OPINION OF ADVOCATE GENERAL
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delivered on 22 May 2008 [1]

I — Introduction

1. Artists commonly use pseudonyms, making it difficult for the public to be sure whether their favourite stars of the screen, stage, visual arts or music are using their real names or are shielding their persona behind a nickname. In very few cases does their true identity achieve a degree of public awareness approaching that of their fictitious one (only Marilyn Monroe/Norma Jean Baker springs to mind).

2. So the singer and songwriter who provides the setting for this case would probably have become famous in a more limited circle had he used his real name of Shabtai Zisel ben Abraham (his family originally came from Odessa). [2] I would hazard a guess that even translating it into a European language (Robert Allen Zimmerman) would not have helped. By contrast, his alias is well known to several generations of music lovers: Bob Dylan. [3]

3. Like the work of Phil Collins [4] and Cliff Richard, [5] the work of this singer, an admirer of the Welsh poet Dylan Thomas (1914-1953), [6] whose Christian name he borrowed as a surname, is a favourite subject for recordings which earn huge profits, resulting in their being widely copied.

1 — Original language: Spanish.

2 — Biographical details are from Satué, F.J., *¡Más madera! Una historia del Rock*, Belacqva, Barcelona, 2004, p. 397 et seq.

3 — Recently his weekly radio show 'Theme time radio hour', broadcast by XM Satellite Radio seems to have been attracting large audiences (EL PAÍS, Tuesday 25 March 2008, p. 48). His life has also been documented in the film *I'm Not There* (2007), a tribute to the musician by the director Todd Haynes.

4 — Drummer and vocalist with the pop rock band Genesis and later solo singer, he brought Joined cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145.

5 — Former lead singer of the Shadows, whose real name is Harry Rodger Webb (http://www.cliffrichard.org/).

6 — It is not known whether his admiration extended only as far as the poetry or also took in the lifestyle of the writer, who declared himself to be 'the drunkest man in the world' and was a confirmed bohemian, at least in his youth, as can be gathered from his book *Portrait of the Artist as a Young Dog* in which he writes: 'Young Mr Thomas was at the moment without employment, but it was understood that he would soon be leaving for London to make a career in Chelsea as a free-lance journalist; he was penniless, and hoped, in a vague way, to live on women'.

4. The Bundesgerichtshof (German Federal Court of Justice) has referred three questions relating to phonograms made in the early sixties with songs by this true hero of rock music, which are the subject of proceedings before that court relating to their protection in Germany and the court fundamentally questions whether they can be granted protection through Community law, since it takes the view that national law does not allow such protection.

5. The debate has considerable economic significance as its outcome will determine whether a large number of works created before the German Law on copyright and related rights came into force in 1966 remain in the public domain and can be freely exploited or are regarded as being protected by these rights, in which case their use is controlled by the rightholders.

II — The legal framework

A — *Community legislation*

6. The harmonisation of the laws of the Member States on intellectual property has been achieved mainly through Directive 93/98/EEC,[7] which was subsequently amended[8] and then repealed by Directive 2006/116/EC,[9] which codifies the earlier directives.

7. Under the title 'Duration of related rights', Article 3(2) of Directive 2006/116 provides:

'The rights of producers of phonograms shall expire 50 years after the fixation is made. …

However, this paragraph shall not have the effect of protecting anew the rights of producers of phonograms where, through the expiry of the term of protection granted them pursuant to Article 3(2) of Directive 93/98/EEC in its version before amendment by Directive 2001/29/EEC, they were no longer protected on 22 December 2002.'

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

8 — In particular by Directive 2001/29 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).

9 — Directive 2006/116 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).

8. The first two paragraphs of Article 7 of Directive 2006/116, entitled 'Protection vis-à-vis third countries' add that:

'1. Where the country of origin of a work, within the meaning of the Berne Convention, [[10]] is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in Article 1.

2. The terms of protection laid down in Article 3 shall also apply in the case of rightholders who are not Community nationals, provided Member States grant them protection. However, without prejudice to the international obligations of the Member States, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 3.

…'

9. Paragraphs 1, 2 and 3 of Article 10 of Directive 2006/116, under the heading 'Application in time', read as follows:

'1. Where a term of protection which is longer than the corresponding term provided for by this Directive was already running in a Member State on 1 July 1995, this Directive shall not have the effect of shortening that term of protection in that Member State.

