the actual facts of the main action or its purpose or where the problem is hypothetical and the Court does not have before it the factual or legal material

6 — Case C-105/94 *Celestini* v *Saar-Sektkellerei Faber* [1997] ECR I-2971, paragraph 21. See also, *inter alia*, Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 15.

7 — See *Celestini*, cited in footnote 6 above, paragraph 21, and Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 59).

8 — For example, see Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 21, Case C-343/90 *Lourenço Dias* v *Director da Alfândega do Porto* [1992] ECR I-4673, Joined Cases C-320/90, C-321/90 and C-322/90 *Telemariscabruzzo and Others* v *Circostel and Others* [1993] ECR I-393 and *Celestini*, cited in footnote 6 above, paragraph 22.

necessary to give a useful answer to the questions submitted to it'.[9]

17. In my view, the manifest grounds[10] upon which the Community judicature may refuse to answer a question referred for a preliminary ruling are not present in the instant case. Nor is the Court entitled to go into the substance of the main proceedings in order to decide, first, whether they are rendered devoid of purpose simply because Butterfly does not have authorisation from the SIAE for the musical works at issue and, second, whether Community law is completely immaterial for the purpose of interpreting the contract between Carosello and Butterfly. On the other hand, if it is proposed that the view ultimately be taken that acquired rights of third parties are not sufficiently protected from the point of view of Community law where that protection is limited to the opportunity to dispose of existing stocks, the question arises as to whether Butterfly's claim in the main proceedings regarding its right to continue to exploit the sound recordings from which the CD 'Briciole di Baci' was produced without Carosello being able to assert related rights thereover is founded on Community law, as the plaintiff in the main proceedings submits. The Court must therefore concern itself with answering the question referred for a preliminary ruling.

VIII — Answer to the question submitted

18. In its observations, Butterfly seeks to promote an approach to the interpretation of Article 10(3) of the directive under which, first, Article 10(3) confers broad and unlimited protection on persons holding acquired rights over works in respect of which copyright or related rights are revived, second, that provision is sufficiently clear and unconditional to produce direct effects in national law, and third, national restrictions on acquired rights such as those in the Italian legislation at issue are incompatible with the above provision of the directive and are therefore not to be applied by the national court. Butterfly maintains that only the above approach is consistent with the fundamental principles of Community law regarding protection of acquired rights and of legitimate expectations.

19. Certain points in Butterfly's reasoning and the conclusion which it reaches are

9 — *Celestini*, cited in footnote 6 above, paragraph 22. See also the analytical approach to the issue in the Opinion of Advocate General Fennelly in that case (paragraph 19 et seq.).

10 — As to the need to make a finding of manifest inadmissibility, see also the recent judgments in Case C-472/93 *Spano and Others* v *Fiat Giotech and Fiat Hitachi* [1995] ECR I-4321, in Case C-2/96 *Sunino and Data* [1996] ECR I-1543 and in Case C-191/96 *Modesti* [1996] ECR I-3937.

disputed by Carosello, FIMI, the Italian Government and the Commission.

20. I will proceed to examine the relevant provisions of Directive 93/98 in order to establish, first, the breadth of the protection of acquired rights envisaged by them and, second, the extent of the discretion which they reserve for the Member States with regard to achieving that protection. I will then check whether the foundations laid by Directive 93/98 for safeguarding acquired rights are sufficient, having regard to general principles of Community law, in particular, the principles of the protection of acquired rights and of legitimate expectations. Finally — and only if it is considered necessary after completing the above stages of the analysis — I will deal with the issue of the direct effect of the second sentence of Article 10(3) of the directive.

21. Directive 93/98 forms part of the efforts of the Community legislature to harmonise rules in the field of protection of copyright and related rights.[11] Those efforts emerged at the beginning of the 1990s and are continuing up to this day.[12] The central idea behind those efforts is to strengthen the protection afforded to the rights in question, as is moreover required by the TRIPs Agreement[13] which was signed within the framework of the Uruguay Round of the GATT. The requirement for enhanced protection is expressly recognised by Directive 93/98; the tenth recital in its preamble stresses the need 'to harmonise copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation...'.

