OPINION OF ADVOCATE GENERAL
BOT
delivered on 24 June 2010[1]

1. The legal framework of the present case is Directive 98/71/EC,[2] Article 17 of which enshrines the principle of the cumulation of protection of registered designs with copyright protection. Thus, under that provision, a design enjoys protection under copyright law as from the date on which the design was created or fixed in any form.

2. A dispute concerning the reproduction of the famous Arco lamp, conceived by the Castiglioni brothers, arose between Flos SpA ('Flos'), which declares that it holds all the property rights in that lamp, and Semeraro Casa e Famiglia SpA ('Semeraro').

3. In accordance with the national legislation in force at the time, the design of the Arco lamp was within the public domain and Semeraro was thus entitled to manufacture, import from China and market the Fluida lamp that imitates the shape of the Arco design.

4. With the entry into force of Directive 98/71 and its transposition into the Italian legal order, Flos considers that copyright law ought to apply to the Arco design. It therefore objects to the fact that Semeraro is manufacturing and marketing the Fluida lamp, and is calling upon the Italian courts to prohibit marketing of the lamp.

5. The question that arises in the present case is therefore whether, first, a design which was in the public domain before the entry into force of Directive 98/71 enjoys protection under copyright law.

6. In the event of a reply in the affirmative to this first question, the referring court asks, secondly, whether the fact that a third party has lawfully manufactured and marketed a product imitating the shape of a design in

1 — Original language: French.

2 — Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28).

the public domain affects the eligibility for copyright protection of that design and, if appropriate, whether it is possible to establish a transitional period during which such protection is excluded.

7. In this Opinion I shall be proposing that the Court should rule that Article 17 of Directive 98/71 must be interpreted as precluding legislation in a Member State which provides that designs which entered the public domain before the entry into force of national provisions implementing that directive are not eligible for copyright protection.

8. Next, I shall state the reasons why I believe that Article 17 of Directive 98/71 does not preclude the establishment of a reasonable transitional period during which persons who were lawfully entitled to manufacture and market a product imitating a design that was in the public domain before the entry into force of national provisions implementing that directive may continue to market that product.

I — Legal framework

A — *European Union Law*

1. Directive 93/98/EEC

9. Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights [3] entered into force on 1 July 1995. [4]

10. That directive provides for copyright protection of a literary or artistic work for the lifetime of the author plus 70 years after his or her death. [5]

11. Under Article 10(2) of Directive 93/98, '[t]he 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

3 — OJ 1993 L 290, p. 9.
4 — See Article 13(1) of Directive 93/98.
5 — See Article 1(1) of that directive.

Article 13(1), pursuant to national provisions on copyright or related rights or which meet the criteria for protection under Directive 92/100/EEC [6]'.

12. Under Article 10(3), Directive 93/98 is without prejudice to any acts of exploitation performed before the date of the directive's entry into force. Member States are to adopt the necessary provisions to protect in particular acquired rights of third parties.

2. Directive 98/71

13. Directive 98/71 is intended to approximate the design protection laws of the Member States.

14. In particular, that directive enshrines the principle of the cumulation of protection under specific registered design protection law with protection under copyright law.

15. Thus, under Article 17 of that directive, '[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'.

16. Under Article 19 of Directive 98/71, Member States had until 28 October 2001 to comply with the directive.

B — *National law*

17. Prior to the transposition of Directive 98/71 into the Italian legal order, Law No 633 of 22 April 1941 on the protection of copyright and other related rights [7] provided, in point 4 of the first paragraph of Article 2, that this protection was conferred on works of sculpture, painting, design, engraving and similar figurative arts, including stage and set designs, and the industrial applications of such works, provided that their artistic value

6 — 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).

7 — GURI No 166 of 16 July 1941, 'Law No 633/41'.

was separable from the industrial nature of the product with which they were associated.

18. After the transposition of Directive 98/71 into the Italian legal order, Legislative Decree No 95 of 2 February 2001 on the implementation of Directive 98/71 [8], amended that provision by removing the separability requirement. Thus, as a result of that amendment, point 4 of paragraph 1 of Article 2 of Law No 633/41 was deleted and a point 10 was added. Under this new point, industrial designs which possess in themselves creative character and artistic value are protected by copyright. Legislative Decree No 95/2001 entered into force on 19 April 2001.