2. The terms of protection provided for in this Directive shall apply to all works and subject matter which were protected in at least one Member State on the date referred to in paragraph 1, pursuant to national provisions on copyright or related rights, or which meet the criteria for protection under [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].

3. This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in paragraph 1. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties.

…'

10 — The Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), amended on 28 September 1979 (the convention can be referred to at http://www.wipo.int/treaties/en/ip/berne/index.html).

B — *International law*

10. The World Intellectual Property Organisation ('WIPO') has sponsored three international treaties which specifically protect the rights of producers of phonograms, namely the 'Rome Convention', [11] the 'Phonograms Convention' [12] and the 'WPPT'. [13] The latter was approved by the European Community by Decision 2000/278/EC, [14] with regard to matters within its competence.

11. There appears to be a trend towards extending the duration of the rights of producers of phonograms as, while the Rome Convention [15] and the Phonograms Convention [16] stipulated a limit of at least 20 years, the WPPT extended this to a minimum of 50 years. [17]

11 — For the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; done at Rome on 26 October 1961.

12 — For the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms of 29 October 1971.

13 — WIPO Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996; all the treaties can be referred to at http://www.wipo.int/treaties/en/.

14 — 2000/278: Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6).

15 — Article 14(a).

16 — Article 4.

17 — Article 17(2).

12. Furthermore, with the aim of effecting a partial harmonisation of intellectual property rights by reason of their incidental impact on international trade, the TRIPs Agreement [18] applies a series of provisions to the various kinds of intellectual property. I shall go on to mention those which affect sound recordings and serve to clarify this matter.

13. Of the basic provisions, Article 3, setting out the principle of national treatment, is worth highlighting:

'1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organisa-

18 — Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) — Annex 1C of the Agreement establishing the World Trade Organisation, approved on behalf of the 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; the TRIPs Agreement is to be found on p. 213).

tions, this obligation only applies in respect of the rights provided under this Agreement. …

…'

14. On the other hand, Article 4 of the TRIPs Agreement confirms most-favoured-nation treatment by providing that any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members and goes on to specify certain exceptions to this requirement which can be discounted in the context of the main proceedings.

15. Article 9(1) of the TRIPs Agreement refers to the Berne Convention, enjoining the contracting states to comply with Articles 1 to 21 of that convention.

16. As regards the rights of producers of sound recordings, Article 14 of the TRIPs Agreement provides:

'1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorisation: the fixation of their unfixed performance and the reproduction of such fixation. …

2. Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.

…

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. …

…'

C — *National legislation*

17. In Germany intellectual property is governed by the Gesetz über Urheberrecht und verwandte Schutzrechte [19] (Law on copyright and related rights, 'UrhG'). Paragraph 137f performs the function of a transitional measure put in place as part of the transposition of Directive 93/98/EEC into national law; Subparagraphs 2 and 3 of that paragraph provide:

'(2) The provisions of this Law in the version applicable as of 1 July 1995 shall apply equally to works for which protection pursuant to this Law expired prior to 1 July 1995, but which continued to be protected on that date under the law of another Member State of the European Union or a Contracting Party to the Agreement on the European Economic Area. The first sentence applies, *mutatis mutandis*, to the … rights … of producers of phonograms (Paragraph 85), ….

(3) If protection for a work in the territory to which this Law applies is revived pursuant to subparagraph 2, the revived rights belong to the author. Exploitation of the rights commenced prior to 1 July 1995 can nevertheless continue, in the context originally envisaged. Appropriate compensation must be paid for exploitation performed after 1 July 1995. Sentences 1 to 3 apply, *mutatis mutandis*, to related rights.

…'

19 — Law of 9 September 1965 (BGB1. I, p. 1273), last amended by the Fünftes Gesetz zur Änderung des Urheberrechtsgesetzes (Fifth law amending the UrhG) of 10 November 2006 (BGBl. I, p. 2587).

III — The facts in the main proceedings

18. The undertaking Falcon Neue Medien Vertrieb GmbH ('Falcon'), the defendant in the main proceedings and respondent on a point of law, distributes two phonograms of performances by the artist Bob Dylan in compact disc or 'CD' form, the first entitled 'Bob Dylan — Blowin' in the Wind' and the second 'Bob Dylan — Gates of Eden'.