22. The position and the importance accorded to the rights in question is particularly useful in interpreting the directive: they make clear the will of the Community legislature to ensure the broadest possible protection of copyright and related rights. Thus, the provisions under which those rights are safeguarded must be interpreted broadly, while the provisions introducing

11 — As far back as the judgment in Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487, the Court had stated that the protection of industrial and commercial property rights was a matter with which Community law was concerned since it was expressly referred to in Article 36 of the EEC Treaty.

12 — In 1989 the Court had found that '... in the present state of Community law, which is characterised by a lack of harmonisation or approximation of legislation governing the protection of literary and artistic property, it is for the national legislatures to determine the conditions and detailed rules for such protection' (Case 341/87 *EMI Electrola* v *Patricia Im- und Export and Others* [1989] ECR 79, paragraph 11). That gap was subsequently filled by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42); Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61); Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15; Directive 93/98; and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

13 — Agreement on Trade-Related Aspects of Intellectual Property Rights.

exceptions to the protective regime should be interpreted restrictively.

23. The above conclusion is also borne out by what happened in the procedure leading to the adoption of the directive. The initial draft merely contained the provision under which application of the directive is not to have the effect of shortening a longer term of protection which may be laid down under the law of certain Member States; in other words, it cannot have the effect of restricting copyright and related rights which have already been secured on the basis of the national provisions in force. The initial draft did not, however, expressly provide that rights which had already expired under national law before the entry into force of the directive could revive. The European Parliament sought its amendment, raising the issues of, on the one hand, the revival of rights whose protection had already expired under national law and, on the other, the safeguarding of acquired rights of third parties.

24. For the purpose, in particular, of protecting acquired rights of third parties, the European Parliament called on the Commission to add to the text of the directive provisions under which, first, the new Community rules on the protection of copyright and related rights were to apply without affecting lawful acts of exploitation of works which had taken place before a specified date, second, holders of copyright and related rights could not object to the continuation of acts of exploitation of works which were directly linked to investments made in good faith before the entry into force of the Community provisions, and third, the Member States had to make provision for appropriate financial compensation to be paid to holders of copyright and related rights in respect of the abovementioned acts of exploitation which continued after the date of entry into force of the Community provisions.

25. A comparison of the Parliament's proposals and the directive in its final form gives rise to the following conclusions:

First, provision is made for the revival of copyright and related rights which had expired under the national legislation applicable before the entry into force of the Community directive.[14] It is to be noted that the solution involving revival of rights is consistent with the general principle according to which rules of law are applicable *ex nunc*. More specifically, when a provision lays down that a right

14 — The solution of revival of rights was necessary in order to achieve in the shortest possible time the harmonisation of national laws concerning the term of protection of copyright and related rights. Without such revival, copyright and related rights in respect of works predating the directive would, for a period at least, be protected in one Member State (which provides for a long term of protection) while having expired in another Member State. That possibility would without doubt have negative consequences for inter-State trade.

expires 50 or 70 years after the event which causes its protection under the law to begin and this period has still not expired when the provision in question enters into force, that right must in principle be considered to be extant. The revival of copyright and related rights under the directive does not amount to the retroactive application of the latter giving rise, from the point of view of its temporal application, to doubts as to its compatibility with general principles of law. [15]

Second, provision is made to safeguard acquired rights of third parties, in accordance likewise with general principles of Community law but not precisely in the way put forward by the Parliament; while an express reservation was added regarding the directive's field of application in respect of acts of exploitation performed before 1 July 1995 — the date on which, as already mentioned, the national measures necessary for transposition of the directive had to be adopted — no particular approach is specified (or imposed) as regards how the rights of third parties are to be protected when acts of exploitation are performed *after* the above date. All that is imposed is a general and imprecise obligation on the Member States to 'adopt the necessary provisions to protect in particular acquired rights of third parties'; it may be concluded, on interpreting this obligation, that that category of persons must not be left entirely unprotected the day after the directive is transposed into national law. Furthermore, in the context of the need to respect acquired rights and legitimate expectations, the 27th recital in the preamble to the directive merely states that *the Member States may, and not that they must*, '... provide... that *in certain circumstances* [16] the copyright and related rights which are revived pursuant to this directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works lay within the public domain'. Thus, no specific right is laid down

