OPINION OF ADVOCATE GENERAL JACOBS

delivered on 30 June 1993 *

My Lords,

1. Two German courts have requested preliminary rulings on the questions whether copyright and related rights fall within the ambit of the EEC Treaty and whether a Member State which allows its own nationals to oppose the unauthorized reproduction of their musical performances must grant identical protection to nationals of other Member States, in accordance with the prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty.

Case C-92/92

2. The plaintiff in Case C-92/92 is Phil Collins, a singer and composer of British nationality. The defendant — Imtrat Handelsgesellschaft mbH ('Imtrat') — is a producer of phonograms. [1] In 1983 Mr Collins gave a concert in California which was recorded without his consent. Reproductions of the recording were sold in Germany by Imtrat on compact disc under the title 'Live and Alive'. Mr Collins applied to the Landgericht München I for an injunction restraining Imtrat from marketing such recordings in Germany and requiring it to deliver copies in its possession to a court bailiff.

3. It appears that if Mr Collins were a German national his application would undoubtedly have succeeded. Paragraph 75 of the Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights, hereafter 'Urheberrechtsgesetz', BGBl. 1965 I, p. 1273) provides that a performing artist's performance may not be recorded without his consent and recordings may not be reproduced without his consent. Paragraph 125(1) of the Urheberrechtsgesetz provides that German nationals enjoy the protection of Paragraph 75, amongst other provisions, for all their performances regardless of the place of performance. However, foreign nationals have less extensive rights under the Urheberrechtsgesetz. Under Paragraph 125(2) they enjoy protection in respect of performances which take place in Germany, and under Paragraph 125(5) they enjoy protection in accordance with international treaties. The Landgericht München I refers to the Rome Convention of 26 October 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, but deduces from its terms that Germany is required to grant foreign performing artists the same treatment as its

* Original language: English.

1 — 'Phonogram' is a generic term covering vinyl records, compact discs and audio cassettes. It is defined by Article 3(b) of the Rome Convention of 26 October 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations as meaning 'any exclusively aural fixation of sounds of a performance or of other sounds'.

own nationals only in respect of performances that take place within the territory of a Contracting State; since the United States has not acceded to the Rome Convention, Paragraph 125(5) of the Urheberrechtsgesetz is of no avail to Mr Collins in the circumstances of the present case. However, Mr Collins argued that he was entitled to the same treatment as a German national by virtue of Article 7 of the EEC Treaty. The Landgericht München I therefore decided to refer the following questions to the Court:

'1. Is copyright law subject to the prohibition of discrimination laid down in the first paragraph of Article 7 of the EEC Treaty?

2. If so: does that have the (directly applicable) effect that a Member State which accords protection to its nationals for all their artistic performances, irrespective of the place of performance, also has to accord that protection to nationals of other Member States, or is it compatible with the first paragraph of Article 7 to attach further conditions (i. e. Paragraph 125(2) to (6) of the German Urheberrechtsgesetz of 9 September 1965) to the grant of protection to nationals of other Member States?'

Case C-326/92

4. The plaintiff and respondent in Case C-326/92 — EMI Electrola GmbH ('EMI Electrola') — produces and distributes phonograms. It owns the exclusive right to exploit in Germany recordings of certain works performed by Cliff Richard, a singer of British nationality. The defendants and appellants are Patricia Im-und Export Verwaltungsgesellschaft mbH ('Patricia'), a company which distributes phonograms, and Mr L. E. Kraul, its managing director. EMI Electrola applied for an injunction restraining Patricia and Mr Kraul (together with other persons) from infringing its exclusive rights in recordings of certain performances by Cliff Richard. The recordings were first published in the United Kingdom in 1958 and 1959, apparently by a British phonogram producer to which Cliff Richard had assigned his performer's rights in the recordings. That company subsequently assigned the rights to EMI Electrola.

5. The Landgericht granted EMI Electrola's application and that decision was confirmed on appeal. Patricia and Mr Kraul appealed on a point of law to the Bundesgerichtshof, which considers that, under German law, EMI Electrola would be entitled to an injunction if Cliff Richard were of German nationality but is not so entitled because he is British. It is not entirely clear from the order for reference how or why the Bundesgerichtshof arrived at the view that German law provides for such a difference of treatment. The reason appears to be that the performances in question took place before 21 October 1966, on which date the Rome Convention came into force in Germany, and that Germany is only required to grant 'national treatment' to foreign performers, under the Rome Convention, in respect of performances that take place after that date. [2]

2 — See the judgment of the Bundesgerichtshof of 20 November 1986 ('Die Zauberflote'), GRUR 1987, p. 814.

