Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 31 May 2016 [1]

Case C-169/15

Montis Design BV
v
Goossens Meubelen BV
(Request for a preliminary ruling

from the Benelux Gerechtshof (Benelux Court of Justice)

(Copyright and related rights — Term of protection — Extinguishment and revival of copyright)

1. In the proceedings between the undertakings Montis Design BV and Goossens Meubelen BV ('Montis' and 'Goossens'), the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred [2] to the Benelux Gerechtshof (Benelux Court of Justice) a question of interpretation relating to the application of Article U(2) of the Protocol ('the Protocol') [3] amending the Uniform Benelux Law on Designs and Models ('the BTMW') which repealed Article 21 of that law.

2. The Benelux Gerechtshof (Benelux Court of Justice), before responding to the question submitted to it by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), has referred three preliminary questions to the Court of Justice for a preliminary ruling, taking the view that the outcome of the proceedings before it depended upon the proper interpretation of Directive 93/98/EEC. [4]

3. The dispute centres on Article 21(3) of the BTMW, under which the proprietors of copyright in respect of models and designs, ensuring the protection thereof, forfeited their copyright if they did not make a 'maintenance declaration'. The immediate consequence of failure to fulfil that formality was that those rights passed into the public domain.

4. Criticisms of the Law and its incompatibility, in that regard, with the Berne Convention [5] prompted the Benelux legislature in 2002 to repeal Article 21(3) of the BTMW. The repealing protocol, however, did not lay down transitional rules or clarify what would happen to the copyright extinguished as a result of application of the BTMW.

1 — Original language: Spanish.

2 — The decision of 13 December 2013 to seek a preliminary ruling was adopted in accordance with Article 6 of the Treaty of 31 March 1965 on the establishment and the statute of a Benelux Court of Justice.

3 — Protocol houdende wijziging van de Eenvormige Beneluxwet inzake tekeningen of modellen, signed in Brussels on 20 June 2002.

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

5 — Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention').

5. In the meantime, Directive 93/98 had harmonised the term of copyright in all Member States, extending the protection period to 70 years following the death of the author, without any need for the proprietors thereof to submit 'maintenance declarations' or similar documents. Directive 93/98 also provided for the revival, in certain circumstances, of the validity of copyright which had entered the public domain.

6. The referring court asks the Court of Justice, essentially, to clarify the effect of Directive 93/98 on the proceedings before it. In particular, it wishes to ascertain whether, under that directive, a copyright that has been extinguished (because of non-fulfilment of the formal requirement laid down by the BTMW) must be re-established and, if so, from what date.

I – Legislative background

A – *EU law*

7. The harmonisation of the laws of the Member States on intellectual property has been achieved mainly through Directive 93/98, which was subsequently amended [6] and then repealed by Directive 2006/116/EC,[7] which codifies the earlier versions.

8. Since the material facts date back to a time when Directive 93/98 was still in force and, in addition, the directive at present in force has left unchanged the content of the articles that are of interest here, the relevant provisions of the Directive are transcribed below.

9. Recital 11 reads:

'… in order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonised at 70 years after the death of the author or 70 years after the work is lawfully made available to the public …'.

10. Recital 27 reads:

'… 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.'

11. According to Article 1(1):

'The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his/her death, irrespective of the date when the work is lawfully made available to the public.'

6 — In particular by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

7 — Directive of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12).

12. Article 10, under the heading ‘Application in time’, states in paragraphs 2 and 3:

‘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. [[8]]

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.’

13. According to the first subparagraph of Article 13(1):

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 11 of this directive before 1 July 1995.’

14. Harmonisation in respect of designs and models was achieved by Directive 98/71/EC, [9] Article 17 of which governs the relationship between those industrial property rights and copyright (the ‘principle of cumulation’) [10] in the following terms:

‘A design protected by a design right registered in or in respect of a Member State in accordance with this directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.’

B – *The Berne Convention*

15. Although the European Union is not party to the Berne Convention, it is indirectly linked to it through the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’) contained in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, to which it is in fact a party. [11]

16. Paragraph 9(1) of TRIPS provides:

‘Members shall comply with Articles 1 [to] 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6 *bis* of that Convention or of the rights derived therefrom.’

8 — Council Directive 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), amended by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 (OJ 2006 L 376, p. 28).

9 — Directive of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28).

10 — See the eighth recital of Directive 98/71.

11 — Approved by the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

17. Article 5(2) of the Berne Convention provides:

'The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.'

C – *Benelux law*

18. According to Article 12 of the BTMW,[12] registration of a design or model is valid for five years, as from the date of the application.

19. Article 21(1) of the BTMW provided (before being repealed) that a design or model of outstanding artistic character might be protected in turn by that law and by the copyright laws, if the conditions for the application of both were fulfilled.

20. Under Article 21(3) of the BTMW (again, before being repealed), cancellation of the registration of a design or model of outstanding artistic character or extinguishment of the exclusive right deriving from such registration gave rise to simultaneous extinguishment of copyright in respect of that design or model, provided that the rights belonged to the same proprietor; extinguishment would not, however, occur if the proprietor of the design or model submitted, under Article 24,[13] a special declaration in order to maintain his copyright.[14]

21. After the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) held that provision to be contrary to Article 5(2) of the Berne Convention, Article U of the Protocol repealed Articles 21 and 24 of the BTMW.[15]

22. The Protocol entered into force on 1 December 2003 and contained neither transitional rules nor any indication as to whether the repeal effected by it might have retroactive effect.