19. Legislative Decree No 164 of 12 April 2001 on the implementation of Directive 98/71 [9] inserted into Legislative Decree No 95/2001 an Article 25a which provided that, for a period of ten years from the date of entry into force of the latter decree, the protection conferred on designs under point 10 of the first paragraph of Article 2 of Law No 633 of 22 April 1941 was not enforceable as against those who engaged before that date in the manufacture, supply or marketing of products based on designs that had entered into the public domain.

20. All those provisions were incorporated into the Italian Industrial Property Code. In particular, Article 239 of that code reproduced the ten-year moratorium established by Article 25a of Legislative Decree No 95/2001. Likewise, Article 44 of the code limited the duration of protection conferred by copyright to 25 years from the death of the author, instead of 70 years.

21. However, the Commission of the European Communities commenced proceedings against the Italian Republic for non-compliance with Articles 17 and 18 of Directive 98/71 since, according to the Commission, the ten-year moratorium and the limitation of protection to 25 years from the death of the author were contrary to those articles.

22. In order to comply with European Union law, the Italian Republic adopted paragraph 4 of Article 4 of Decree-Law No 10 of 15 February 2007 implementing Community and international obligations. [10] This provision increases the duration of copyright in respect

8 — GURI No 79 of 4 April 2001, 'Legislative decree No 95/2001'.
9 — GURI No 125 of 31 May 2001.
10 — GURI No 38 of 15 February 2007.

of industrial designs to 70 years and amends Article 239 of the Italian Industrial Property Code. Thus, under that article, the protection granted to industrial designs within the meaning of the first paragraph of Article 2(10) of Law No 633/41, as amended, is not enforceable as against products made in accordance with designs that entered into the public domain before the date of entry into force of Legislative Decree No 95/2001.

II — Facts and main proceedings

23. Flos is an Italian company which has, since the beginning of the 1960's, been operating in the sector of high-value lighting products. It stated that it holds all property rights in the famous Arco lamp design created by the Italian designers Achilles and Pier Giacomo Castiglioni.

24. Flos claims that Semeraro imported from China and marketed in Italy the Fluida lamp design that imitates all the stylistic and aesthetic features of the Arco lamp, in breach of its copyright in that lamp. Flos considers that Semeraro infringed its property rights in the industrial design for the Arco lamp and that it therefore infringed competition law.

25. Semeraro disputed the fact that the Arco design could have any intrinsic artistic value, which is a prerequisite under point 10 of the first paragraph of Article 2 of Law No 633/41 for eligibility for copyright protection. It further refuted the existence of any identity of form between the two lamp designs.

26. It should be made clear that, since the Arco lamp design was in the public domain under the national legislation in force at the time, Semeraro was lawfully entitled to copy that model.

27. Assoluce (the national association of manufacturers of lighting products) intervened in support of Flos.

28. Prior to its action on the merits, Flos applied for interim measures, seeking confiscation of the Fluida lamp and an order prohibiting Semeraro from further importing or marketing the lamp.

29. By order of 29 December 2006, the Italian court ruled that the Arco lamp enjoyed copyright in the industrial design and that the

Fluida lamp design imitated its form slavishly. It therefore ordered confiscation of the lamps and prohibited Semeraro from continuing to market them. That order was upheld on appeal.

30. The Tribunale di Milano (Italy) has doubts as to the conformity with European Union law of the successive legislative amendments which have occurred during the course of the proceedings.

III — The questions referred

31. The Tribunale di Milano decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Articles 17 and 19 of Directive [98/71] be interpreted as meaning that, in implementing a national law of a Member State which has introduced copyright protection for designs into its legal order in accordance with that directive, the discretion accorded to such a Member State to establish independently the extent to which, and the conditions under which, such protection is conferred may include discretion to preclude such protection in the case of designs which – albeit meeting the requirements for protection laid down in copyright law – fell to be regarded as having entered into the public domain before the date on which the statutory provisions introducing copyright protection for designs into the domestic legal order entered into force, in so far as they had never been registered as designs or in so far as the relevant registration had already expired by that date?