15 — As I also pointed out in my Opinion in Case C-321/97 *Andersson* v *Svenska Staten (Swedish State)* [1999] ECR I-3551, at point 57, there must be no confusion between the retroactive effect and the immediate effect of a rule of law. In order to distinguish between them, regard must be had to the temporal aspects of the situations governed by the rule. Retroactive effect consists in the application of the rule to situations which were *permanently fixed* before that rule came into force. Immediate effect, which, in principle, works likewise according to the principle *tempus regit actum*, consists in applying the rule to situations which are still ongoing. This means that the temporal scope of a rule also includes the future effects of ongoing situations which were created but were not permanently fixed before the rule entered into force. Such an ongoing, not permanently fixed, situation is created when a work which previously entered the public domain begins and continues to be exploited. In other words, third parties acting in good faith are unable to claim that there is a permanently fixed legal situation merely because they are exploiting a work. By contrast, if the exploitation had been completed before Directive 93/98 first applied, I consider that there would be a permanently fixed situation of that kind, whose reversal would amount to retroactive application of the subsequent rule of law.
In short, the situation of third parties acting in good faith may be considered to be permanently fixed only where they have not merely begun to produce and exploit a CD but have also sold the pressed copies in the market. It is only if the directive had provided that the revival of related rights extended to requiring third parties acting in good faith to pay for CDs which they had pressed, released and *sold* before 1 July 1995 that the issue of retroactive application contrary to general principles of law would have arisen. That issue does not arise in the present case since it follows from both the letter and the spirit of the directive that the revival of related rights does not also cover products which were sold before the expiry of the time-limit laid down by the Community legislation.

16 — Emphasis added.

enabling third parties acting in good faith to continue after 1 July 1995 as well, even on payment of an appropriate fee (let alone without payment of a fee), the exploitation of a work which they had begun before that date.

26. In my view, the above considerations clearly show the will of the Community legislature to protect acquired rights while none the less conferring a wide discretion on the competent national authorities; the latter moreover are, by their nature and position, the best suited for achieving the golden mean between the opposing rights of the creator, the producer or the interpreter, on the one hand, and third parties acting in good faith, on the other. Nor does there appear to be any foundation for Butterfly's assertion that its right, as a third party acting in good faith, to continue the exploitation of Mina's songs even after 1 July 1995 may be derived directly from Article 10 of Directive 93/98. The Member States are, in principle, given the power to legislate with regard to situations created by the revival of related rights under the directive after 1 July 1995 and to the protection which must be guaranteed to third parties. It is only if the national measures were to be regarded as conferring such inadequate protection on third parties that they fell beyond the discretion available to the Member State that the question would arise of examining Article 10(3) of the directive in order to establish whether it has direct effect and whether it may be relied on by persons such as Butterfly, for the purpose of the continued exploitation of works which lay within the public domain before 1 July 1995.

27. So far as concerns review of the discretion which has been conferred on the Member States to settle how acquired rights of third parties are safeguarded, it should be noted that that discretion is particularly wide, as is apparent from the following observations. First, Article 10(2) of the directive is worded in the most general manner possible. Second, that general formulation was preferred notwithstanding the Parliament's proposal referred to above which laid down, albeit partially, specific forms of protection for third parties. Third, the mere fact that the national provisions in question are adopted to implement Community legislation which is in the form of a directive is sufficient to demonstrate the extent of the freedom enjoyed by the competent national bodies. The latter are bound by Article 189 of the Treaty as regards achieving the objective pursued by the directive, but retain the

power to choose the specific methods with which that objective is realised.

28. The above points do not mean, of course, that legislative action by the Member States under Article 10(3) of the directive is not subject to review. Furthermore, as the Court had already pointed out before the Community legislation at issue was enacted, '... 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... those rights, although governed by national legislation, are subject to the requirements of the Treaty and therefore fall within its scope of application'.[17] National protection conferred on copyright and related rights therefore could not be so absolute that it affected other rights and interests which Community law considers worthy of protection, such as acquired rights of third parties in the present case.