II – Facts underlying the dispute and the questions referred to the Court

23. The Benelux Gerechtshof (Benelux Court of Justice) repeated, in its decision, the account of the facts of the dispute given by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which I shall adopt.

24. The Montis company has been manufacturing furniture in the Netherlands since 1974. Since 1983 it has marketed an armchair known as Charly, designed by Gerard van den Berg. In 1987, inspired by that armchair, the latter also designed the Chaplin dining chair, which was also offered for sale.

25. On 19 April 1988 Mr van den Berg applied for international registration of, among others, a design (No DM/010786) for the Charly armchair and the Chaplin chair, indicating that Montis was the proprietor of the design and Gerard van den Berg was its designer.

12 — *Tractatenblad*, No 1966, p. 13.

13 — According to Article 24, the declaration provided for in Article 21 was to be made, together with payment of the appropriate charge, during the year preceding extinguishment of the exclusive right in respect of the design or model.

14 — According to the Joint Commentary of the Governments of the Benelux Countries on the requirement of a maintenance declaration (referred to by Advocate General Timmerman in point 3.6 of his Opinion delivered to the Benelux Gerechtshof (Benelux Court of Justice), '… it seemed essential to penalise the absence of such a declaration with a sufficient degree of severity; undeclared copyright came to an end at the same time as rights in respect of the design with which it was associated'.

15 — See footnote 3.

26. In 1990 Gerard van den Berg assigned to Montis his copyright in respect of both chairs.

27. At the end of the five-year registration period for the models (that is to say, in 1993), Montis had not submitted the maintenance declaration provided for in (the old) Article 21(3) of the BTMW. Under that provision, on 18 April 1993 the copyright and rights in respect of the design, vested in Montis, were extinguished.

28. In 2008 Montis commenced proceedings against Goossens, taking the view that the Beat chair, offered for sale by the latter in its furniture shops, infringed its copyright in respect of the Charly and Chaplin chairs. Goossens objected that the absence of a maintenance declaration, within the meaning of (the old) Article 21(3) of the BTMW, meant that the copyright had expired.

29. Montis replied that its copyright had been re-established by reason of the repeal, on 1 December 2003, of (the old) Article 21(3) of the BTMW. In its view, the repeal was retroactive. It also contended, in the alternative, that its rights had been retroactively restored on 1 July 1995, that is to say on the date set by Article 10(2), in conjunction with Article 13(1), of Directive 93/98.

30. After being partially unsuccessful at first instance and on appeal, Montis filed an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which stayed its proceedings until the Benelux Gerechtshof (Benelux Court of Justice) had given a ruling on the two questions on the interpretation of (the old) Article 21(3) of the BTMW which it had submitted to that court.

31. Since, according to the Benelux Gerechtshof (Benelux Court of Justice), the answer it is to give depends upon an interpretation of EU law (in particular, of Article 10 in conjunction with Article 13(1) of Directive 93/98), that court in turn sought from the Court of Justice of the European Union a preliminary ruling on the following questions:

‘(1) Is the term of protection referred to in Article 10, in conjunction with Article 13(1), of [Directive 93/98] applicable to rights of copyright that were originally protected by national copyright law but which lapsed before 1 July 1995 on the ground that a formal condition had not been satisfied (in due time), more specifically because a maintenance declaration, as referred to in Article 21(3) of the Uniform Benelux Law on Designs and Models (old version), had not been filed (in due time)?

(2) If the answer to Question 1 is in the affirmative:

Must the Term of [Directive 93/98] be construed as precluding a rule of national legislation under which the copyright in a work of applied art that lapsed before 1 July 1995 on the ground that a formal condition had not been satisfied is deemed to have lapsed permanently?

(3) If the answer to Question 2 is in the affirmative:

If, under national legislation, the copyright in question is to be considered to revive or to be revived at a certain time, from what date does such revival occur?’

III – Procedure before the Court of Justice and observations of the parties

A – *Procedure*

32. The order for reference was received at the Court Registry on 13 April 2015.

33. The parties to the main proceedings, the Government of Portugal and the European Commission submitted written observations within the period laid down in the second paragraph of Article 23 of the Statute of the Court of Justice.

34. At the hearing on 10 March 2016, representatives of Montis, Goossens and the European Commission presented oral argument.

B – *Summary of the observations submitted*

35. According to Montis, the questions submitted by the Benelux Gerechtshof (Benelux Court of Justice) must be extended to Article 17 of Directive 98/71 and answered to the effect that that article is inimical to the old Article 21(3) of the BTMW, with the result that the copyright revived on 17 November 1998 (that is to say, on the date of entry into force of Directive 98/71).

36. In the alternative, Montis proposes that the contested article of the BTMW is ineffective, being contrary to Article 7(4), in conjunction with Article 5(2), of the Berne Convention, for which reason its copyright did not expire on 19 April 1993. And, in the further alternative, it contends that the obligations under the Berne Convention are supported by the 'national provisions' of Article 10(2) of Directive 93/98. On that basis, it infers that the copyright revived on 1 July 1995, the final date for transposition of that directive into national legislation.

37. Goossens considers, essentially, that, as at 1 July 1995, no copyright protected in the Union in respect of the Charly and Chaplin chairs existed any longer, so that it was impossible for it to be revived as a result of Directive 93/98. It also contends that the case-law of the Court of Justice (in particular the judgments in *Sony Music Entertainment* [16] and *Butterfly Music* [17]) is not relevant to the decision to be given in this case, since those cases concern circumstances in which the disputed rights were protected in another Member State of the European Union, and their extinguishment is attributable to expiry of the protection period and not, as in this case, to non-fulfilment of a formal requirement.