6. It is in any event common ground that a difference in treatment, depending on the nationality of the performer, exists in German law. The Bundesgerichtshof therefore referred the following questions to the Court:

'Is the national copyright law of a Member State subject to the prohibition of discrimination laid down in the first paragraph of Article 7 of the EEC Treaty?

If so, are the provisions operating in a Member State for the protection of artistic performances (Paragraph 125(2) to (6) of the Urheberrechtsgesetz) compatible with the first paragraph of Article 7 of the EEC Treaty if they do not confer on nationals of another Member State the same standard of protection (national treatment) as they do on national performers?'

The issues raised by the two cases

7. Both cases raise essentially the same issues: (a) whether it is compatible with Community law, in particular Article 7 of the EEC Treaty, for a Member State to grant more extensive protection in respect of performances by its own nationals than in respect of performances by nationals of other Member States and (b) if such a difference in treatment is not compatible with Community law, whether the relevant provisions of Community law produce direct effect, in the sense that a performer who has the nationality of another Member State is entitled to claim, in proceedings against a person who markets unauthorized recordings of his performances, the same rights as a national of the Member State in question.

8. I note in passing that, although both the national courts refer to copyright, the cases are in fact concerned not with copyright in the strict sense but with certain related rights known as performers' rights.

The prohibition of discrimination on grounds of nationality

9. The prohibition of discrimination on grounds of nationality is the single most important principle of Community law. It is the leitmotiv of the EEC Treaty. It is laid down in general terms in Article 7 of the Treaty, the first paragraph of which provides:

'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.'

That general prohibition of discrimination is elaborated upon in other, more specific provisions of the Treaty. Thus Article 36 permits certain restrictions on the free movement of goods, provided that they do not constitute 'arbitrary discrimination' or a disguised restriction on trade. Article 48(2) requires the 'abolition of any discrimination based on nationality between workers of the Member

States as regards employment, remuneration and other conditions of work'. Under Article 52, second paragraph, nationals of one Member State may work in a self-employed capacity in another Member State 'under the conditions laid down for its own nationals'. Under Article 60, third paragraph, a person providing a service may temporarily pursue his activity in the State where the service is provided 'under the same conditions as are imposed by that State on its own nationals'.

10. It is not difficult to see why the authors of the Treaty attached so much importance to the prohibition of discrimination. The fundamental purpose of the Treaty is to achieve an integrated economy in which the factors of production, as well as the fruits of production, may move freely and without distortion, thus bringing about a more efficient allocation of resources and a more perfect division of labour. The greatest obstacle to the realization of that objective was the host of discriminatory rules and practices whereby the national governments traditionally protected their own producers and workers from foreign competition. Although the abolition of discriminatory rules and practices may not be sufficient in itself to achieve the high level of economic integration envisaged by the Treaty, it is clearly an essential prerequisite.

11. The prohibition of discrimination on grounds of nationality is also of great symbolic importance, inasmuch as it demonstrates that the Community is not just a commercial arrangement between the governments of the Member States but is a common enterprise in which all the citizens of Europe are able to participate as individuals. The nationals of each Member State are entitled to live, work and do business in other Member States on the same terms as the local population. They must not simply be tolerated as aliens, but welcomed by the authorities of the host State as Community nationals who are entitled, 'within the scope of application of the Treaty', to all the privileges and advantages enjoyed by the nationals of the host State. No other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared destiny without which the 'ever closer union among the peoples of Europe', proclaimed by the preamble to the Treaty, would be an empty slogan.

12. Much has been written about the relationship between Article 7 and the other provisions of the Treaty which lay down more specific prohibitions of discrimination on grounds of nationality (e. g. Articles 48(2), 52, second paragraph, and 60, third paragraph). There is also a substantial body of case-law on that relationship. The generally accepted position seems to be that recourse is to be had to Article 7 only when none of the more specific provisions prohibiting discrimination is applicable. [3] Thus one of the main functions of Article 7 is to close any gaps left by the more specific provisions of the Treaty. [4]

13. It is sometimes said that, where rules are compatible with the specific Treaty articles prohibiting discrimination, they are also

3 — See for example Grabitz, in *Kommentar zum EWG-Vertrag*, by E. Grabitz (ed.), paragraph 20 on Article 7; see also Case 305/87 *Commission* v *Greece* [1989] ECR 1461, at paragraph 13.