29. However, as the Commission rightly points out, national legislation which merely, and indeed for a restricted period, grants third parties the opportunity to dispose of stocks resulting from the exploitation of a work which had been in the public domain before 1 July 1995 does not appear to be insufficient for the purposes of the directive, as I will now explain.

30. So far as concerns the present dispute, it should be noted first of all that the period within which stocks had to be disposed of under the Italian legislation at issue was three months from its entry into force. In other words, the period expired three months after 25 February 1996, that is to say on 26 May 1996. That observation is interesting inasmuch as the revival of copyright and related rights brought about by the incorporation of the directive into the national law of the Member States had already taken place on 29 June 1995. Implementation of the Italian legislation at issue therefore had the effect, where works had begun to be exploited before 1 July 1995, of guaranteeing holders of acquired rights the opportunity to dispose of their stocks for a period slightly in excess of 11 months from the time when copyright and related rights revived.[18] In that way, traders who exploited works that had fallen into the public domain before 1 July 1995 gained the opportunity, through the disposal of their copies within an appropriate period, to earn the profits from that exploitation without having to pay fees to

17 — Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145.

18 — To be precise, third parties were granted the opportunity to continue to press and sell CDs from 1 July 1995 until 25 February 1996 and freely to dispose of the copies pressed from 25 February 1996 until 26 May 1996.

the holders of rights which revived under the directive.

31. The three-month period laid down by the Italian Law, which amounted in practice to a period of 11 months from the date on which copyright and related rights revived under the directive, appears in principle to be sufficient to safeguard the economic interests of third parties acting in good faith, as the Italian Government explains in its observations. [19] In any event, it is not manifestly inadequate and disproportionately restrictive *vis-à-vis* those parties, who moreover must be considered to have known from 29 January 1993, the date on which the directive was published in the Official Journal, that the revival of related rights had been set for 1 July 1995 at the latest. Nor is it for the Court to take the place of the national legislature and seek a more satisfactory system for balancing the opposing interests which would also take other parameters into account, such as the size of the investment made by the third party acting in good faith, special circumstances and the extent of the exploitation which took place during the period when the work in question lay in the public domain, or even the particular nature of the exploited work. Since the Community legislature preferred to confer discretion on the Member States in relation to those issues, the leeway available to the Court when interpreting Article 10(3) of the directive is particularly restricted.

32. Furthermore, the fact that, as may be gathered from the comparative analysis relied on by Butterfly, the Italian legislature appears to have treated third party producers more harshly than they were treated by the competent bodies of the other Member States, of course does not mean that it acted beyond the powers conferred on it by Article 10(3) of the directive.

33. In that regard, Butterfly's argument that the Italian legislature treated holders of acquired rights in respect of phonograms unfavourably compared with persons exploiting literary works is not of assistance in resolving the problem of interpretation before the Court. The national legislation at issue is, indeed, manifestly favourable for third parties who had begun to exploit literary works which lay in the

19 — The Italian Government states in its observations that, before the adoption of the legislation at issue, account was taken of the normal costs to which producers of phonograms are subject, the amount of their investment and the potential profit. In particular, it was found that production costs are especially low in the case of works in the public domain; they amount in practice to the expenditure on actual reproduction (manufacture of the CD). In order to absorb that expenditure, it is therefore sufficient to grant the opportunity for stocks to be disposed of for a limited period after the revival of the related rights coupled with a dispensation from the obligation to pay a fee to the holder of those rights.

public domain before the date for transposition of the directive and in respect of which copyright has now revived; those traders may freely continue to exploit the work in question (distribution, reissue and, if required, updating without temporal restriction). However, the above treatment of literary works of course does not mean that the national authorities are obliged to accord equivalent treatment to musical works and to acquired rights of third parties acting in good faith in relation to such works. If the treatment reserved for the latter, despite being clearly unfavourable compared with that accorded to third parties who continue to exploit literary works, does not go beyond the limits of the discretion which the national authorities enjoy under the directive, there can be no question of an infringement of Community law. [20]