38. Goossens also considers, in relation to the *Flos* [18] judgment, that harmonisation of the protection period does not extend to the arrangements for the exercise thereof, for which reason Directive 93/98 is not inimical to (the old) Article 21(3) of the BTMW.

39. At most, in Goossens's opinion, revival of copyright in respect of the Charly and Chaplin chairs would have taken place on 1 December 2003, that is to say, on the day on which Article 21 of the BTMW was repealed. The requirement of legal certainty prevents 1 July 1995 from being taken as the date of revival of such rights. It therefore suggests that the first preliminary question be answered in the negative, as a result of which it is unnecessary to give a ruling on the other two.

40. The Portuguese Government considers that the principle of revival of copyright is contrary to the objectives of Directive 93/98, but, in case the Court of Justice should not accept that thesis, it considers that the revival of extinguished copyright occurs, under that directive, regardless of the reason for its extinguishment, particularly if it was contrary to the Berne Convention. Therefore, it suggests that the answer to the third question should be that the date of revival of Montis's copyright is 1 July 1995.

16 — Judgment of 20 January 2009 (C-240/07, EU:C:2009:19).

17 — Judgment of 29 June 1999 (C-60/98, EU:C:1999:333).

18 — Judgment of 27 January 2011 (C-168/09, EU:C:2011:29).

41. The Commission takes a different view from the referring court, which confines the revival of copyright to those cases in which the protection period had expired under the national law in force prior to the adoption of the directive (provided that it was less than the period prescribed by the latter, namely 70 years). For the Commission, the case-law indicates that the reason for extinguishment of copyright is entirely irrelevant, and therefore Directive 93/98 also applies when copyright has been extinguished for failure to fulfil a formal requirement.

42. The Commission considers that the Benelux Gerechtshof (Benelux Court of Justice) is wrong to determine the existence of copyright exclusively on the basis of national law, as being the law governing its term before the entry into force of the directive. In its opinion, Article 10(2) of the directive offers two options for the revival of copyright in respect of the Charly and Chaplin chairs: either Montis proves the validity of that copyright in any Member State as at 1 July 1995 or else it could take advantage of the protection offered by Directive 92/100.

43. In any event, the Commission draws attention to the conflict with the Berne Convention of (the old) Article 21(3) of the BTMW and considers that to uphold the extinguishment (of copyright) deriving from the failure to make the declaration prescribed by that article of the BTMW is incompatible not only with the objectives of Directive 93/98 but also with the fundamental right to property, enshrined in Article 17 of the Charter of Fundamental Rights of the Union ('the Charter'), which extends to intellectual property. In short, it suggests that it be stated in reply to the referring court that Directive 93/98 applies, as from 1 July 1995, to copyright such as the copyright at issue in this case, which was extinguished for failure to fulfil a formal requirement.

IV – Analysis of the questions submitted

A – *Preliminary observations*

44. First, I shall deal with Montis's[19] request, which, in my opinion, should not be acceded to, that consideration of the questions referred for a preliminary ruling should be extended to include an analysis of Article 17 of Directive 98/71.

45. Although it is well known, I would point out that the procedure under Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Union law which they need in order to decide the disputes before them.[20] The Court of Justice has stated that its dialogue with the national courts is conducted by way of a non-contentious procedure excluding any initiative of the parties, who are merely invited to be heard in the course of that procedure. Since the right to determine the questions devolves upon the national court alone, the parties may not change the tenor of the questions.[21]

46. The Benelux Gerechtshof (Benelux Court of Justice) has not received any question from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) relating to Article 17 of Directive 98/71,[22] and that court makes no reference to that directive in its questions, and the same applies to the other parties to the proceedings. Even though, theoretically, the Court of Justice may reformulate the questions addressed to it, in order to give the referring court further guidance, I do not believe that

19 — See point 35 above.

20 — See judgment of 15 September 2011, *Unió de Pagesos de Catalunya* (C-197/10, EU:C:2011:590, paragraph 16 and the case-law cited).

21 — See judgment of 6 July 2000, *ATB and Others* (C-402/98, EU:C:2000:366, paragraph 29 and the case-law cited).

22 — Nevertheless, Montis asserts in its observations (page 2, paragraph 5) that in a document of 21 February 2014, sent to the Benelux Gerechtshof (Benelux Court of Justice), it claimed reinstatement of its copyright, on the basis of Article 17 of Directive 98/71.

Montis's request can be granted, because there is insufficient information available in these proceedings to give an answer in relation to Article 17 of Directive 98/71. Consequently, I propose that the discussion should not be extended beyond the scope of the questions referred for a preliminary ruling.

47. My second observation concerns Montis's copyright in respect of the chairs, the existence of which, as such, is not at issue in the main proceedings. Although there is discussion of the revival of copyright under Directive 93/98, none of the parties — nor the referring court — has cast any doubt on the fact that the Charly armchair and the Chaplin dining chair fulfilled the characteristics for protection both under the rules on designs and models and under those protecting copyright, in accordance with the principle of cumulation included in the Benelux legislation and in Article 17 of Directive 98/71.

48. This second observation is of some importance because, in more general terms, it is difficult to identify when an object (in this case, an armchair or a dining chair) can be classified as an 'artistic work' which is capable, by virtue of its individual characteristics, of benefiting from the protection inherent in copyright. It will not be necessary to go into this issue (which, moreover, is very dependent on factual assessments as to the originality and the degree of creativity exhibited by each item, as against its functional requirements), because, I repeat, in the proceedings before the national court no doubt has been expressed about the fact that the Charly armchair and the Chaplin dining chair are covered by copyright. I should point out that Article 17 of Directive 98/71 confers on Members States the power to decide 'the extent to which, and the conditions under which, such a protection is conferred, including the level of originality required', if their legislation gives protection inherent in copyright to designs and models.