4 — See B. Sundberg-Weitman, *Discrimination on Grounds of Nationality*, 1977, p. 14.

compatible with Article 7. [5] It would perhaps be more accurate to say that, if a national provision discriminates in a manner that is positively permitted by one of the more specific Treaty articles, it cannot be contrary to Article 7. Thus, since Article 48(4) of the Treaty allows nationals of other Member States to be excluded from employment in the public service in certain circumstances, such a practice cannot be contrary to Article 7 notwithstanding its manifestly discriminatory nature. It would, however, be wrong to say that a rule discriminating against nationals of other Member States cannot be contrary to Article 7 simply because it is not caught by the specific provisions of Articles 48, 52, 59 and 60 of the Treaty. Otherwise Article 7 would cease to perform its gap-closing function.

14. In the circumstances of the present cases I do not think that it is necessary to explore more fully the relationship between the general prohibition of Article 7 and the more specific prohibitions laid down elsewhere. There cannot be any doubt that Article 7, either alone or in conjunction with other provisions of the Treaty, has the effect that nationals of a Member State are entitled to pursue any legitimate form of economic activity in another Member State on the same terms as the latter State's own nationals.

15. That simple observation is probably sufficient in itself to resolve the fundamental issues raised by the present cases. In so far as intellectual property rights assist the proprietor thereof to pursue the economic freedoms granted by the Treaty, in particular by Articles 30, 52 and 59, a Member State must accord the nationals of other Member States the same level of protection as it accords its own nationals. If, for example, a Member State granted patents only to its own nationals and refused to grant patents to the nationals of other Member States, it could not seriously be argued that such a practice was compatible with the Treaty.

16. Indeed, such discrimination was specifically identified by the Council in 1961 in the General Programme for the Abolition of Restrictions on Freedom to Provide Services [6] and in the General Programme for the Abolition of Restrictions on Freedom of Establishment. [7] Both those programmes call for the abolition of 'provisions and practices which, in respect of foreign nationals only, exclude, limit or impose conditions on the power to exercise rights normally attaching to the provision of services [or to an activity as a self-employed person] and in particular the power ... to acquire, use or dispose of intellectual property and all rights deriving therefrom'. [8] It may be noted that the General Programmes provide 'useful guidance for the implementation of the relevant provisions of the Treaty'. [9]

17. There are many ways in which the proprietor of intellectual property rights may seek to exercise those rights in pursuit of the economic freedoms guaranteed by the Treaty. A performer may for example have phonograms embodying his performance manufactured in his own country and export those goods to another Member State, in which case he is in a situation covered by Article 30. Or he may set up a company or branch in that other Member State and have

5 — See, for example, Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, at paragraph 36.

6 — OJ, English Special Edition, Second Series IX, p. 3.

7 — OJ, English Special Edition, Second Series IX, p. 7.

8 — Title III. A, third paragraph, indent (e).

9 — Case 71/76 *Thieffry* v *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765, at paragraph 14.

phonograms manufactured there for sale in that country, in which case he is exercising his right of establishment under Article 52. Or again — and this is no doubt the commonest method of exploiting performers' rights and is the method used in the present cases — he may license another person to manufacture and sell phonograms embodying his performance in the other Member State; in that case he will doubtless receive a royalty for each sale and will be able to obtain further royalties by licensing a copyright management society (or, more accurately, a performers' rights management society) to authorize public performances of his recordings. Such licensing activities will constitute services which are provided across national frontiers and are as such covered by Article 59 of the Treaty.

18. Whichever way a performing artist chooses to exploit his performances for commercial gain in another Member State, he will be in a situation covered by Community law. As such, he will be 'within the scope of application of the Treaty' and will be entitled to invoke the prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty. Indeed the Court has gone much further than that. It has held that a tourist who travels to another Member State may, as a recipient of services, benefit from a scheme for compensating the victims of violent crime on the same terms as nationals of that Member State; [10] that a person who goes to another Member State for the purpose of receiving vocational training may not be required to pay a registration fee if no such fee is payable by nationals of that Member State; [11] and that a migrant worker who is prosecuted in a criminal court is entitled to the same treatment, with regard to the use of languages in judicial proceedings, as a national of the host country. [12] It would be extraordinary if those who exercise the fundamental freedoms guaranteed by the Treaty were entitled to equality of treatment in relation to matters that are — while not without importance — peripheral and essentially non-economic in nature, but were to be denied equality of treatment in the field of intellectual property rights, the economic importance of which is considerable.