34. A subsidiary point which may usefully be made is that it is not self-evident, as Butterfly mistakenly appears to think, that the provisions of the Italian legislation relating to the fate of acquired rights of third parties in respect of literary works where copyright revives are consistent with the spirit of the directive. That issue is not raised directly by the national court and has not been the subject of detailed analysis by the parties which submitted observations. For that reason, I consider it preferable for the Court not to examine the issue, in particular as it is not, in my view, essential in order to answer the question submitted to the Court. However, if the Court is of a different view, I consider that it should be found that the effect of such extended — in effect unlimited — protection of the interests of third parties is to completely undermine copyright and related rights, which the Community legislature seeks to safeguard, and is therefore contrary to the directive. Butterfly thus cannot claim that it should be accorded like treatment, as the provisions relating to literary works, unlike those relating to musical works, are unlawful.

35. In the final analysis — and this is the most important argument supporting the positions of Carosello, FIMI, the Italian Government and the Commission — the power which is conferred on the Member States by the relevant provision of the directive relates to the adoption of *transitional provisions* which, *by their nature*, must be as narrow as possible, since they are equivalent to exceptions inserted into the general system for the protection of related rights which is created by the rules of the directive. In other words, when the national authorities are called on to give effect to the requirement in Article 10(3) of the directive to protect acquired rights of third parties, they must have in mind that

20 — In addition, it may be argued that the third parties who in good faith exploited a musical work which had been in the public domain are not in the same situation as those exploiting a literary work in respect of which copyright protection expired. It is therefore not possible to require, on the basis of general principles for the interpretation of the law, that different situations be treated in the same way.

that protection is by way of exception; the scope of the protection afforded to copyright and related rights, the safeguarding of which constitutes the directive's central and principal objective, must be restricted as little as possible.

36. Nor can the outcome of the preceding analysis as to the interpretation of Directive 93/98 be called into question by relying on general principles of Community law, in particular those concerning the protection of acquired rights of third parties and of legitimate expectations. So far as concerns the concept of acquired rights, while the Court has recognised that they are protected by Community law,[21] it has never been held — nor, moreover, could it be — that the safeguarding of those rights by the insertion of transitional provisions in Community legislation can result in the reversal of the general system set up by that legislation and nullify the rights and legitimate interests which it seeks, first and foremost, to protect. Similarly, the Court has consistently held that the principle of the protection of legitimate expectations '... cannot... be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules'.[22] The Court is expressing the same view when it holds that 'traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained'.[23]

37. Consequently, I do not consider that there can be a legal basis in Community law enabling traders who are in the same position as Butterfly — that is to say traders who have begun to exploit a work in respect of which the related rights had expired and wish to continue that exploitation after the revival of those rights by virtue of the transposition of Directive 93/98 into national law — to claim protection that is in any way fuller than that provided for by the Italian legislation at issue.[24] In the light of that finding, it is unnecessary to examine whether Article 10(3) of the directive displays the legal characteristics necessary for it to produce direct effects in national law.

21 — Case 159/82 *Verli-Wallace* v *Commission* [1983] ECR 2711.

22 — Case C-221/88 *ECSC* v *Busseni* [1990] ECR I-495, paragraph 35. See also Case 278/84 *Germany* v *Commission* [1987] ECR 1, Case 68/69 *Bundesknappschaft* v *Brock* [1970] ECR 171 and Case 270/84 *Licata* v *ESC* [1986] ECR 2305.

23 — Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33; see also Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 27 and Joined Cases 424/85 and 425/85 *Frico and Others* v *Voedselvoorzienings In- en Verkoopbureau* [1987] ECR 2755, paragraph 33.

24 — While the national legislature might be able to grant them fuller protection, it is under no obligation to do so.

IX — Conclusion

38. In view of the foregoing, I propose that the Court should answer the question referred to it for a preliminary ruling as follows:

Article 10(3) of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, and Community law generally, do not preclude a national rule which, for the protection of acquired rights of third parties against the revival, provided for by the directive, of such related rights over musical works, merely grants third parties the opportunity to dispose of their stocks for a period not exceeding three months from the entry into force of the relevant national provision.