JUDGMENT OF THE COURT (Fifth Chamber)

6 June 2002 *

In Case C-360/00,

REFERENCE to the Court under Article 234 EC by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Land Hessen

and

G. Ricordi & Co. Bühnen- und Musikverlag GmbH,

on the interpretation of the first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Land Hessen, by H.L. Bauer, Rechtsanwalt,

— G. Ricordi & Co. Bühnen- und Musikverlag GmbH, by O. Brändel, Rechtsanwalt,

— the German Government, by A. Dittrich and W.-D. Plessing, acting as Agents,

— the Commission of the European Communities, by K. Banks, acting as Agent, and W. Berg, Rechtsanwalt,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2002,

gives the following

Judgment

1 By order of 30 March 2000, received at the Court on 28 September 2000, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of the first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC).

2 That question was raised in proceedings between the Land Hessen and G. Ricordi & Co. Bühnen- und Musikverlag GmbH (hereinafter 'Ricordi'), a firm publishing musical and dramatic works, concerning the right to have the opera *La Bohème* by the Italian composer Giacomo Puccini performed in the 1993/1994 and 1994/1995 seasons.

Legal background

National laws

3 At the material time, artistic and intellectual works were protected in Germany under the 1965 version of the Gezetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights, hereinafter 'the UrhG'; *Bundesgesetzblatt* 1965 I, p. 1273). That legislation distinguished between the

protection of the works of German nationals and that of the works of foreign authors.

4 Whilst the former enjoyed protection for all their works, whether published or not and regardless of where they were first published (Paragraph 120(1) of the UrhG), the latter were entitled to protection only for works published in Germany for the first time or within 30 days of their being first published (Paragraph 121(1) of the UrhG).

5 In other cases, foreign authors enjoyed the protection afforded to their rights by international treaties (Paragraph 121(4) of the UrhG).

6 The copyright protection granted by German legislation expires 70 years after the 1 January following the author's death (Paragraphs 64 and 69 of the UrhG).

7 Under Italian law, Article 25 of Law No 633 of 22 April 1941 on the protection of copyright and other rights relating to its exercise (GURI No 166 of 16 July 1941) and Article 1 of Legislative Decree No 440 of 20 July 1945 (GURI No 98 of 16 August 1945) provide that the term of copyright protection is 56 years from the time of the author's death.

International law

8 The principal international agreement governing copyright protection is the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of

24 July 1971) which applies to the main proceedings in the version as amended on 28 September 1979 ('the Berne Convention').

9 Under Article 7(1) of the Berne Convention, the term of protection granted thereby is to be the life of the author and 50 years after his death. Article 7(5) provides that the 50-year term is to be deemed to begin on 1 January of the year following the death. Under Article 7(6), the contracting parties may, however, grant a longer term of protection.

10 Article 7(8) of the Berne Convention institutes a scheme known as 'comparison of the terms of protection'. Under that provision, the term of protection is, in any case, to be governed by the legislation of the country where protection is claimed. However, unless the legislation of that country otherwise provides, which German legislation has not, the term is not to exceed the term fixed in the country of origin of the work.

11 The limitations permitted under Article 7(8) of the Berne Convention were reproduced in Article 3(1) of the Agreement on trade-related aspects of intellectual property rights contained in Annex 1 C to the Agreement establishing the World Trade Organisation approved on behalf of the European Community as regards matters within its competence by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1). Article 9 of that agreement also provides that the signatory States are to comply with Articles 1 to 21 of the Berne Convention and the Appendix thereto.

Community law

12 The first paragraph of Article 6 of the EC Treaty states:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

The main proceedings and the question referred for a preliminary ruling

13 Ricordi holds the rights of performance in the opera *La Bohème* by Puccini, who died on 29 November 1924 (see point 13 et seq. of the Opinion of the Advocate General). The Land Hessen operates the Staatstheater (State theatre) in Wiesbaden (Germany).

14 During the 1993/1994 and 1994/1995 seasons, the Staatstheater in Wiesbaden staged a number of performances of that opera without Ricordi's consent.

15 Ricordi argued before a Landgericht (Regional Court, Germany) that, in the light of the prohibition of discrimination on grounds of nationality in the EC Treaty,

Puccini's works were necessarily protected in Germany until the expiry of the 70-year term prescribed by German law, that is, until 31 December 1994.

16 The Land Hessen contended that the opera *La Bohème* was covered by the term of protection of 56 years prescribed by Italian law, so that the copyright in that work had expired on 31 December 1980.

17 The Landgericht seised allowed Ricordi's application. The appeal brought by the Land Hessen was unsuccessful. The Land thus brought an appeal on points of law (Revision).

18 In the order for reference, the Bundesgerichtshof points out that since, according to the findings made, the opera *La Bohème* was first published in Italy and not in Germany, it was, at the material time, protected in Germany solely to the extent provided by international treaties, pursuant to Paragraph 121(4) of the UrhG.

