JUDGMENT OF THE COURT (Second Chamber)

27 January 2011 *

In Case C-168/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Milano (Italy), made by decision of 12 March 2009, received at the Court on 12 May 2009, in the proceedings

Flos SpA

v

Semeraro Casa e Famiglia SpA,

intervener:

Assoluce – Associazione nazionale delle Imprese degli Apparecchi di Illuminazione,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas, U. Lõhmus (Rapporteur), and A. Ó Caoimh, Judges,

* Language of the case: Italian.

Advocate General: Y. Bot,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 April 2010,

after considering the observations submitted on behalf of:

— Flos SpA, by G. Casucci and N. Ferretti, avvocati,

— Semeraro Casa e Famiglia SpA, by G. Floridia and F. Polettini, avvocati,

— Assoluce – Associazione Nazionale delle Imprese degli Apparecchi di Illuminazione, by C. Galli, M. Bogni and C. Paschi, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

— the European Commission, by H. Krämer and S. La Pergola, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 June 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 17 and 19 of 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).

2 The reference has been made in proceedings between Flos SpA ('Flos'), a company manufacturing designer lighting, and Semeraro Casa e Famiglia SpA ('Semeraro') concerning breach of the copyright that Flos claims to hold in respect of a design known as the 'Arco' lamp.

Legal context

European Union law

Directive 93/98/EEC

3 Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9) states, in recital 2 in the preamble, that differences between the national laws governing the terms of

protection of copyright and related rights are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market and that, with a view to the smooth operation of the internal market, the laws of the Member States should be harmonised so as to make terms of protection identical throughout the European Union.

4 Article 1(1) of Directive 93/98 provides that protection of the rights of an author in a literary or artistic work within the meaning of Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 July 1979, is to run for the life of the author and for 70 years after his death.

5 Article 10 of that directive, entitled 'Application in time', provides at paragraphs 1 to 3:

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

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

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.'

6 Pursuant to the first subparagraph of Article 13(1) of Directive 93/98, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 11 of the directive before 1 July 1995.

Directive 98/71

7 According to recitals 2 and 3 in the preamble to Directive 98/71, the differences in the legal protection of designs offered by the legislation of the Member States directly affect the establishment and functioning of the internal market as regards goods embodying designs and can distort competition within the internal market; as a result the approximation of national design protection laws is necessary for the smooth functioning of the market.

8 In the words of recital 8 to Directive 98/71, 'in the absence of harmonisation of copyright law, it is important to establish the principle of cumulation of protection under specific registered design protection law and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred'.

9 Article 12 of Directive 98/71, entitled 'Rights conferred by the design right', provides as follows:

'1. The registration of a design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. The aforementioned use shall cover, in particular, the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.

2. Where, under the law of a Member State, acts referred to in paragraph 1 could not be prevented before the date on which the provisions necessary to comply with this Directive entered into force, the rights conferred by the design right may not be invoked to prevent continuation of such acts by any person who had begun such acts prior to that date.'

10 Article 17 of Directive 98/71, entitled 'Relationship to copyright' provides:

'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.'

11 The first subparagraph of Article 19(1) of Directive 98/71 provided that Member States were to bring into force the laws, regulations or administrative provisions necessary to comply with the directive not later than 28 October 2001.

Directive 2001/29/EC

12 Article 1 of 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), entitled 'Scope', states, at paragraph 1, that the directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

13 Article 2 of Directive 2001/29, entitled 'Reproduction right', provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

…'

National legislation

14 Protection of designs is conferred by Royal Decree No 1411 of 25 August 1940 concerning provisions laid down by law in respect of patents for industrial designs (*Gazzetta Ufficiale* No 247 of 21 October 1940). In the version which applied until 19 April 2001, Article 5 of the royal decree provided:

'An ornamental design patent may be granted in respect of a new design which is capable of conferring on certain industrial products a special ornamental character by virtue of shape or by a particular combination of lines, colours or other features. The provisions relating to copyright shall not apply to the abovementioned designs …'

15 Point 4 of the first paragraph of Article 2 of Law No 633 of 22 April 1941 concerning copyright and other rights related to the exercise thereof (*Gazzetta Ufficiale* No 166 of 16 July 1941, 'Law No 633/1941'), in the version which applied until 19 April 2001, made copyright protection for designs subject to the condition of 'separability' ('scindabilità'), providing that copyright protection was afforded for 'works …, even the industrial applications of such works, provided that their artistic value is separable from the industrial nature of the product with which they are associated'.