(2) If the answer to the first question is in the negative, must Articles 17 and 19 of Directive [98/71] be interpreted as meaning that, in implementing a national law of a Member State which has introduced copyright protection for designs into its legal order in accordance with that Directive, the discretion accorded to such a Member State to establish independently the extent to which, and the conditions under which, such protection is conferred may include discretion to preclude such protection in the case of designs which – albeit meeting the requirements for protection laid down in copyright law –

fell to be regarded as having entered into the public domain before the date on which the statutory provisions introducing copyright protection for designs into the domestic legal order entered into force and where a third party – without authorisation from the holder of the copyright on such designs – has already produced and marketed products based on such designs in that State?

(3) If the answers to the first and second questions are in the negative, must Articles 17 and 19 of Directive [98/71] be interpreted as meaning that, in implementing a national law of a Member State which has introduced copyright protection for designs into its legal order in accordance with that Directive, the discretion accorded to such a Member State to establish independently the extent to which, and the conditions under which, such protection is conferred may include discretion to preclude such protection in the case of designs which – albeit meeting the requirements for protection laid down in copyright law – fell to be regarded as having entered into the public domain before the date on which the statutory provisions introducing copyright protection for designs into the domestic legal order entered into force and where a third party – without authorisation from the holder of the copyright on such designs – has already produced and marketed products based on such designs in that State, where protection is precluded for a substantial period (a period of 10 years)?'

IV — Analysis

32. Like the Commission, I believe that Article 19 of Directive 98/71 is not relevant to the present case. In fact, that provision merely set the date by which the Member States had to comply with the provisions of that directive, namely 28 October 2001. However, the issue to be decided in this case is not whether the Italian Republic transposed the directive within the time limits laid down.

33. The dispute in the main proceedings concerns the question whether Semeraro, which at the material time lawfully acquired the right to manufacture and market the Fluida lamp design, must now cease such manufacture and marketing on the ground that the national legislation implementing Directive 98/71 revived the copyright in the Arco model which the Fluida design copies.

34. In particular, the national court seeks to ascertain whether Article 17 of the directive must be interpreted as precluding legislation in a Member State which provides that designs which were in the public domain before the entry into force of national provisions implementing the directive are not eligible for copyright protection.

35. In the event of an affirmative answer, the national court is essentially asking whether the fact that a third party lawfully acquired the right to produce and market a product imitating a design that is in the public domain affects copyright protection in regard to that design and, in an appropriate case, whether it is possible to lay down a transitional period during which such protection is excluded.

A — *Application of copyright to designs that entered the public domain before the entry into force of Directive 98/71*

36. Under Article 17 of Directive 98/71, a design registered in or in respect of a Member State is also 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*. [11]

37. The directive does not specify whether a design that was in the public domain before it entered into force may enjoy such protection.

38. Under the second sentence of Article 17, '[t]he extent to which, and the conditions under which, such a protection is conferred … shall be determined by each Member State'. The national court accordingly asks whether the Member States have a certain margin of discretion enabling them to exclude from copyright protection designs that entered the public domain before the entry into force of the national legislation transposing Directive 98/71.

39. I do not believe so, for the following reasons.

40. It is clear from the preparatory documents which led to the enactment of Directive 98/71 that the directive is intended to harmonise national laws in respect of designs

11 — My italics.

so that these laws become compatible both with each other so far as their more salient features are concerned and also with the future system of Community protection. [12]

41. It is also stated that the approximation of those laws need not cover all aspects of national legislation, but that it is sufficient to reconcile the features which are necessary for the coexistence of specific national and Community design protection and, in particular, those concerning the scope and term of protection. [13]

42. Those preparatory documents also state that [t]here is no cause to interfere in matters such as existing national provisions relating to the official procedures and to the examination as to fulfilment of requirements for protection. [14] That is the reason, I believe, why the second sentence of Article 17 of Directive 98/71 provides that the extent to which, and the conditions under which, copyright protection is conferred, including the level of originality required, are to be determined by each Member State.