19 Accordingly, in the light of Article 7(8) of the Berne Convention and the fact that German law does not contain any provision derogating from the principle according to which the term of protection must not exceed the term fixed in the country of origin of the work, the term of protection in Germany for the opera *La Bohème* was restricted by the term of protection prescribed by Italian law and thus expired in 1980.

20 According to the Bundesgerichtshof, the outcome of the main proceedings depends on the applicability to the facts of the case of the prohibition of discrimination on grounds of nationality in the first paragraph of Article 6 of the EC Treaty.

21 In that regard, the national court expresses some doubt as to whether the prohibition of discrimination in the first paragraph of Article 6 of the EC Treaty is applicable to the protection of copyright in cases where the author had died when the Community prohibition of discrimination on grounds of nationality entered into force. That prohibition has applied to both the Federal Republic of Germany and the Italian Republic since 1 January 1958, whereas Puccini died in 1924.

22 In those circumstances, the Bundesgerichtshof stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Must the prohibition of discrimination in the first paragraph of Article 12 EC be applied in cases where a foreign author had already died when the Treaty entered into force in the State of which he was a national, if otherwise the consequence, under national law, would be unequal treatment as regards the term of protection of the foreign author's works and of those of a national author who also died before the entry into force of the Treaty?'

The question referred for a preliminary ruling

23 By its question, the national court seeks in essence to ascertain whether the prohibition of discrimination in the first paragraph of Article 6 of the EC Treaty is also applicable to the protection of copyright in cases where the author had died when the EEC Treaty entered into force in the Member State of which he was a national and, if so, whether it precludes the term of protection granted by the legislation of a Member State to the works of an author who is a national of

another Member State being shorter than the term granted to the works of its own nationals.

24 First of all, it must be recalled that, by reason in particular of their effects on intra-Community trade in goods and services, copyright and related rights fall within the scope of application of the EC Treaty (see, to that effect, Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 27).

25 Next, it should be noted that the fact that the author had died when the EEC Treaty entered into force in the Member State of which he was a national does not preclude the application of the first paragraph of Article 6 of the EC Treaty.

26 Copyright may be relied on not only by an author, but also by those claiming under him (see *Phil Collins and Others*, cited above, paragraph 35). It is not disputed that the copyright concerned in the main proceedings was still producing its effects as regards the persons claiming under Giacomo Puccini when the EEC Treaty entered into force (see Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraphs 49 and 50).

27 Lastly, it must be determined whether the difference of treatment at issue in the main proceedings, established by the UrhG between German and foreign authors, is contrary to Community law.

28 The Land Hessen contends that this difference of treatment is due to the disparity between the laws of the Member States.

29 It argues that comparison of the terms of protection, provided for in Article 7(8) of the Berne Convention, does not use nationality, but country of origin, as a criterion. The term of protection is fixed by each Member State, which remains free to extend the term of protection applicable under its legislation and thereby, by virtue of that provision, the term applicable in respect of its nationals living abroad. In those circumstances, the national legal situation constitutes a criterion of differentiation which is not arbitrary, but objective. The term of protection is only indirectly related to the nationality of the author.

30 That interpretation cannot be accepted.

31 Although it is undisputed that the first paragraph of Article 6 of the EC Treaty is not concerned with any disparities in treatment or the distortions which may result, for the persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various Member States, so long as those laws affect all the persons subject to them, in accordance with objective criteria and without direct or indirect regard to nationality, it does prohibit 'any discrimination on grounds of nationality'. Consequently, that provision requires each Member State to ensure that nationals of other Member States in a situation governed by Community law are placed on a completely equal footing with its own nationals (see, to that effect, *Phil Collins and Others*, cited above, paragraphs 30 and 32).

32 Clearly, Paragraphs 120(1) and 121(1) of the UrhG discriminate directly on grounds of nationality.

33 Moreover, since Article 7(8) of the Berne Convention permits the Federal Republic of Germany to extend to the rights of a foreign author the 70-year term of protection prescribed by German law, the mechanism of comparison of the terms of protection provided for in that provision cannot justify the difference of treatment as regards the term of protection, which is established by the abovementioned provisions of the UrhG, between the rights of a German author and those of an author who is a national of another Member State.

34 In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling must be that the prohibition of discrimination in the first paragraph of Article 6 of the EC Treaty is also applicable to the protection of copyright in cases where the author had died when the EEC Treaty entered into force in the Member State of which he was a national and it precludes the term of protection granted by the legislation of a Member State to the works of an author who is a national of another Member State being shorter than the term granted to the works of its own nationals.

Costs

35 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Bundesgerichtshof by order of 30 March 2000, hereby rules:

The prohibition of discrimination in the first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC) is also applicable to the protection of copyright in cases where the author had died when the EEC Treaty entered into force in the Member State of which he was a national. It precludes the term of protection granted by the legislation of a Member State to the works of an author who is a national of another Member State being shorter than the term granted to the works of its own nationals.

Jann von Bahr

La Pergola Wathelet Timmermans

Delivered in open court in Luxembourg on 6 June 2002.

R. Grass P. Jann

Registrar President of the Fifth Chamber