49. My third observation concerns the way in which the referring court has formulated its questions. For reasons I shall give shortly, I do not believe that the answer to the second question necessarily depends on an affirmative answer to the first.

50. Without, therefore, accepting the alleged interdependence in the terms in which it has been described, I shall start by analysing the applicability of Directive 93/98 to the present case, for which reason it is necessary to interpret Article 10(2). This examination will provide a basis for then deciding on the compatibility with Directive 93/98 of the disputed formal requirement (the maintenance declaration under the old Article 21 of the BTMW). Finally, it will be necessary to clarify, if appropriate, the time at which the copyright at issue in the main proceedings revives.

B – *The interpretation of Article 10(2) of Directive 93/98 and its application to the present dispute*

1. General remarks

51. It is clear from the 11th recital to Directive 93/98 [23] that the Union legislature harmonised the term of copyright, and that of certain related rights, in order to achieve a high level of protection, responding both to the demands of the internal market and to the creation of a legal environment conducive to literary and artistic creativity in the Union.

23 — See point 9 of this Opinion.

52. Thus, the periods of validity, equal throughout the Union, are laid down as the lifetime of the author plus 70 years *post mortem auctoris* (*p.m.a.*), both for literary and artistic works and for cinematographic or audiovisual works,[24] and 50 years from the date of presentation or performance for artists or performers, or from the date of recording, for the producers of phonograms.[25]

53. So far as concerns the calculation of those periods, Article 8 of Directive 93/98 provided that they would commence from 1 January of the year following the event giving rise to the copyright or related right.

54. In this context, and pursuing the same aim of harmonising protection periods, Article 10(2) of Directive 93/98 introduced a rule which reinstated copyright in Member States where it had passed into the public domain, in two alternative situations: (a) where at 1 July 1995[26] protection continued in at least one Member State; or (b) where the subject matter fulfilled the criteria for protection under Directive 92/100.

55. The underlying idea was, essentially, that the revival[27] of copyright in those Member States where it did not continue to be protected should unify the protection period for the time needed to achieve the maximum set by Directive 93/98. This would avoid the distortions that disparate periods would create regarding the free movement of goods, the freedom to provide services and competition.[28]

56. Whilst the first alternative requirement (that is to say, continuing protection in at least one Member State before 1 July 1995) has already been examined by the Court of Justice, as I shall explain below, the same is not true of the second. And, indeed, it is not easy to ascertain when a work fulfils 'the criteria for protection under Directive 92/100/EEC'.

2. The first alternative requirement

57. In the judgment in *Butterfly Music*[29] an interpretation was given for the first time of Article 10 of Directive 93/98 and, in particular, of paragraph 2 thereof.[30] The Court of Justice emphasised that, under that paragraph, the application of the prescribed protection periods could entail the result, in those Member States whose legislation provided for a shorter protection period, that works or subject matter that had entered the public domain would again be protected.

58. The Court of Justice recognised, at the same time, that that consequence resulted from the express will of the Community legislature,[31] confirming that the aim was to achieve as rapidly as possible the harmonisation of the national laws governing the terms of protection of copyright and related rights[32] and to avoid a situation where rights have expired in some Member States but are protected in others.[33]

24 — Article 1(1) and Article 2(1), respectively, of Directive 93/98.

25 — Article 3(1) and (2), respectively, of Directive 93/98.

26 — That date derives from Article 13(1) of Directive 93/98.

27 — The terms re-establishment, restoration, renewal or revival of the right are used without distinction to describe the same legal phenomenon.

28 — See the third recital of Directive 2006/116, cited in footnote 7. The distortions are not purely hypothetical, as had been demonstrated by the judgment of 24 January 1989, *EMI Electrola* v *Patricia Im- und Export and Others* (341/87, EU:C:1989:30).

29 — Judgment of 29 June 1999 (C-60/98, EU:C:1999:333).

30 — The question from the national court referred to the acquired rights of third parties, that is to say those referred to in paragraph 3.

31 — It inferred the existence of that will by comparing the Commission's initial proposal (according to which its provisions would apply to 'rights which have not expired on or before 31 December 1994') with the amendments incorporated by the European Parliament in the new wording which, essentially, were taken up in the final version of Directive 93/98. See paragraphs 18 and 19 of the judgment of 29 June 1999 in *Butterfly Music* (C-60/98, EU:C:1999:333).

32 — An aim mentioned in the second recital of Directive 93/98.

33 — Judgment of 29 June 1999, *Butterfly Music* (C-60/98, EU:C:1999:333, paragraph 20).