16 Article 22 of Legislative Decree No 95 of 2 February 2001 implementing Directive 98/71 (GURI No 79 of 4 April 2001, 'Legislative Decree No 95/2001'), which entered into force on 19 April 2001, amended point 4 of the first paragraph of Article 2 of Law No 633/1941, removing the requirement for 'separability' and adding to the categories of protected works, as a new point 10, 'industrial designs which possess in themselves creative character and artistic value'.

17 Legislative Decree No 164 of 12 April 2001 implementing Directive 98/71 (GURI No 106 of 9 May 2001, 'Legislative Decree No 164/2001'), inserted Article 25a into Legislative Decree No 95/2001, which introduced, as a transitional provision, a 10-year moratorium starting on 19 April 2001, during which 'the protection conferred on designs under point 10 of the first paragraph of Article 2 of Law [No 633/1941] shall not be enforceable as against those persons who engaged before that date in the manufacture, supply or marketing of products based on designs that were in, or had entered into, the public domain'.

18 That provision was subsequently restated in Article 239 of the Italian Industrial Property Code (the 'IPC') which was adopted in 2005.

19 Article 4(4) of Decree-Law No 10 of 15 February 2007 implementing Community and international obligations (GURI No 38 of 15 February 2007), converted into a law by Law No 46 of 6 April 2007, abolished the 10-year moratorium introduced by Legislative Decree No 164/2001, amending Article 239 of the IPC. Article 239, as amended, provided:

'The protection conferred on industrial designs under point 10 of the first paragraph of Article 2 of Law [No 633/1941] shall not be enforceable as against products based on designs that were in, or had entered into, the public domain prior to the entry into force of Legislative Decree [No 95/2001].'

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 On 23 November 2006, Flos brought proceedings against Semeraro before the Tribunale di Milano (Milan district court) complaining that Semeraro had imported from China and marketed in Italy a lamp called the 'Fluida' lamp, which, in its submission, imitated all the stylistic and aesthetic features of the Arco lamp, an industrial design in which Flos claimed to hold the property rights.

21 It is apparent from the order for reference that, in interim proceedings preceding the action on the merits in which that order was made, it was found that the Arco lamp, which was created in 1962 and entered the public domain before 19 April 2001, was eligible for copyright protection as an industrial design under Law No 633/1941, as amended by Legislative Decree No 95/2001, and that the lamp imported by Semeraro 'slavishly imitated all [its] stylistic and aesthetic features'. The court hearing the interim proceedings, by order of 29 December 2006, therefore confiscated the imported lamps and prohibited Semeraro from continuing to market them.

22 As regards the proceedings on the substance, the national court states that, since these proceedings were commenced, legislative amendments have been made concerning copyright protection for industrial designs and that some doubt arises as to their conformity with Directive 98/71 and, more specifically, with the principle of cumulation of protection established by Article 17 of that directive.

23 In particular, the national court refers in that regard to Article 239 of the IPC, as amended by Article 4(4) of Decree Law No 10 of 15 February 2007.

24 In those circumstances, 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 … 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 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 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 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)?'

Consideration of the questions referred

Preliminary observations

25 The European Commission and Semeraro express some doubts as to the relevance of Article 19 of Directive 98/71 for the outcome of the dispute in the main proceedings, since that provision merely sets the period within which the Member States were to comply with the directive.

26 In that regard, the order for reference contains no explanation of the relevance, for the resolution of the dispute before the national court, of the expiry of the period for transposition of Directive 98/71. Indeed, in the grounds explaining this reference for a preliminary ruling, the national court refers solely to Article 17 of Directive 98/71.

27 The questions should therefore be considered to relate essentially to Article 17 of Directive 98/71 and accordingly the Court will reply to them in the light of that provision alone.

