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THE NON DISCRIMINATION PRINCIPLE AND ITS APPLICATION TO COPYRIGHT PROTECTION WITHIN THE EUROPEAN UNION

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1 Introduction: the Phil Collins decision

Art. 6 of the EU Treaty (former art. 7, in the version before Maastricht) contains a general disposition that, without prejudice to any special provision contained therein, prohibits any discrimination between European citizens on grounds of their nationality.

Such a rule, included in the Treaty since its original wording adopted in Rome in 1957 by the 6 founder Member States of the European Community, has recently become of great importance, following the decision by the European Court of Justice of October 20, 1993, in the proceedings nn. C 92/92 - the "Phil Collins" decision – the benefits of which have, maybe, developed beyond initial expectations.

The case concerned a famous British singer, Phil Collins, and a German company named Imtrat, based in Munich, which had imported and distributed some records in Germany containing the recording of a concert performed by Collins in 1993 in California and recorded without his consent.

Consequently, the singer began a lawsuit against the German company before the Court (Landgericht) of Munich, claiming the protection foreseen in Germany by articles 75 and 96 of the local copyright law (UhrG). This provides that a performance cannot be fixed on visual or sound records, and the records reproduced and distributed, without the consent of the performer.

The defendant company objected that art. 120 of the same law, referred to by art. 125, limited such protection to performances by German nationals, irrespective of where they took place, and to performances taking place in Germany, irrespective of the nationality of the performers. The only exception to this position would be where Germany's international obligations require otherwise.

The Court of Munich referred the following questions to the European Court:

1) whether German copyright law was subject to the nondiscrimination principle set forth by art. 7 of the EEC Treaty;
2) if so, whether a member State was allowed to impose conditions on nationals of other member States before granting them the same level of protection enjoyed by its own citizens; and
3) whether art. 7 of the EEC Treaty was directly applicable.

This was the decision of the European Court:

1) Authors' rights and neighboring rights fall within the scope of application of the EEC Treaty in the sense of art. 7; the prohibition of discrimination laid down in this article is therefore applicable to these rights;
2) Art. 7 of the EEC Treaty shall be interpreted so that it is a violation of this regulation if legal provisions, which benefit the nationals of one member State, exclude authors and performing artists of another member State, as well as those deriving rights from them, from the right to prohibit the distribution in such State of a phonogram produced without their permission, where the performance took place abroad;
3) Art. 7 of the EEC Treaty shall be interpreted so that an author or performing artist of another member State, or those deriving rights from him, can rely on the prohibition of discrimination laid down in this regulation before a national Court, in order to claim the protection reserved to authors and performing artists who are nationals of that State.

The decision follows the same principle laid down in 1982 by an older decision of the EEC Commission, where the German body for the administration of rights of performing artists (GVL) was held to have abused its dominant position, by refusing to represent performing artists who were not

German nationals and did not reside in Germany in claiming their rights against German users of their music (broadcasting companies); this was the only decision of its kind until 1993.

2 The pre-existing situation

At the time when the Phil Collins decision was delivered, copyright protection throughout Europe still varied greatly from State to State.

In Germany and Austria (which at that time was outside the EEC) protection lasted for seventy years *post mortem auctoris*. In France too, it was seventy years but only in relation to musical works (with or without words). In Spain it was sixty years (eighty, according to the former law). Otherwise, protection existed for fifty years after the author's death.

Moreover, the States listed below granted the following additional periods of protection in conjunction with World War I and World War II:

- Austria:	7 years	law dated July 8, 1953;
- Belgium:	10 years	law dated June 25, 1921;
- France:	6 years and 152 days	law dated February 3, 1919;
	8 years and 120 days	law dated July 22, 1941;
- Italy	6 years	decree dated July 20, 1945.

With Italy, the following bilateral agreements have been reached in order to extend the same prorogations to Italian authors:

- Austria:	exchange of diplomatic notes dated March 5, 1969 (but only for 6 years);
- France:	exchange of diplomatic notes dated December 29, 1951 and July 29, 1957.

Under these agreements, Italy granted, on a reciprocal basis, the 6 additional years of the Italian World War II prorogation to Austrian and French authors.

Bilateral agreements have also been reached by Italy with Spain on October 12, 1957, and Germany on April 18-28, 1967, granting the full 56 years protection period to Italian authors in Spain and Germany and, by reciprocity, to Spanish and German authors in Italy.

Finally, the peace Treaty signed at the end of World War II contains a disposition (enclosure XV, letter A, art. 3), under which, when calculating the period of copyright protection in relation to works that were protected at the beginning of the conflict, belonging to any of the allied or associated powers (among which were France and the United Kingdom) or to their citizens, the period between the beginning of the conflict and the date when the Treaty came into force is not to be taken into account. As a consequence, the normal duration of such rights shall be considered as automatically extended in Italy for an additional term, corresponding to the above mentioned period of suspension.