43. Conversely, the term of copyright protection and its temporal application were harmonised at European Union level in Council Directive 93/98, which was in force at the time when the facts giving rise to the dispute in the main proceedings occurred. [15]

44. Under Directive 93/98, that protection lasts for the author's lifetime plus 70 years. [16] Article 10(2) of that directive provides, in addition, that that term applies to all works and subject matter which are protected in at least one Member State on the date of entry into force of the directive.

45. I therefore believe that Article 17 of Directive 98/71 must be read in conjunction with the provisions of Directive 93/98 and, in particular, Article 10(2) of the latter directive.

46. The latter provision has already been interpreted by the Court in a case involving the revival of copyright in a musical work.

12 — See point 1.4 of the Proposal for a European Parliament and Council Directive on the legal protection of designs (COM (93) 344 final).

13 — See point 1.5 of the Proposal.

14 — Ibid.

15 — Directive 93/98 was codified by Directive 2006/116/EC 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).

16 — See Article 1(1) of Directive 93/98.

47. Thus, in its judgment in *Butterfly Music,* [17] the Court held that it is clear from that provision that application of the terms of protection laid down by Directive 93/98 may have the effect, in the Member States which had a shorter term of protection under their legislation, of protecting afresh works or subject-matter which had entered the public domain. [18]

48. The Court pointed out that that solution was adopted in order to achieve as rapidly as possible the objective of harmonising the national laws governing the terms of protection of copyright and to avoid the situation where rights have expired in some Member States but are protected in others. [19]

49. I believe that this case-law may be applied to the present case.

50. One of the main contributions of Directive 98/71 is to lay down the principle of the cumulation of specific registered design protection with copyright protection, in order to eliminate disparities in the laws of the Member States in this field. In its preparatory work, the Commission stated that the cumulative application of design protection is mandatory, and that consequently national legislation needs to be amended where it provides that copyright protection cannot, or can only under certain conditions, be cumulated with protection under specific design protection law. [20]

51. The cumulation of specific registered design protection with copyright protection is not therefore an option offered to Member States, but an objective to be achieved in order to put an end to the disparities between the various laws.

52. This objective would, to my mind, be jeopardised if the Member States were able to apply or not to apply copyright protection to designs that have entered the public domain. In fact, the result of that would be that a design created before the entry into force of Directive 98/71 would be protected in certain Member States but not in others. The disparities that this directive seeks to remove would remain, and trade between Member States

17 — Case C-60/98 [1999] ECR I-3939.

18 — Ibid. (paragraph 18).

19 — Ibid. (paragraph 20).

20 — See Article 18 of the Proposal for a directive mentioned in footnote 12.

would be affected. In addition, it would also run counter to the main objective of Directive 93/98 which seeks to harmonise the term and application in time of copyright protection. [21]

53. I consider the solution in the *Butterfly Music* judgment to be the only one that guarantees uniform application of Directive 98/71 throughout the European Union.

54. In the light of these considerations, I believe that Article 17 of Directive 98/71 must be interpreted as precluding legislation in a Member State which provides that designs that entered the public domain before the entry into force of national provisions transposing that directive are not eligible for copyright protection.

55. The question is now whether the fact that third parties have lawfully produced and marketed a product copying a design that has entered the public domain affects the application of copyright protection to that design.

21 — See recital 2 in the preamble to the directive.

B – *Effect of the rights that third parties have lawfully acquired on the application of copyright in designs that entered the public domain before the entry into force of Directive 98/71*

56. We have seen that, in my view, copyright protection of designs applies as from their creation, even if, at the time of entry into force of Directive 98/71, they are in the public domain.

57. By its second and third questions, the national court queries whether it should not be otherwise or if, at least, a transitional period during which such protection is excluded should be instituted, when a third party, such as Semeraro, has lawfully produced and marketed a design imitating another design that has entered the public domain.

58. Directive 98/71 does not specify what effect the application of copyright might be on rights acquired by third parties before the entry into force of national provisions transposing the directive.

59. In my view, in order to provide a useful reply to the national court, reference should once again be made to the provisions of

Directive 93/98 governing the terms of application in time of copyright, in particular at Article 10(3) thereof.