First question

28 By its first question, the national court asks, in essence, whether Article 17 of Directive 98/71 must be interpreted as precluding legislation of a Member State which excludes from copyright protection designs which were in, or entered into, the public domain before the date of entry into force of the legislation that introduced such

protection into the domestic legal order of that State, either because the designs were never registered as such or because their registration had ceased to have effect as at that date, although they met all the requirements to be eligible for such protection.

29 The national court thus envisages two cases: first, the case of designs which, before the date of entry into force of the national legislation transposing Directive 98/71 (19 April 2001), were in the public domain because they had not been registered as designs and, second, the case of designs which, before that date, entered the public domain because the protection deriving from registration ceased to have effect.

30 In that regard, although Flos stated, at the hearing, that it had not registered the lamp at issue in the main proceedings as a design, the order for reference provides no information in that respect.

31 The Court must therefore take into account both the cases mentioned in paragraph 29 of this judgment when it replies to the first question. It falls to the national court to determine whether or not the lamp was registered as a design.

32 As regards the first case (that of designs which have never been registered as such), Article 17 of Directive 98/71 provides that only a design protected by a design right registered in or in respect of a Member State in accordance with that directive may be eligible, by virtue of the directive, for protection under the law of copyright of that State.

33 It follows that designs which, before the date of entry into force of the national legislation transposing Directive 98/71 into the legal order of a Member State, were in the public domain because they had not been registered do not fall within the scope of Article 17 of the directive.

34 However, it is conceivable that copyright protection for works which may be unregistered designs could arise under other directives concerning copyright, in particular Directive 2001/29, if the conditions for that directive's application are met, a matter which falls to be determined by the national court.

35 As regards the second case (that of designs which have entered the public domain because the protection resulting from registration has ceased to have effect), although the first sentence of Article 17 of Directive 98/71 provides that a design protected by a design right 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, the second sentence of Article 17 allows the Member States to determine the extent to which, and the conditions under which, such a protection is conferred, including the level of originality required.

36 However, the second sentence cannot be interpreted as meaning that Member States have a choice as to whether or not to confer copyright protection for a design protected by a design right registered in or in respect of a Member State if the design meets the conditions under which copyright protection is conferred.

37 Indeed, it is clear from the wording of Article 17 of Directive 98/71, and particularly from the use of the word 'also' in the first sentence thereof, that copyright protection must be conferred on all designs protected by a design right registered in or in respect of the Member State concerned.

38 The intention of the European Union legislature to confer that protection also emerges clearly from recital 8 in the preamble to Directive 98/71, affirming, in the absence of harmonisation of copyright legislation, the principle of cumulation of protection under specific registered design protection law and under copyright law.

39 Nor does the fact that the Member States are entitled to determine the extent of copyright protection and the conditions under which it is conferred affect the term of that protection, since the term has already been harmonised at European Union level by Directive 93/98.

40 In that regard, Article 1(1) of Directive 93/98 provides for copyright in a literary or artistic work within the meaning of Article 2 of the Berne Convention for the Protection of Literary and Artistic Works to run for the life of the author and for 70 years after his death. Article 10(2) of Directive 93/98 provides that that term of protection is to apply to all works and subject matter which, on 1 July 1995, were protected in at least one Member State.

41 It follows 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.

42 In that regard, as the Court stated in paragraphs 18 to 20 of its judgment in Case C-60/98 *Butterfly Music* [1999] ECR I-3939, it is clear from Article 10(2) of Directive 93/98 that application of the terms of protection laid down by the directive 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. The Court held that that consequence results from the express will of the European Union legislature and that such a solution was intended to achieve as rapidly as possible the objective – formulated, in particular, in recital 2 in the preamble to Directive 93/98 – of harmonising the national laws on the terms of protection of copyright and related rights and to avoid the situation where rights have expired in some Member States but are protected in others.

43 That reasoning must also hold true in relation to the revival of copyright protection for designs which were previously protected by another intellectual property right. Indeed, in view of recitals 2 and 3 in the preamble to Directive 98/71, national law transposing the directive cannot – without undermining both the uniform application of the directive throughout the European Union and the smooth functioning of the internal market for products incorporating designs – preclude copyright protection in the case of designs which, although being in the public domain before the date of entry into force of the national law concerned, at that date meet all the requirements to be eligible for such protection.