19. The recordings of songs on the phonograms were originally included on the albums 'Bob Dylan — Bringing It All Back Home','The Times They Are A-Changin" and 'Highway 61 Revisited'.

20. Sony Music Entertainment (Germany) GmbH ('Sony'), the applicant in the main proceedings and appellant on a point of law, is

the German subsidiary of the well-known Japanese multinational of the same name; it maintains that all the songs on the two CDs were released in the United States before 1 January 1966, in 1964 and 1965, to be precise.

21. Sony also submits that a US record label acquired the original phonogram rights in the Bob Dylan albums in Germany, which were then transferred to Sony and, consequently, the respondent is infringing Sony's intellectual property rights by copying and distributing these CDs.

22. Sony is therefore seeking an order prohibiting Falcon from copying and marketing the CDs 'Bob Dylan — Blowin' in the Wind' and 'Bob Dylan — Gates of Eden' either itself or through third parties. It is also seeking orders for disclosure of certain information and for damages in respect of the losses suffered by Sony.

23. However, Falcon argues that German law provides no protection for rights of any record company in Bob Dylan phonograms prior to 1 January 1966.

24. At first instance the Landgericht (Regional Court), Rostock did not accept Sony's arguments and rejected the application.

25. In the proceedings before the Oberlandesgericht (Higher Regional Court) of that Baltic city, in pursuit of a settlement of the case, the appellant discontinued its action for an injunction, but continued to seek orders for disclosure of certain information and for damages.

26. The appellate court dismissed Sony's appeal on the grounds that, by reason of the Geneva Phonograms Convention, which is in force in Germany and in the USA, record producers enjoy rights under Paragraph 85 of the UrhG only in relation to activities that took place after 1 January 1966. Furthermore, it held that musical recordings made prior to that date cannot benefit from the protection of Paragraph 137f of the UrhG, the transitional measure for the transposition of Directive 93/98/EEC into national law, either, because subparagraph 2 does not apply to phonograms made prior to 1 January 1966, as they had at no time been protected in Germany.

IV — The questions referred and the procedure before the Court of Justice

27. The judgment on appeal having been referred to it for review on a point of law, the Bundesgerichtshof notes that the success of

the application for review turns on the interpretation of Article 10(2) of Directive 2006/116/EC. The referring court bases its view that it is appropriate to refer questions to the Court of Justice on the following premises.

28. First, it does not accept that the retroactive effect of the Phonograms Convention can go beyond the protection accorded under national law, which, by virtue of Paragraph 129(1) of the UrhG, limits the retroactive effect of the protection of record companies' rights under Paragraph 85 of the UrhG to the date when the UrhG itself came into force, that is, 1 January 1966.

29. Second, neither is it prepared to accept that the phonograms in question are protected in Germany by virtue of direct application of Paragraph 137f(2) of the UrhG, which, being a provision that was introduced [20] in order to transpose Directive 93/98/EEC into national law, must be interpreted in the light of Article 10(2) of that directive. Indeed, given that Paragraph 137f (2) of the UrhG revives protection only once it has 'expired' prior to 1 July 1995, the referring court shares the view of the Oberlandesgericht, Rostock that phonograms recorded prior to 1 January 1966 by record companies established in non-member countries have at no time been protected in Germany and consequently it is not possible to revive a protection that they never enjoyed.

30. As the Bundesgerichtshof agrees with Sony's assertion that United Kingdom legislation also covers phonograms created prior to 1 January 1966 and those produced by US record companies and released in the USA, it is unsure about the interpretation of Article 10(2) of Directive 2006/116.

31. In these circumstances, the German supreme court decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the term of protection granted by Directive 2006/116 under the conditions set out in Article 10(2) thereof apply also in the case of subject-matter that has not at any time been protected in the Member State in which protection is sought?

20 — By Paragraph 1(26) of the Drittes Gesetz zur Änderung des Urheberrechtsgesetzes (Third law amending the UrhG) of 23 June 1995 (BGBl. 1995 I, p. 842).

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

(a) Do national provisions governing the protection of rightholders who are not Community nationals constitute national provisions within the meaning of Article 10(2) of Directive 2006/116?