59. That interpretation was clarified in the *Sony Music Entertainment* judgment, where it was held that the first alternative requirement under Article 10(2) of Directive 93/98 implied the prior existence of protection for the subject matter at issue in at least one Member State, although not necessarily the one in which the protection was sought.[34] The Court of Justice added that the harmonised term of protection was also applicable where the subject matter at issue had at no time been protected in the Member State in which the protection was sought.[35]

60. Finally, in its judgment in *Flos*,[36] the Court of Justice recognised, first, the principle of cumulation of protection for copyright and for designs and models,[37] and then denied the Member States the right to decide on the duration of copyright protection, it having already been determined in Directive 93/98.[38] The Court concluded that 'under Article 17 of Directive 98/71, designs which were protected by a design right in or in respect of a Member State and which met the conditions under which copyright protection is conferred by the Member States, in particular the condition relating to the level of originality, and in respect of which the term laid down in Article 1(1) of Directive 93/98, in conjunction with Article 10(2) thereof, had not yet expired, were to be eligible for copyright protection in that Member State'.[39]

61. Transposing that case-law to the matter of the Charly and Chaplin chairs, and accepting that those two objects qualify for copyright protection (which, I repeat, no one has disputed), the 'restorative' effect of Directive 93/98 should apply to Montis's copyright if it is proved that on 1 July 1995 that copyright continued to be protected in any Member State, whether the Netherlands or elsewhere.

62. However, in reply to a question posed at the hearing as to whether the chairs were protected by copyright in any Member State (since in the documentation presented the validity of those rights in Germany appeared to be a matter of contention), both Montis and Goossens bluntly answered 'no'.

63. We must assume therefore, as a proven fact, that on 1 July 1995 the Charly and Chaplin chairs lacked copyright protection in any State of the European Union. Consequently, Montis cannot invoke the retroactive effect of Article 10(2) of Directive 93/98, relying on the first alternative requirement which triggers it.[40]

3. The second alternative requirement

64. The interpretative problems are greater regarding the other alternative requirement that must be fulfilled to bring into play the protection periods provided for in Directive 93/98, under Article 10(2), the final part of which refers to Directive 92/100. I have already stated that no case-law exists in that regard.

34 — Judgment of 20 January 2009, *Sony Music Entertainment* (C-240/07, EU:C:2009:19, paragraph 22).

35 — Idem, paragraph 25.

36 — Judgment of 27 January 2011 (C-168/09, EU:C:2011:29).

37 — Idem, paragraphs 37 and 38.

38 — Idem, paragraph 39.

39 — Idem, paragraph 41.

40 — According to Montis, the fact that proof of such validity in Germany could have been produced in the context of another action involving a third party changes nothing, since the present preliminary-ruling proceedings are a procedural issue within the dispute pending before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) in which it is not now appropriate to discuss the facts or produce fresh evidence.

65. The wording of that clause and a subsequent reading of Directive 92/100 give rise to a degree of confusion, since it is not easy to identify the 'criteria for protection' allegedly set out in the latter. [41] In reality, Article 2 of Directive 92/100 merely refers to the proprietors and subject matter of rental and lending rights, and other rights related to copyright, in respect of the works protected by copyright. [42]

66. Although for certain hypothetical cases Directive 92/100 mentions specific criteria which must be fulfilled, such as the case of the cinematographic producer (Article 2(1), fourth indent), [43] in others it does not specify them, as in the case of a producer of phonograms (Article 2(1), third indent). But in all cases the general requirements for protection contained in that directive must be met, [44] among others that of the duration of protection under Article 12. [45]

67. As regards the point of interest here, it must be emphasised that Article 13(1) of Directive 92/100 also limited revival of the rights recognised in it to those which 'are, on 1 July 1994, still protected by the legislation of the Member States … *or meet the criteria for protection under the provisions of this directive on that date.*' [46]

68. From a historical perspective, the position may be clearer: Directive 92/100 required Member States for the first time to protect certain rights which were either not protected in all of them or else were not protected in any of them. [47] The clearest case is that of a performer's right in respect of fixations of his performances, [48] introduced by Directive 92/100 itself.

69. In the light of those considerations, and turning back to Directive 93/98, it seems that the reference at the end of Article 10(2) to Directive 92/100 must be deemed to confirm — and if appropriate extend — the protection of copyright and related rights in respect of works or objects which already enjoyed it on 1 July 1994 or which should have enjoyed such protection if the relevant Member States had transposed Directive 92/100 into their national legislation. [49]

70. Directive 93/98 did not seek retroactive reinstatement of any copyright and subject matter which had entered the public domain in the Member States, since that measure was not necessary for the proper functioning of the internal market. [50] The only aim was that its protection should extend to rights and subject matter which either continued to survive in any Member State as at 1 July 1995 or else that such protection should have been available by choice under Directive 92/100. Its intent was therefore, as I have pointed out, to unify the term of protection throughout the Union and thus avoid distortions deriving from differences between national periods of protection. [51]

41 — The Commission accepted, at the hearing, that Directive 92/100 contains no 'criteria for protection' of the kind referred to in the final subparagraph of Article 10(2) of Directive 93/98.

42 — Reference is made specifically to exclusive rights to authorise or prohibit rental or lending, which may attach to: the author (regarding the original and copies of his works), the artist or performer (regarding fixations of their performances), the phonogram producer (regarding his phonograms) and the producer of the first fixation of a film (with regard to the original and copies of his films).

43 — This must relate to the first fixation of a film — also defined in this provision — and the rights extend only to the original and copies.

44 — For the producers of phonograms it would be a minimum of 20 years, according to the reference to the Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) in Article 14 thereof.

45 — Reinbothe, J., von Lewinski, S., *The EC Directive on Rental and Lending Rights and on Piracy*, London, 1993, p. 120.

46 — Emphasis added.

47 — See Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology — Copyright Issues Requiring Immediate Action*, COM(88) 172 final, p. 159.

48 — Article 2(1), second indent, of Directive 92/100.

49 — Walter, M.M., 'Term Directive — Article 10 Application in time', in Walter, M.M., von Lewinski, S., *European Copyright Law — A Commentary*, Oxford, 2010, p. 622.