60. Under that provision, Directive 93/98 is without prejudice to any acts of exploitation performed before the date of entry into force of the latter and Member States are to adopt the necessary provisions to protect in particular acquired rights of third parties.

61. In *Butterfly Music*, the Court first stated that the application of terms of protection provided by Directive 93/98 could have the effect of protecting afresh works or subject matter to have entered the public domain, and then quoted recital 27 in the preamble to the directive, which states that '*respect of acquired rights and legitimate expectations is part of the Community legal order [and that] 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*.' [22]

62. The Court went on to say that the directive provided for the possibility that copyright and related rights which had expired could be revived, without prejudice to acts of exploitation performed before the date of its implementation, while leaving it to the Member States to adopt measures to protect acquired rights of third parties. [23]

63. The Court observed that amending legislation applies, unless otherwise provided, to the future consequences of situations which arose under earlier legislation. Since the revival of copyright and related rights has no effect on acts of exploitation definitively performed by a third party before the date on which revival occurred, it could not be considered to have retroactive effect. Its application to the future consequences of situations which were not definitively settled meant, on the other hand, that it had an effect on a third party's rights to continue the exploitation of a sound recording where the copies already manufactured had not yet been marketed and sold on that date. [24]

22 — *Butterfly Music* (paragraph 22).
23 — Ibid. (paragraph 23).
24 — Ibid. (paragraph 24).

64. The Court also noted that *the principle of the protection of legitimate expectations could not be extended to the point of generally preventing new rules from applying to the future consequences of situations which had arisen under earlier rules.* [25]

65. The Court therefore held that the institution of a limited period during which third parties who were lawfully reproducing and marketing sound-recording media in respect of which the rights of use had expired under the previous legislation might distribute those media met the requirements of Directive 93/98. [26] First, *such legislation satisfied the obligation imposed on the Member States to adopt measures to protect acquired rights of third parties and, secondly, it met the need to apply new terms of protection of copyright and related rights on the date laid down by that directive, that being the directive's principal objective.* [27]

66. The same reasoning must, in my view, be followed in the present case.

67. In fact, a fair balance must be struck between, on the one hand, compliance with a major objective of Directive 98/71, namely the application of copyright protection to designs and, on the other, the need to guarantee the rights that third parties acquired in good faith before the entry into force of national provisions transposing the directive. Intellectual property is a field in which interests that can sometimes seem to be very much in conflict have to co-exist. It is essential to encourage creativity by ensuring that works and designs will be protected from any form of counterfeiting. Similarly, it is important to allow adequate competition in this type of market so that the citizens of the European Union can have access to the fruits of creativity, be it in the field of technology, information or design.

68. In accordance with the case-law cited in point 63 of this Opinion, the application of copyright to designs that entered the public domain before the date of entry into force of the national provisions transposing Directive 98/71 cannot affect situations definitively settled before that date. To my mind that therefore means that the copyright enjoyed by the Arco design cannot be relied on against Fluida lamps which were manufactured and sold on the market before that date.

69. Conversely, since the Member States enjoy a certain margin of discretion in regard to

25 — Ibid. (paragraph 25 and case-law cited).
26 — Ibid. (paragraph 26).
27 — Ibid. (paragraphs 27 and 28).

rights acquired by third parties,[28] the competent national authorities may provide for a transitional period starting from the date of entry into force of the provisions transposing Directive 98/71, during which third parties having lawfully acquired the right to market a product imitating a design that entered the public domain before this date may continue to market that product.

70. In its observations, Flos indicates moreover that 'it seems acceptable to provide for a transitional rule which mitigates the abruptness of the transition to protection on the basis of copyright arising from implementation of Directive 98/71'.

71. The Court stated in *Butterfly Music* that the transitional period must be a reasonable one.[29] In fact, account has to be taken not only of the legitimate interests of third parties acting in good faith, but also of the interests of copyright holders and of the objective pursued by the legislation in question.

72. The national court will, in my view, have to take account of several matters in considering the specific situation in the present case, in order to assess the need for a transitional period during which the Arco lamp is not eligible for copyright protection.

73. We have seen that Article 17 of Directive 98/71 does not specify whether copyright protection is applicable to designs that entered the public domain before the entry into force of the directive.