(b) Does the term of protection granted pursuant to Article 10(2) of Directive 2006/116 also apply to subject-matter that, on 1 July 1995, fulfilled the criteria set out in Council Directive 92/100 of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, but whose rightholder is not a Community national?'

32. The order for reference was lodged at the Court Registry on 16 May 2007 and the parties to the main proceedings and the Commission submitted observations during the written proceedings.

33. At the hearing held on 15 April 2008 the representatives of Sony, Falcon and the Commission appeared in court to present their submissions orally.

V — Analysis of the questions referred

A — *Retroactive protection (first question)*

34. The first of the Bundesgerichtshof's questions seeks to clarify whether the protection provided by Article 10(2) of Directive 2006/116 should be extended to subject-matter which has never received it in the Member State in which it is sought, which would entail making the national legislation retrospectively applicable to a period before the legislation itself came into force.

35. There are grounds for uncertainty because in Germany there was no legal protection for phonograms prior to the passing of the UrhG on 9 September 1965, and, as indicated in the earlier summary of the facts of the main proceedings, the recordings at issue were made in 1964 and 1965, that is, prior to that date.

36. Moreover, to extend the application of the protection of rights retroactively would be contrary to certain basic principles of international intellectual property law. Article 18(2) of the Berne Convention does not permit a work created in one country which has fallen into the public domain of another country of the Union, [21] where protection is claimed, to be readmitted to the sphere of private law and benefit from the Convention, basically because of the rights acquired by third parties during the period of unrestricted exploitation. [22]

37. In the context of the rights of producers of phonograms, non-retroactivity is stated as a general rule in all the relevant international treaties, namely the Rome Convention, [23] the Phonograms Convention [24] and the WPPT. [25]

38. Nevertheless, in the Community context, the Court of Justice, having analysed Article 10 of Directive 93/98, subscribed to the view that it does, on the one hand, provide for the possibility that copyright and related rights which had expired under the applicable legislation before the directive was implemented can be revived, without prejudice to acts of exploitation performed while such legislation was in force, and, on the other hand, leaves it to the Member States to adopt measures to protect the rights of third parties acquired by virtue of such acts. [26]

39. The Court of Justice reached this conclusion by taking an integrationist approach, pointing out that it was the result of the express will of the Community legislature, as, while the Commission's original proposal for the Directive provided that its provisions would apply 'to rights which have not expired on or before 31 December 1994', the European Parliament amended that proposal by introducing new wording which was taken up in the final version; [27] adding that this solution was intended to achieve as rapidly as possible the objective of harmonising the national laws on the terms of protection of copyright and related rights and avoid the situation where rights which have expired in some Member States continue to be protected in others. [28]

40. The desire to achieve the harmonisation of national laws as rapidly as possible had become more pronounced after the judgment

21 — 'Union' in the sense of Article 1 of the Berne Convention, which states that: 'The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works'.

22 — *WIPO Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971)* published by WIPO, Geneva, 1978, p. 117.

23 — Article 20, entitled 'Non-retroactivity'.

24 — Article 7(3): 'No Contracting State shall be required to apply the provisions of this Convention to any phonogram fixed before this Convention entered into force with respect to that State'.

25 — Article 22 ('Application in Time'), paragraph 1 of which refers back to Article 18 of the Berne Convention.

26 — Case C-60/98 *Butterfly Music* [1999] ECR I-3939, paragraph 23.

27 — *Butterfly Music*, paragraph 19.

28 — *Butterfly Music*, paragraph 20.

in the case known as *Patricia*, [29] in which the Court, finding a lack of approximation of national legislation on the protection of intellectual property, accepted restrictions on trade which resulted from the disparity between national rules in this area. [30]

41. In other words, it can be inferred from Article 10(2) of the directive that application of the terms of protection laid down has the effect of protecting afresh works or subject-matter which had entered the public domain. [31]

42. Such explanations answer the question of whether the restoration of previously protected rights related to copyright is valid, but it is not clear whether they can help to resolve the uncertainty about rights which *never* had such protection.

43. However, I am minded to suggest that the same treatment be accorded to both cases, for the following reasons.

44. First, the rapid harmonisation argument is still valid in the context of unprotected related rights. Second, the reference in Article 10(2) of Directive 2006/116 to the rules upholding related rights, whether they be national or contained in Directive 92/100, [32] in cases where the subject-matter meets the requirements for protection thereunder, takes on a new importance.