Italian literature and case law have paid great attention to the question of the duration of copyright protection, whenever possible interpreting the rules broadly in order to allow the most comprehensive copyright protection.

After a few controversial decisions from various Courts of first and second instance, two consecutive decisions of the Italian Supreme Court (Corte di Cassazione) n. 9326 dated September 4, 1993, and n. 9529 dated November 12, 1994, concerning the protection of cinematographic works originating from the United States of America (but the principle could also apply, *mutatis mutandis*, to other allied and associated powers, such as France and the United Kingdom) clearly stated that the Italian presidential decree n. 19/79, which extended copyright protection in Italy for those works from thirty to fifty years, did not include the six years prorogation for World War II and the suspension provided for by the peace Treaty in favour of the works of the allied and associated powers.

3 The interaction between the EC Directive n. 93/98 dated October 29, 1993, and the nondiscrimination principle

On October 29, 1992, the EC Council issued the Directive n. 93/98, harmonizing the duration of copyright protection in every member State to 70 years *p.m.a.*. Articles 10 and 13 of the Directive ruled that the extension would be granted to all those works and subject matter which, on July 1, 1995, were still protected in at least one member State.

All the European States are also members of the Bern Convention for the protection of literary and artistic works, under which (art. 7, par. 8) the duration of copyright protection is ruled by the law of the Country in which the protection is claimed; however, the convention states that, unless there is a

different legal disposition in that Country, the duration of such protection cannot exceed the period foreseen in the Country of origin of the work (the so called "rule of comparison of terms": as a general principle, no work can enjoy protection abroad when it has already fallen into the public domain in its own Country).

One exception to this rule can be found in the exchange of diplomatic letters dated July 29, 1957, between Italy and France; these allow Italian works which enjoy the full French World War II prorogation of 8 years and 120 days to benefit in France from a protection period of 2 years and 120 days longer than in Italy, their Country of origin.

Outside the European Union, there is the exchange of diplomatic notes dated October 28, 1892 (later confirmed in 1902 and then again in 1915), between Italy and the United States of America; according to which Italy has given "*formal assurance that the law of Italy permits to citizens of the United States the benefit of literary, artistic and musical copyright on substantially the same basis as to Italian subjects*". In return, Italian citizens enjoy the protection granted to US citizens by American copyright law (on the basis of this agreement Italy currently grants to the works of US nationals the full period of protection available in Italy - 70 years *p.m.a.* – plus 5 years and 10 months of war suspension in accordance with the aforementioned peace Treaty).

The original intention of the EC Directive was that "*at least one member State*" (as indicated in Art. 10) was meant to be – save specific exceptions – the Country of origin of the work.

However, the Phil Collins decision has changed things completely by bringing with it the unexpected consequence that every European author was to be considered protected, in every member State, exactly as if he were a citizen of that State, even if his works had already fallen into the public domain in his own Country.

So, for example, an English author whose works are no longer protected in the UK could - and actually should, if his death took place not more that 70 years before 1995 - still be considered protected in Germany for the entire term foreseen by the German law (70 years *p.m.a.*) at the reference date of the Directive (July 1, 1995). As such, he is entitled by articles 10 and 13 of the Directive to enjoy the longer

protection period foreseen by the new European rule (also 70 years *p.m.a.*) all over Europe, including his own Country, on a retroactive basis.

In other words, the Phil Collins decision provided the key to circumvent, at the European level, the rule of comparison of terms set out in art. 7, par. 8, of the Bern Convention.

4. "Divisibility"

A further consequence may be seen in relation to dramatico-musical works; some States with a shorter protection period, such as Italy, consider these as works of joint authorship. They are, therefore, protected as a whole and there is only one protection term running from the death of the last surviving co-author, composer or librettist (the so called "indivisibility" rule).

In other member States, such as Germany, dramatico-musical works are subject instead to the opposite regime (the so called "divisibility" rule), so that each of the contributions (music and libretto) enjoys an independent period of protection, running from the death of each co-author.

So, for example, we could have a work, originating from a State with a shorter term of protection (50 years) and in which the "indivisibility" rule applies, which has already fallen into the public domain in his own Country but that should be considered still protected, even if limited to the musical or literary part, in a Country with a longer protection term and in which the "divisibility" rule applies (such as Germany). For the combined effect of the Directive n. 93/98 and the Phil Collins decision, such work would then re-acquire protection in the entire EU, including its Country of origin. And since this Country applies the "indivisibility" rule, the protection would also be extended to the other contribution, even if no longer protected in the Country of longer protection.