50 — Jorna, K., Martin-Prat, M., 'New rules for the game in the European copyright field and their impact on existing situations', *European intellectual Property Review* (EIPR), 1994, p. 148.

51 — See, in relation to the free movement of goods, judgment of 17 May 1988, *Warner Brothers and Others* v *Christiansen* (158/86, EU:C:1988:242, paragraphs 10 to 16).

71. In any event, Montis claims the revival of its copyright and protection for its chairs, but no rental or lending right or other copyright (or related rights) among those specifically provided for in Directive 92/100. Consequently, it is again not entitled to rely upon the reference in the final part of Article 10(2) of Directive 93/98.

4. The possible reference to Directive 98/71

72. At the hearing, a degree of agreement emerged between the parties in interpreting the reference in Article 10(2) of Directive 93/98 to Directive 92/100 in a flexible and dynamic manner, in the sense of extending it to all rules harmonising intellectual property rights, including designs and models, the legal protection of which at European Union level is governed by Directive 98/71. Accordingly, protection of the twin rights of copyright and rights in respect of the design of the chairs at issue in the main proceedings would be duly established.

73. However, I am not convinced by this extension of the scope of the reference in question.

74. First, from a purely formal standpoint, Article 10(2) of Directive 2006/116, codifying the term of protection for copyright and certain related rights, repeats word for word Article 10(2) of Directive 93/98, leaving unchanged the reference to Directive 92/100. This fact is sufficient to demonstrate that the legislature did not wish to extend the reference to other types of intellectual property rights. In fact, when adopting that codifying directive in 2006, it could easily have extended that reference to Directive 98/71 on the protection of models, which was already in force, but it did not do so.

75. Moreover, from a substantive point of view, it was logical that Directive 2006/116 should incorporate exactly the same reference to Directive 92/100, since the duration of the rights protected by the latter directive, initially based on minimum periods, had been replaced by the duration provided for in Articles 2 and 3 of Directive 93/98.[52] In other words, the setting of the period of validity of rights under Directive 92/100 was in fact to be found in Directive 93/98. Consequently, the transfer of Article 10(2) of Directive 93/98 to Directive 2006/116 was found to be necessary to guarantee the protection period for the rights governed by Directive 92/100, in particular, in cases where those rights were not recognised in all the Member States.

76. Thus, so far as concerns Directive 98/71, on the one hand, the protection period for rights in respect of designs is governed by Article 10 and takes the form of five-year periods, that is to say on a basis very different from the protection periods for copyright and related rights. On the other hand, the connection between rights in respect of designs and copyright had been established by means of Article 17, which essentially refers to national law. In those circumstances, there was no need for a reference based on a very loose interpretation of the reference to Directive 92/100, nor is it evident what legislative purpose would have been served by that new reference.

5. Conclusion

77. In short: (a) Montis cannot benefit from the opening part of Article 10(2) of Directive 93/98 after admitting that its copyright in respect of the Charly and Chaplin chairs was not in force, on the requisite date, in any State of the European Union; (b) nor can it rely on the protection of Directive 92/100, given that the reference to it made in Article 10(2) of Directive 93/98 is not applicable to copyright of this kind but only to the rights referred to in Directive 92/100. Moreover, as stated, it is not appropriate to extend the reference to protection in Directive 98/71 on the legal protection of designs.

52 — According to Article 11 thereof, which expressly repeals Articles 11 and 12 of Directive 92/100, in which the minimum duration was set, pending ‘further harmonisation’, as introduced by Directive 93/98 (see the 16th recital).

78. Nevertheless, Directive 93/98 could apply to the case of Montis's copyright in the event that (the old) Article 21(3) of the BTMW, by impeding the revival of copyright, were to be incompatible with it, as being contrary to the intent pursued by Article 10(2) thereof. And that, precisely, is the sense of the second question referred to the Court by the Benelux Gerechtshof (Benelux Court of Justice).

C – *The compatibility of (the old) Article 21(3) of the BTMW with Directive 93/98*

79. The Protocol,[53] signed in Brussels on 20 June 2002 repealed, with effect from 1 December 2003, (the old) Article 21(3) of the BTMW and its corollary, Article 24 of the same Law. The reasons for repealing them were, as I have suggested, that the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) had stated that they were contrary to Article 5(2) of the Berne Convention[54] and that Article 9 of the TRIPS Agreement required the signatory States to comply with that convention.

80. That decision appears to be logical, because the BTMW required any person vested with copyright in respect of models or designs, who wished to keep them alive, to make a maintenance declaration which had to be filed within the year preceding the expiry of the five-year term of protection. The declaration was, in reality, one of the formalities proscribed by Article 5(2) of the Berne Convention and, therefore, it was removed from the BTMW.

81. By virtue of the connection between the Berne Convention and European Union law, through Article 9(1) of the TRIPS, it must be considered that (the old) Article 21(3) of the BTMW was also, as from the entry into force of the TRIPS Agreement, incompatible with European Union law.

82. The incompatibility of (the old) Article 21(3) of the BTMW with international law and, subsequently, with European Union law by virtue of the combination of the TRIPS and the Berne Convention does not, however, remove the difficulties affecting discussion of its relationship with Directive 93/98.

83. Goossens contends that Directive 93/98 did not harmonise the arrangements for exercising copyright. That assertion is not entirely correct, since Article 8 of Directive 93/98 governs the calculation of periods of time, a factor which affects the exercise of those rights. But, even if it were correct, that contention would not make it possible to maintain the effectiveness of (the old) Article 21 of the BTMW after the entry into force of Directive 93/98.