45. Regarding speed of harmonisation, it should be noted that the Community legislature took a middle path between rejecting retroactivity and embracing it fully, preferring a compromise whereby if a particular work is protected in just one Member State on the date by which Directive 93/98 must be transposed, namely 1 July 1995, [33] that is sufficient for the Community-wide terms of protection to apply to it. [34]

29 — Case 341/87 *EMI Electrola* v *Patricia Im- und Export and Others* [1989] ECR 79.

30 — In that particular case the Court of Justice assented to the application of a Member State's legislation which allowed a producer of sound recordings to rely on the exclusive rights to reproduce and distribute musical works of which he was the owner in order to prohibit the sale, in the territory of that Member State, of other phonograms of the same musical works; such phonograms were imported from another Member State in which they had been marketed lawfully, although without the consent of the owner or his licensee, and the protection which the producer of those recordings had enjoyed had expired (*Patricia*, paragraph 14).

31 — *Butterfly Music*, paragraph 18.

32 — Council Directive 92/100 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).

33 — Article 13(1) of that directive.

34 — Dietz; A., 'Die Schutzdauer Richtlinie der EU', in *GRUR Int.*, No 8/9 (1995), p. 682.

46. As a result, in Member States where those works or subject-matter had re-entered the public domain, legal protection was reactivated, unless they had re-entered the public domain in all the Member States, in which case presumably the new terms introduced by the directive would also cover all subject-matter protected by related rights. [35]

47. Furthermore, the judgment in *Phil Collins and Others*, referred to earlier, which was delivered almost contemporaneously with the adoption of Directive 93/98, ruled that the principle of non-discrimination is also applicable to national provisions on literary and artistic works and related rights, and this, in practice gave rise to full retroactive effect, since it meant that in every Member State all copyright and similar rights had to be given the same treatment as that accorded to national rights, in every case. [36]

48. The approach remains the same for rights which were never protected in the country where protection is sought (Germany, in the case in the main proceedings), since to hold otherwise would counteract the efforts to achieve harmonisation. The underlying premiss of the Community provisions is that the smooth functioning of the internal market requires the laws of the Member States to be brought into line so as to make terms of protection the same throughout the Community. [37]

49. The objective is therefore to harmonise the terms of protection and of re-entry into the public domain of these rights. It would consequently be contrary to the spirit of the directive to leave works and related rights unprotected by reason of their lack of protection prior to the entry into force of the national provisions on copyright.

50. This approach is upheld by the express reference in Article 10(2) of Directive 2006/116 to Directive 92/100, which had introduced brand new related rights in some Member States, in an endeavour to extend the application of the terms of protection granted by Directive 2006/116 to the rights preserved by Directive 92/100, even where these had not been incorporated into national law. [38] For this reason, and contrary to the view of the Bundesgerichtshof that the UrhG should be interpreted literally, it is not appropriate to refer only to a 'resurgence' of the protection. [39]

35 — Maier, P., 'L'harmonisation de la durée de protection du droit d'auteur et de certains droits voisins', *Revue du Marché Unique Européen*, No 2/1994, p. 77.

36 — Dietz, A., op. cit., p. 683.

37 — Recital 2 of Directive 93/98 and Recital 3 of Directive 2006/116.

38 — Katzenberger, P., '§ 64 — Schutzdauer — Allgemeines', in Schricker, G. (ed.), *Urheberrecht Kommentar*, 2nd edition, Munich, 1999, p. 1024; Walter, M., 'Schutzdauer-RL — Art. 10', in Walter, M. (ed.), *Europäisches Urheberrecht Kommentar*, Vienna, 2001, p. 635.

39 — Walter, M., op. cit., p. 631.

51. However, in addition to the possibility that a work may be in the public domain in all the Member States, there is a further limit to the integrationist mission of the directives in question, which does not affect the answer to the question referred but which should be mentioned for the sake of completeness: the related rights referred to in Articles 5 and 6 of Directive 2006/116, whose regulation is optional for the Member States.