19. Certainly there can be no doubt about the economic importance of the performing artist's exclusive right to authorize the reproduction and distribution of recordings embodying his performance. The exercise of that right is essential to the commercial exploitation of a performance. The sale of unauthorized recordings damages the performing artist in two ways: first, because he earns no royalties on such recordings, the sale of which must inevitably reduce the demand for his authorized recordings, since the spending power of even the most avid record collector is finite; secondly, because he loses the power to control the quality of the recordings, which may, if technically inferior, adversely affect his reputation. The latter point was argued forcefully, but to no avail, by the 'world-famous Austrian conductor' who was unable to prevent the sale of unauthorized recordings in the 'Zauberflöte' case referred to above (in paragraph 5).

10 — Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195.

11 — Case 293/83 *Gravier* v *City of Liège* [1985] ECR 593.

12 — Case 137/84 *Ministère Public* v *Mutsch* [1985] ECR 2681, at paragraph 12 in particular.

20. Performers' rights also play a role in the field of consumer protection: the consumer doubtless assumes that recordings made by well-known, living performers are not released without the performer's authorization and that such persons would not jeopardize their reputation by authorizing the distribution of low-quality recordings; that limited guarantee of quality is lost entirely if recordings may be distributed without the performer's consent. It may thus be seen that performers' rights operate in much the same way as trade marks, the economic significance of which was recognized by the Court in the *Hag II* case. [13]

21. The defendants in both the present cases advance a number of arguments purporting to show that the contested German legislation is not contrary to the prohibition of discrimination on grounds of nationality. I shall briefly summarize the main arguments and state why, in my view, none of them is convincing.

22. Both defendants contend that the discrimination lies outside the scope of application of the Treaty. Imtrat reaches that conclusion on the grounds that the performance in question took place outside the territory of a Member State and that the existence of intellectual property rights is a matter for national law by virtue of Article 222 of the Treaty. That cannot be correct. The place where the original performance took place is irrelevant; what matters is that Phil Collins and his licensees are denied protection, in an overtly discriminatory manner, when they attempt to exploit — or prevent others from exploiting — the performance in a Member State. [14] The argument based on Article 222 of the Treaty is equally untenable. That article, which, it will be recalled, provides that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership, clearly does not authorize Member States to grant intellectual property rights on a discriminatory basis. It might just as well be argued that a Member State could prohibit the nationals of other Member States from buying land for business use.

23. It is contended on behalf of Patricia and Mr Kraul that the absence of Community legislation harmonizing the laws of Member States on copyright and related rights removes such matters from the scope of the Treaty entirely. That argument is of course doomed to failure. The application of the principle of non-discrimination is not dependent on the harmonization of national law; on the contrary, it is precisely in areas where harmonization has not been achieved that the principle of national treatment assumes special importance.

24. It is true that the Court has several times held that in the absence of harmonization it is for national law to determine the conditions governing the grant of intellectual property rights; see, for example, *Thetford* v *Fiamma*. [15] But that does not mean that Member States are free to lay down discriminatory conditions for the grant of such rights. That much is clear from the *Thetford* judgment itself (at paragraph 17), in which

13 — Case C-10/89 *CNL-Sucal* v *HAG GF* [1990] ECR I-3711.

14 — In Case 36/74 *Walrave* v *Union Cycliste Internationale* [1974] ECR 1405, at paragraph 28, the Court stated that 'the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community'.

15 — Case 35/87 [1988] ECR 3585, at paragraph 12.

the Court attached importance to the non-discriminatory nature of a provision of United Kingdom law relating to the grant of patents, there being 'no discrimination based on the nationality of applicants for patents'; the Court clearly implied that a patent granted on the basis of a discriminatory provision could not be relied on to justify a restriction on trade between Member States under Article 36 of the Treaty. Moreover, the Council has also recognized, in the General Programmes referred to above (in paragraph 16), that the grant and exercise of intellectual property rights are matters falling within the scope of the Treaty and are therefore subject to the prohibition of discrimination.