84. Even though the harmonisation effected by Directive 93/98 does not extend to the procedural aspects of the exercise of copyright in respect of designs and models, it would be illogical — and absolutely formalistic — to accept the survival of (the old) Article 21 of the BTMW in the context of protection temporarily extended (70 years) to copyright, of the kind introduced by that Directive, which even requires copyright that has expired to be restored.

85. If Directive 93/98 is inspired by the basic principles of the Berne Convention (to which it repeatedly refers)[55] and one of those principles is the prohibition of subjecting copyright to certain administrative formalities, it could be difficult to accept that, once Directive 93/98 was in force, the requirement of (the old) Article 21 of the BTMW should continue to exist as part of a national provision (in this case, a Benelux provision) as a precondition for the existence of those same rights. If

53 — See, again, footnote 3.

54 — Transcribed in point 17 of this Opinion. According to that provision, the enjoyment and exercise of copyright is not to be subject to any formality.

55 — Recitals 1, 5, 12, 14, 17 and 22; and also Articles 1 and 7.

that formality had not been imposed or if it had been eliminated in time, the proprietor of copyright governed by Directive 93/98 could opt for the benefits granted to him by it, in order to extend his period of protection. The continuing existence of the requirement under (the old) Article 21 of the BTMW eliminated that possibility and thus undermined the useful effect of Directive 93/98.

86. Moreover, by limiting copyright in that way, (the old) Article 21(3) of the BTMW impeded the effectiveness of Directive 93/98, in so far as it prohibited attainment of the objectives stated in its 11th recital, [56] that is to say to achieve a high level of protection and create a legal environment conducive to the harmonious development of literary and artistic creativity.

87. I believe, therefore, that the useful effect of Article 10(2) of Directive 93/98, after the expiry of its period for transposition, precluded the applicability of a national provision such as (the old) Article 21(3) of the BTMW, according to which copyright in respect of a work, having expired before 1 July 1995 for failure to fulfil a formality, continued to be regarded as extinguished.

88. Nevertheless, this inference must be subject to two qualifications. First, the incompatibility of Article 21 of the BTMW with Directive 93/98 occurs, as I have stated, from the time when that directive became effective. It would not be appropriate to contend, on the basis of Directive 93/98, that (the old) Article 21 of the BTMW was incompatible with it before the directive itself had any legal existence, however much it ran counter to the Berne Convention, which then did not form part of European Union law.

89. The second qualification is that, since the dispute between Montis and Goossens is between private parties, the court that is to adjudicate must be apprised of the fact that directives do not have horizontal direct effect, even in the presence of clear, precise and unconditional rules which grant rights to or impose obligations upon private individuals. [57] The case-law of the Court of Justice requires a national court, in such circumstances, to interpret its national law so far as possible in the light of the wording and the purpose of the directive concerned, taking account of all its national law and using the interpretative methods recognised in that law to guarantee the full effectiveness of the directive and reach a solution consonant with the aim which it pursues. [58]

90. The obligation of the national court to refer to the content of a directive, when interpreting and applying the relevant rules of its internal law, is nevertheless subject to limitations in the form of general principles of law, in particular those of legal certainty and non-retroactivity, and does not render lawful an interpretation *contra legem* of national law. [59]

91. Although it falls to the referring court to verify whether it can interpret national law — in the aforementioned period — in accordance with Directive 93/98, if, as I suspect, it would not be feasible to do so, the party adversely affected by the lack of conformity of national law with European Union law will be able to rely on the case-law in relation to the damage suffered as a result of such circumstances, provided that the conditions laid down in that case-law are satisfied. [60]

56 — Transcribed in point 9.

57 — See judgment of 7 June 2007, *Carp* (C-80/06, EU:C:2007:327, paragraph 20 and the case-law cited).

58 — Judgments 5 October 2005, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 113 and the case-law cited), and of 15 September 2011, *Mücksch* (C-53/10, EU:C:2011:585, paragraph 29 and the case-law cited).

59 — Judgment of 23 April 2009, *Angelidaki and Others* (C-378/07 to C-380/07, EU:C:2009:250, paragraph 199 and the case-law cited).

60 — The cumulative conditions for the incurring of liability are, in short: (a) the aim of the directive must be to grant rights to individuals; (b) the substance of those rights must be capable of being determined on the basis of the provisions of the directive; and (c) there must be a causal connection between the breach of the obligation incumbent upon the Member State and the damage suffered. See the judgments of 24 January 2012, *Domínguez* (C-282/10, EU:C:2012:33, paragraph 43), and of 23 April 2009, *Angelidaki and Others* (C-378/07 to C-380/07, EU:C:2009:250, paragraph 202 and the case-law cited).

92. Finally, with regard to the possible direct application of Article 17(2) of the Charter, which covers intellectual property rights, a tenet to which the Commission has referred,[61] suffice it to say that the facts of the dispute date back to a time when the Charter had no binding legal effect. I consider therefore that it is superfluous to discuss whether that article of the Charter may confer, on private individuals, a subjective right within the meaning of the judgment in *Kücükdeveci*,[62] which might allow its application in a dispute *inter privatos* governed by Directive 93/98.

93. The disputed national legislation — whilst it was in force — could not therefore infringe Article 17(2) of the Charter, which at that time had no legal effect. In any event, no possible infringement of property rights, by reason of the extinguishing effects of the formal requirement laid down by (the old) Article 21(3) of the BTMW, would likewise be imputable to the other party in the main proceedings.