52. According to Recital 19 of that directive, the Member States remain free to maintain or create other rights related to copyright in relation to critical and scientific publications of works which have come into the public domain, [40] and non-original photographs, [41] but there is no obligation to protect them throughout the Community, so that any attempt to claim protection for them in Member States which have exercised their option not to recognise them will fail. [42]

53. Finally, Article 10(3) of Directive 2006/116 also supports the retroactivity argument, providing that: 'This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in paragraph 1', that is, 1 July 1995, the date when its predecessor, Directive 93/98, came into force; it therefore assumes retroactive validity of the rights to which it refers, but, in order to protect rights acquired in good faith by third parties, it restricts the impact on events which occurred prior to its becoming effective. In other words, if Article 10(2) did not contemplate retroactive effect, the following subparagraph would be devoid of logic.

54. In short, in the light of the foregoing, I am of the opinion that the first question referred by the German Bundesgerichtshof should be answered in the affirmative, to the effect that the term of protection granted by Directive 2006/116, assuming the conditions set out in Article 10(2) thereof are met, also applies in the case of subject-matter that has not at any time been protected in the Member State in which protection is sought, without prejudice to the provisions of Article 10(3).

B — *Protection of rightholders who are not Community nationals (second question)*

55. Through the two questions which make up the second question referred, the referring court seeks to establish whether the fact that the holder of the rights for which protection is sought is a national of a non-Member state affects the interpretation of the two alternative bases for protection of subject-matter under Article 10(2) of Directive 2006/116.

40 — Article 5 of Directive 2006/116.

41 — In relation to 'ordinary' photographs, see the third sentence of Article 6.

42 — Katzenberger, P., op. cit., p. 1025.

56. The court is therefore asking whether national provisions relating to the protection given to citizens of non-Member countries should be considered 'national provisions' within the meaning of that article (part (a) of the second question) and whether, in circumstances where the owner of the rights is a citizen of one of these countries, the term of protection provided for in Article 10 would be valid for subject-matter that, on 1 July 1995, fulfilled the conditions for protection set out in Directive 92/100 (part (b) of the second question).

57. In my view, the two questions should be examined together, without prejudice to the separate answer to be given to each question, although, as the topic is Bob Dylan, I would prefer to sing 'the answer is blowing in the wind'. [43]

58. No doubt taking their cue from the nationality of the holder of the original production rights to the contested phonograms, all the parties submitting written observations in these preliminary ruling proceedings have assumed that the answer to the second question, as a whole, lies in the interpretation of Article 7 of Directive 2006/116, which is headed 'Protection vis-à-vis third countries'.

59. First of all, I share the Commission's view that a distinction should be made between scope *ratione personae* and scope *ratione materiae*.

60. Article 7 of Directive 2006/116 lays down the principle of comparison of terms of protection; in respect of works whose country of origin is a third country under the Berne Convention, and the author of the work is not a Community national (Article 7(1)), the term of protection expires in accordance with the legislation of the country of origin of the work, but can never exceed the term laid down in the directive itself.

61. Article 7(2) concerns related rights and introduces a principle similar to that set out in the preceding paragraph. [44] As it makes reference to 'rightholders who are not Community nationals' it can also be regarded as one of the directive's provisions on scope *ratione personae*. However, by making the application of the term of protection which it offers conditional on the granting of that protection by the Member States, it brings into play the international treaties, both bilateral and multilateral, which bind the Member State where the protection is sought, particularly the Rome Convention, the Phonograms Convention, the WPPT and the TRIPs Agreement. [45]

43 — 'Blowin' in the wind' (© 1962 Warner Bros. Inc.) is probably one of the singer songwriter's most famous songs and also gave its name to the collection on the phonograms at issue.

44 — Mayer, P., op. cit., p. 75.

45 — Walter, M., op. cit., p. 608.

62. Consequently, decisions as to the protection to be accorded to non-nationals and calculation of the term of protection are both matters for the courts of the Member State where the related rights are sought to be exercised in each individual case to determine, in accordance with the international treaties to which that Member State is a signatory.

63. Article 10, on the other hand, as well as containing provisions on the application in time of Directive 2006/116, includes a definition of its scope *ratione materiae*.

64. As pointed out by the Commission, although Article 10 of Directive 2006/116 is to be found under the heading 'Application in time', its provisions focus on the *subject-matter* of the protection rather than on the nationality of the rightholder and cover 'works and subject matter' protected on 1 July 1995 under national law on copyright in at least one Member State (with regard to question a)) or under Directive 92/100 (with regard to question b)).