44 Accordingly, the answer to the first question is that Article 17 of Directive 98/71 must be interpreted as precluding legislation of a Member State which excludes from copyright protection in that Member State designs which were protected by a design right registered in or in respect of a Member State and which entered the public domain before the date of entry into force of that legislation, although they meet all the requirements to be eligible for such protection.

Second and third questions

45 By its second and third questions, which it is appropriate to consider together, the national court asks, in essence, whether Article 17 of Directive 98/71 must be interpreted as precluding legislation of a Member State which – either for a substantial period, namely 10 years, or completely – excludes from copyright protection designs which, although they meet all the requirements to be eligible for copyright protection, entered the public domain before the date of entry into force of that legislation, that being the case with regard to third parties who have produced and marketed products based on such designs in that State.

46 Concerning the revival of protection under an intellectual property right, namely copyright, for designs which were in the public domain, Flos, the Italian Government and the Commission, in their written observations, and Semeraro, at the hearing, maintained that such protection is likely to give rise to a conflict between, on the one hand, the legitimate interests of the rightholders and their successors in title and, on the other, the interests of third parties acting in good faith who had relied on the availability of the designs in order to produce or market products on the basis of those designs.

47 It is true that national legislation transposing Directive 98/71, such as Legislative Decree No 164/2001 inserting Article 25a into Legislative Decree No 95/2001, and Article 239 of the IPC, setting a 10-year moratorium which renders the protection of the designs concerned unenforceable as against a category of third parties to have manufactured products on the basis of those designs before 19 April 2001, may give rise to a legitimate expectation, on the part of third party producers of those products, that they will be able to continue using those designs.

48 However, as regards the application of copyright protection to designs, Directive 98/71, unlike Article 10(3) of Directive 93/98, does not contain express provision as to its application in time so far as the protection of the acquired rights and legitimate expectations of third parties is concerned.

49 In that regard, Article 12(2) of Directive 98/71, which concerns the carrying out of acts of exploitation of designs by any person who first carried out such acts before the date of entry into force of the national provisions transposing the directive, relates solely to rights conferred by registration of a design, as is apparent from the actual wording of Article 12(2), and it cannot therefore apply in relation to copyright protection.

50 However, the absence of a provision expressly referring to protection, for third parties, of acquired rights and legitimate expectations in relation to the revival of copyright protection provided for in Article 17 of Directive 98/71 does not preclude application of the principle that acquired rights must be respected or the principle of legitimate expectations, both of which are among the fundamental principles of European Union law.

51 In that connection, it should be recalled that, in accordance with the principle that amending legislation applies, except where otherwise provided, to the future consequences of situations which arose under the law as it stood before amendment (see, in particular, Case 68/69 *Brock* [1970] ECR 171, paragraph 6; Case 270/84 *Licata* v *Economic and Social Committee* [1986] ECR 2305, paragraph 31; and *Butterfly Music*, paragraph 24), acts performed before the date of entry into force of new legislation continue to be governed by the previous law. Thus, the revival of copyright protection has no effect on acts of exploitation definitively performed by a third party before the date on which such rights became applicable.

52 Conversely, by virtue of that principle, the fact that copyright protection applies with regard to the future consequences of situations which are not definitively settled means that it has an effect on a third party's rights to continue the exploitation of subject-matter which is protected afresh by an intellectual property right (see, to that effect, *Butterfly Music*, paragraph 24).

53 It should also be recalled that it is settled case-law that the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future consequences of situations which arose under the earlier rules (see, to that effect, Case 278/84 *Germany* v *Commission* [1987] ECR 1, paragraph 36; Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 19; Case C-221/88 *Busseni* [1990] ECR I-495, paragraph 35; and *Butterfly Music*, paragraph 25).

54 In this instance, the Member State concerned adopted two types of legislative measure intended to protect the acquired rights and legitimate expectations of a particular category of third parties.