5. The German experience

The Phil Collins decision originated in Germany and it was in Germany that it had its first and most significant effects.

Back in 1985, the rule of comparison of terms set out by the Bern Convention was applied exactly by the German Supreme Court (Bundesgerichtshof), when it denied an Italian opera ("Tosca" by Puccini) the right to be protected for the German term of 70 years *p.m.a.*, because it had already fallen into the

public domain in Italy, its Country of origin (protection in Italy at that time was 50 years *p.m.a.*, plus 6 years for the war prorogation).

Notwithstanding this, on April 21, 1994, the German Supreme Court (Bundesgerichtshof) changed its viewpoint with its decision in respect of some recordings by the British group "The rolling Stones" made in the UK in 1964 and 1965; this was followed by another decision of the Court of Appeal (Oberlandesgericht) of Stuttgart on November 2, 1994, concerning some recordings by the group "Genesis" made in the US in 1986.

Both decisions affirmed the applicability of the non discrimination principle to authors' and neighboring rights. They show, in particular, how the Phil Collins decision, which applies an already existing law, is also applicable to violations which took place prior to the judgement.

In relation to authors' rights, the Court (Landgericht) of Frankfurt on Main considered the issue in its decision of April 4, 1996. Again this concerned a series of performances of the works of Giacomo Puccini (who died in 1924) in Germany after the works had fallen into the public domain in Italy but during the period in which, under the non discrimination principle, they should have been considered as protected by German copyright law. The decision (against which an appeal has been filed and is still pending) applied the same principle, granting the publisher of the works the right to receive: i) statements of information about the use of the works in Germany within the term of 70 years *p.m.a.* (i.e. up to December 31, 1994); and ii) compensation for damages.

Finally, art. 120 of the German copyright law (UhrG) - the root of the Phil Collins decision – was amended on July 23, 1995, by the implementation in Germany of the term Directive n. 93/98. The new version of art. 120 provides today that "*nationals of another member State of the European Union or another signatory State to the Agreement on the European Economic Area*" shall have "*equal status with German nationals*".

6 Italian implementation of the Directive n. 93/98

In Italy, the extension of the term of copyright protection from 50 (plus 6 years of the war prorogation) to 70 years *p.m.a.* has been granted by art. 17 of the law n. 52 of February 6, 1996, which came into force on February 25, 1996.

Since the law has been adopted after the reference date set forth in art. 10 of the Directive n. 93/98 (July 1, 1995), the adoption of a new instrument has been proposed in order to ensure that the extension of the protection runs from a date before July 1, 1995. At the time of writing this article, the new instrument is still under discussion at the Italian Parliament.

It is clear that, if the new instrument is adopted, Italian works and subject matter will be protected in every member State on the basis of the Directive and as a consequence of an explicit legal disposition of the Italian State.

Even without this explicit disposition, however, the same conclusion should be reached, and this for two reasons:

1) on the basis of the Phil Collins decision, at the reference date of July 1, 1995, Italian works and subject matter were protected in those Countries with a longer protection term (Germany, Austria, Spain and - for musical works - France);
2) with the adoption of the German law of June 23, 1995, an explicit equalization of treatment has been granted, under German copyright law, between German citizens and other EU nationals, including Italians.

7 Conclusions

In the past few years significant developments have been taking place in the framework of copyright protection within the European Union. A series of legal systems, at first quite different from one another, have been the focus of an effort of harmonization by the European institutions: harmonization that, with the EC Directive n. 93/98, has also affected the duration of copyright protection.

The Phil Collins decision, intervening after the issuing of the Directive but before the national legislations could implement it, has anticipated and, in part, extended its effect. We have already pointed out how the original wording of Art. 10, par. 2, of the Directive ("*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 art. 13*") was intended to grant the longer protection period to all works still protected, at

the reference date of July 1, 1995, at least in their Country of origin in strict application, within the European Union, of the principle of comparison of terms indicated by the Bern Convention.

However, the non discrimination principle that the Phil Collins decision unexpectedly brought to the center of the scene has had the consequence that works which had already fallen into the public domain in their own Country have to be considered still protected abroad (even if only within Europe), therefore eliminating the principle of comparison of terms within the European Union and indirectly affecting the meaning of Art. 10 of the Directive n. 93/98.

At the end of this process, copyright protection in the European Union has been gradually harmonized. The Directive n. 93/98, after the anticipatory effect of the Phil Collins decision, is now receiving full implementation in every member State, so that we can say that in Europe protection is established at a much higher level than the rest of the world. As far as the term of copyright is concerned, member States no longer discriminate between national and European authors and this strengthens further the harmonization process.