65. As regards the application of Article 10(2), it appears (question 2(a)) to refer to all material provisions of the relevant national law on copyright and related rights and its various branches, including the applicable multilateral or bilateral treaties. [46] It is therefore for the national court to determine whether particular subject-matter, in the present case the contested Bob Dylan recordings, fulfils the conditions of the national legislation. Where a legal action involving that subject-matter relies on the law of another Member State, the court in the Member State in which protection is sought must investigate the foreign law in accordance with its own procedural rules on proof of foreign law. The first head of Article 10(2) does not therefore refer to national rules on the protection of nationals of non-Member countries.

66. In conclusion, I propose to address part a) of the second question by stating that national provisions governing the protection of rightholders who are not Community nationals do not constitute national provisions within the meaning of Article 10(2) of Directive 2006/116.

67. With regard to part b) of the second question, it should be recalled that in this case the right to rely on Directive 92/100 arises only when its provisions have not been incorporated into national law by the given date. [47] The court in the Member State where protection is sought must assess whether its

46 — Walter, M., op. cit., p. 632.
47 — See point 47 of this Opinion.

own law or that of another Member State protects these rights and, if not, it must consider whether it is appropriate to extend the protection in the light of Directive 92/100.

68. However, in order to clarify how this applies to a citizen of a non-Member country, it is necessary to take into consideration Article 7(2) of Directive 2006/116, as interpreted to date.

69. In this regard, I have already mentioned how Community law is necessarily linked to international treaties. Of these the most salient is the TRIPs Agreement, particularly Article 14(2) read together with Article 14(5), which grants protection of at least 50 years for the rights of producers of phonograms. The similarity between Article 14(2) and Article 10 of the Rome Convention means that these two provisions always need to be carefully analysed. [48]

70. It is also appropriate to forewarn the national court of the complex interrelationship between the various international treaties and their overlapping provisions; by way of example, Article 2(2) of the TRIPs Agreement provides that 'Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under … the Berne Convention, the Rome Convention …', implying that the international obligations that the various contracting states have entered into between themselves or with third countries pursuant to other conventions remain in force. [49]

71. Furthermore, as the Commission correctly points out, according to a very recent case, [50] there is no doubt that the TRIPs Agreement applies to related rights, since the Community has competence and has exercised it, as demonstrated by Directive 2001/29 and Directive 92/100, discussed earlier.

72. In short, it is my view that part b) of the second question should be answered to the effect that it is for the national court to establish, in accordance with Article 7(2) of Directive 2006/116 and the international treaties having binding effect in its legal order, whether the term of protection granted pursuant to Article 10(2) of that directive in respect of subject-matter that, on 1 July 1995, fulfilled the criteria for protection set out in Directive 92/100 applies to a rightholder who is not a Community national.

48 — Füller, J.T., 'Artikel 14 — Ausübende Künstler', in Busche, J. and Stoll, J.-T. (Eds), *TRIPs — Internationales und europäisches Rechts des geistigen Eigentums,* Cologne, 2007, p. 271.

49 — Wager, H., 'Substantive Copyright Law in TRIPs', in Cohen Jehoram, H., Keuchenius, P and Brownlee, L.M. (Eds), *Trade-related Aspects of Copyright,* Kluwer, Deventer, 1996, p. 36.

50 — Case C-431/05 *Merck Genéricos* [2007] ECR I-7001, paragraphs 32 to 39.

VI — Conclusion

73. In the light of the foregoing considerations, I propose that the Court of Justice reply to the questions referred for a preliminary ruling by the Bundesgerichtshof by ruling:

(1) The term of protection granted 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, assuming the conditions set out in Article 10(2) thereof are met, also applies in the case of subject-matter that has not at any time been protected in the Member State in which protection is sought, without prejudice to the provisions of Article 10(3).

(2) National provisions within the meaning of Article 10(2) of Directive 2006/116 do not include provisions of a Member State governing the protection of rightholders who are not Community nationals.

(3) In respect of subject-matter that, on 1 July 1995, fulfilled the criteria for protection set out in 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, it is for the national court to establish, in accordance with Article 7(2) of Directive 2006/116 and the international treaties having binding effect in its legal order, whether the term of protection granted pursuant to Article 10(2) of that directive applies to rightholders who are not Community nationals.