74. I note that, initially, the Italian legislation transposing Directive 98/71 provided for a transitional period of ten years during which designs that had entered the public domain were not to be eligible for copyright protection. Then, at a later stage, following infringement proceedings initiated by the Commission, the Italian legislature amended the legislation to provide that copyright protection is not applicable to designs that entered the public domain before the entry into force of Legislative Decree No 95/2001, transposing Directive 98/71.

75. In the light of these matters and of the fact that Directive 98/71 is silent on the application of copyright to designs that are in the

28 — Ibid. (paragraph 23).
29 — Ibid. (paragraph 27).

public domain, I believe that the entry into force of the directive in the national legal order is likely to have created in Semeraro a legitimate expectation as to the maintenance in force of the national legislation existing at the time, namely that all rights in the Arco lamp were extinguished and that it was therefore entitled to continue to produce and market Fluida lamps.

76. Economic operators could reasonably have doubts, in my view, as to an interpretation of Article 17 of Directive 98/71 such as the one that I am proposing to the Court, namely that designs that entered the public domain before the entry into force of the national provisions transposing that directive are eligible for copyright protection.

77. As to the term of the transitional period, the national court asks whether it is appropriate to provide for a period of ten years, as the Italian legislature initially did.

78. In my view, the transitional period should be sufficiently long to secure the economic interests of undertakings which have invested in good faith in the production of designs imitating ones that entered the public domain before the date of entry into force of Directive 98/71. It is in fact a matter of protecting those undertakings whose economic activities become illegal almost overnight owing to the transposition of the directive.

79. Nor, however, should the transitional period have the effect of preventing new rules from applying to the future consequences of situations which arose under the earlier rules. [30]

80. In the case giving rise to the *Butterfly Music* judgment, the Court held that a period of three months for the distribution of sound-recording media by third parties who had, lawfully, acquired rights could be considered to be reasonable having regard to the objective pursued and in view of the circumstances in which Directive 93/98 was transposed. This period may appear very short and strict but in fact, as the Court pointed out, the transposition had allowed such third parties nearly a year after the date of implementation

30 — Ibid. (paragraphs 25 and 28).

of the directive to continue marketing sound recording media. [31]

81. As regards the present case, a period of 10 years in a term of protection of 70 years after author's death, seems to me excessive. Indeed, the Commission brought infringement proceedings against the Italian Republic, *inter alia,* because the national legislation provided for a ten-year transitional period.

82. Conversely, I am inclined to the view that the period enjoyed by Semeraro between 28 October 2001, the date by which the Member States had to comply with Directive 98/71, [32] and 29 December 2006, the date on which the Italian court ordered seizure of the Fluida lamp and prohibited Semeraro from marketing it, is a reasonable one.

83. During this period of a little over five years, Semeraro was, in fact, able to produce and sell its lamps on the market.

84. This period seems to me to strike a fair balance between protection of the rights that third parties have lawfully acquired and the need to secure one of the objectives of Directive 98/71, namely the application of copyright to designs.

85. It is therefore in the light of the circumstances of the present case, and taking into account the legislative aims in question, that it will be for the national court to assess to what extent it is necessary to lay down a reasonable transitional period in order to ensure the protection of rights acquired by third parties.

86. In the light of the foregoing, I believe that Article 17 of Directive 98/71 does not preclude the establishment of a reasonable transitional period during which persons who were able lawfully to produce and market a product imitating a design that entered the public domain before the entry into force of national provisions implementing that directive may continue to market that product.

31 — Ibid. (paragraphs 27 and 28).

32 — See Article 19(1) of the directive.

V — Conclusion

87. In the light of all the foregoing considerations, I propose that the Court should reply as follows to the questions raised by the Tribunale di Milano:

'(1) Article 17 of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs must be interpreted as precluding legislation of a Member State which provides that designs that entered the public domain before the entry into force of national provisions transposing that directive are not eligible for copyright protection.

(2) Article 17 of Directive 98/71 does not preclude the establishment of a reasonable transitional period during which persons who were able lawfully to produce and market a product imitating a design that entered the public domain before the entry into force of national provisions implementing that directive may continue to market that product.'