D – *The date of the revival of copyright*

94. It is easy to understand the doubts concerning the time at which copyright revived in respect of the Charly armchair and the Chaplin dining chair. Montis suggests that it should be retroactive to the date on which the copyright expired, that is to say 18 April 1993. I do not believe, however, that there is any basis in Directive 93/98 for arriving at that conclusion, which might, nevertheless, be supported by arguments of a different kind.

95. In fact, the national court may, possibly, adopt an interpretation to the effect that the repeal of (the old) Article 21 of the BTMW by virtue of the Protocol had retroactive effect, so that the extinguishment of copyright brought about by that rule would be invalid *ex tunc* (without prejudice to the rights of third parties). The Benelux courts could also decide, if their legal order so permits, that the incompatibility of (the old) Article 21 of the BTMW with the Berne Convention rendered inoperative, once more *ex tunc*, the extinguishment of copyright for failure to fulfil administrative formalities. In both cases, rather than the revival of forfeited copyright, there would be a finding that, legally, the copyright was never extinguished. But, in order to arrive at one solution or the other, they could not, in my opinion, rely on the support of the Court of Justice, which has no jurisdiction either to interpret national law (in this case, the BTMW and the Protocol which repeals it in part) or to compare and contrast it with the provisions of international law (the Berne Convention) when they did not form part of European Union law.

96. In my view, the re-establishment of copyright brought about by Directive 93/98 took place, from the standpoint of European Union law, on 1 July 1995, that is to say the date appointed by Article 10(2) of that directive, read in conjunction with Article 13(1). The Community legislature made it clear (Article 13(1)) that the Member States were to adopt, before that day, the measures necessary to fall into line with the new unified rules on copyright, including the possible revival of such rights (deriving from Article 10(2)). The legislature was also aware of the possible 'acts of exploitation' performed by third parties before that date, when, without prejudice to those acts and to acquired rights, it extended the protection period to 70 years.

97. Nevertheless, I consider it appropriate to separate that date from the other two: the first one marks the time (19 April 1993) at which, without any break of continuity, there would be a revival of copyright which had entered the public domain without any legally permissible cause. That would be the time of revival if the Netherlands courts were to find that the maintenance declaration was illegal

61 — The Commission maintains, in paragraph 45 of its observations, that the limitation of an intellectual property right should in all cases be in conformity with its essential content, referring to the judgments of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 43), and of 16 July 2015, *Coty Germany* (C-580/13, EU:2015:485, paragraph 35). It does not seem however that a rule which, by way of exception, introduces the retroactive revival of copyright, after it has entered the public domain, forms part of the essential nucleus of a property right.

62 — Judgment of 19 January 2010 (C-555/07, EU:C:2010:21, paragraph 56).

and to hold that, being deemed not to be in place, that requirement had not existed. In those circumstances, the period of 70 years *p.m.a*. of copyright protection under Article 10(2) of Directive 93/98 would prove applicable, since Montis's rights would, despite everything, have been valid in a Member State as at 1 July 1995.

98. The second date [63] is that of the entry into force of the Protocol by which (the old) Article 21 of the BTMW was repealed, namely 1 December 2003. This being a matter of Benelux law, which for proceedings of this kind has the same standing as national law, it is not for the Court of Justice to interpret it. If, as I suggest, the date of revival of the Montis copyright can only be, from the point of view of Union law, 1 July 1995, it is incumbent upon the national courts to clarify the importance of the date of entry into force of the Protocol and its possible effects stretching back in time. Although interpretation of that internal rule is not required of me, perhaps it might be inferred that Montis's re-born rights could not be relied upon as against third parties until 1 December 2003, which brings me to a last consideration concerning the protection of rights of third parties acting in good faith.

99. Logically, it is not appropriate to claim from such third parties any economic compensation for the improper use of those rights before the date on which they revived, 1 July 1995, by virtue of the mandatory requirement in the first sentence of Article 10(3) of Directive 93/98. However, the second sentence of that same paragraph calls on the Member States to adopt measures to protect the acquired rights of third parties, giving them a very considerable degree of discretion in legislating in that regard.

100. In those circumstances, subject to the qualifications set out in the foregoing points, national law should govern the effects of the repeal of (the old) Article 21 of the BTMW as from 1 December 2003, in accordance with the Protocol, and should clarify whether that repeal can be classified as a legislative measure of that kind, proportionate to the aim pursued by the directive. Since the Benelux Gerechtshof (Benelux Court of Justice) has not expressly raised any question as to the interpretation of Article 10(3) of Directive 93/98, it is not appropriate to delve further into that aspect of the dispute.

V – Conclusion

101. Having regard to the foregoing arguments, I suggest that the Court of Justice answer the questions submitted by the Benelux Gerechtshof (Benelux Court of Justice) in the following terms:

(1) Article 10(2) of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights precludes a provision of national law under which there continues to be regarded as extinguished copyright in respect of an artistic work which, by reason of mere non-fulfilment of an administrative formality, had expired before 1 July 1995. It falls to the national court to verify whether, in the circumstances of the proceedings between private individuals being heard by it, it can interpret its law in accordance with the abovementioned directive and, if so, disapply the provision of national law.

(2) Article 10(2), in conjunction with Article 13(1), of Directive 93/98 must be interpreted to the effect that any copyright that it affects revives on 1 July 1995.

63 — Montis has suggested a third date, 17 November 1998, that of the entry into force of Directive 98/71. For the reasons set out in point 44 et seq., on not extending the discussion to the possible impact of that directive, I consider that there is no reason to concern ourselves with that putative date.