55 As regards, in the first place, the legislative measure providing for a transitional period in relation to a specific category of third parties with a view to protecting their legitimate interests, it follows from the principle that acquired rights must be respected and from the principle of the protection of legitimate expectations that Article 17 of Directive 98/71 does not preclude such a measure, provided that the measure does not have the effect of deferring for a substantial period the application of the new rules on copyright protection for designs so as to prevent them from applying on the date laid down by that directive (see, to that effect, *Butterfly Music*, paragraphs 23 and 28).

56 In that regard, the assessment of the compatibility of the length of that transitional period and of the category of third parties covered by the legislative measure must be carried out in the light of the principle of proportionality.

57 Accordingly, the legislative measure adopted by the Member State concerned must be appropriate for attaining the objective pursued by the national law and necessary for that purpose – namely ensuring that a balance is struck between, on the one hand, the acquired rights and legitimate expectations of the third parties concerned and, on the other, the interests of the rightholders. Care must also be taken to make sure that the measure does not go beyond what is needed to ensure that that balance is struck.

58 For that purpose, the measure may be regarded as appropriate only if it is directed at a category of third parties entitled to rely on the principle of protection of legitimate expectations – that is to say, persons who have already performed acts of exploitation in relation to designs within the public domain at the date of entry into force of the legislation transposing Article 17 of Directive 98/71 into the domestic law of the Member State concerned.

59 Furthermore, the legislative measure should ensure that the period of use of the designs by those third parties is limited to what is necessary for them to phase out the part of their business that is based on earlier use of those designs or to clear their stock.

60 The measure does not go beyond what is necessary to ensure that a balance is struck between the competing rights if it does not defer entitlement to copyright protection for a substantial period.

61 In this instance, as regards the definition of the category of third parties as against whom it is provided that copyright protection is for a temporary period to be unenforceable, Legislative Decree No 95/2001 and Article 239 of the IPC may be regarded as appropriate since they are directed solely at persons who acquired their rights before the entry into force of the national measures transposing Directive 98/71.

62 Conversely, unenforceability for a transitional period of 10 years does not appear to be justified by the need to safeguard the economic interests of third parties acting in good faith, since it is apparent that a shorter period would also allow the part of their business that is based on earlier use of those designs to be phased out and, even more so, their stock to be cleared.

63 Furthermore, a 10-year moratorium in respect of copyright protection appears to go beyond what is necessary, since, by taking 10 years off the period during which a work is protected (as a rule 70 years after the death of the author), the application of copyright protection is deferred for a substantial period.

64 As regards, in the second place, Article 4(4) of Decree Law No 10 of 15 February 2007, abolishing the moratorium and rendering copyright protection unenforceable for an indefinite period in the case of products manufactured on the basis of designs which were in the public domain before 19 April 2001, it follows from the foregoing that such a measure negates Article 17 of Directive 98/71, since it has the effect of preventing, generally, the application of the new protection, that is to say, protection relating to copyright. Nor does that measure seek to restrict the category of third parties who may rely on the principle of the protection of legitimate expectations. On the contrary, the measure renders copyright more generally unenforceable, since, under the provision, it is not necessary for a third party to have begun exploiting the designs before 19 April 2001.

65 In view of all the foregoing considerations, the answer to the second and third questions is that, Article 17 of Directive 98/71 must be interpreted as precluding legislation of a Member State which – either for a substantial period of 10 years or completely – excludes from copyright protection designs which, although they meet all the requirements to be eligible for copyright protection, entered the public domain before the date of entry into force of that legislation, that being the case with regard to any third party who has manufactured or marketed products based on such designs in that State – irrespective of the date on which those acts were performed.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

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 excludes from copyright protection in that Member State designs which were protected by a design right registered in or in respect of a Member State and which entered the public domain before the date of entry into force of that legislation, although they meet all the requirements to be eligible for copyright protection.**

2. **Article 17 of Directive 98/71 must be interpreted as precluding legislation of a Member State which – either for a substantial period of 10 years or completely – excludes from copyright protection designs which, although they meet all the requirements to be eligible for copyright protection, entered the public domain before the date of entry into force of that legislation, that being the case with regard to any third party who has manufactured or marketed products based on such designs in that State – irrespective of the date on which those acts were performed.**

[Signatures]