25. Also relevant in this context is the Court's judgment in *GVL* v *Commission*, [16] in which the Court held that a performers' rights management society abused its dominant position, in breach of Article 86 of the Treaty, by refusing to manage the rights of foreign performers not resident in Germany. The decision [17] in issue in that case was based partly on Article 7 of the Treaty. As the Commission has pointed out, it would be very strange if undertakings were prohibited from discriminating on grounds of nationality, in the field of intellectual property, but Member States were allowed to maintain in force discriminatory legislation. The United Kingdom also cites *GVL* v *Commission* and submits, rightly in my view, that that judgment clearly shows that the management and enforcement of performers' rights are matters falling within the scope of the Treaty.

26. It is in any event not true to say that the Community legislature has been completely inactive in the field of copyright and related rights. Several measures have been adopted; notably, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [18] and 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. [19] It is interesting to note that the 18th recital in the preamble to the latter Directive states that measures based on Article 5 of the Directive, which permits derogations from the exclusive lending right created by Article 1 of the Directive, must comply with Article 7 of the Treaty. Mention may also be made of the Council Resolution of 14 May 1992 on increased protection for copyright and neighbouring rights. [20] Article 1 of that Resolution notes that the Member States undertake to become parties to the Berne Convention for the Protection of Literary and Artistic Works of 24 July 1971 (Paris Act) and to the 1961 Rome Convention. In the circumstances, the view that copyright and related rights lie outside the scope of the Treaty is clearly untenable.

27. The only argument advanced by either of the defendants that has some plausibility is the one based on the Rome Convention, on which great reliance is placed by Imtrat. According to that argument, all questions concerning the level of protection to be granted to foreign performers are to be resolved in the context of the Rome Convention, which has established a delicate balance

16 — Case 7/82 [1983] ECR 483.

17 — Commission Decision 81/1030/EEC (OJ 1981 L 370, p 49); see, in particular, paragraph 46 of the decision.

18 — OJ 1991 L 122, p. 42.

19 — OJ 1992 L 346, p. 61.

20 — OJ 1992 C 138, p. 1

based on considerations of reciprocity. The connecting factor, under the Rome Convention, is not nationality — which would be unworkable because many performances are given by groups of performers who may have different nationalities — but place of performance. Imtrat points out further that both Germany and the United Kingdom were bound by the Rome Convention before they became mutually bound by the EEC Treaty (presumably on 1 January 1973, when the United Kingdom acceded to the Communities) and argues that the Rome Convention should therefore take precedence over the EEC Treaty by virtue of Article 234 of the latter. Imtrat suggests that dire consequences would ensue if Article 7 of the Treaty were applied in the field of copyright and related rights: authors from other Member States would, for example, be able to claim in Germany the long term of protection (70 years after the author's death) provided for in German law, whereas under Article 7(8) of the Berne Convention Germany is not required to grant them a longer term of protection than the term fixed in the country of origin of the work.

28. In response to those arguments the following points may be made. First, even if the Rome Convention had been concluded before the EEC Treaty, Article 234 of the latter would not give precedence to the Convention as regards relations between Member States. Article 234 is concerned solely with relations between Member States and non-member States. [21]

21 — See, for example, Case 121/85 *Conegate* v *HM Customs and Excise* [1986] ECR 1007, at paragraph 24.

29. Secondly, there is in any event no conflict between Community law and the Rome Convention. That Convention merely lays down a minimum standard of protection and does not prevent the Contracting States from granting more extensive protection to their own nationals or to nationals of other States. That much is clear from Articles 21 and 22 of the Convention. Article 21 provides:

'The protection provided for in this Convention shall not prejudice any protection otherwise secured to performers, producers of phonograms and broadcasting organisations.'

Article 22 provides:

'Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention.'

The Rome Convention does not prevent Germany from granting performers more extensive protection than the minimum provided for in the Convention. However, Article 7 of the Treaty requires that, if more extensive protection is granted to German performers, the same level of protection should be available to nationals of other Member States.

30. Thirdly, if nationality is unworkable as a connecting factor on account of the problem of multinational ensembles, it may well be asked why German law uses nationality as a connecting factor at all, as of course it clearly does since it grants differing levels of protection depending on whether the performer is German or of some other nationality. Moreover, even if only one member of an ensemble has German nationality, it seems that the performance is protected. [22] That constitutes a very simple criterion for resolving the difficulties supposedly caused by multinational ensembles; it would be equally workable where one member of an ensemble had the nationality of another Member State.

31. Fourthly, as regards the consequences of applying the principle of non-discrimination to copyright law in general and to the question of the term of protection, it may well be the case that Article 7 of the Treaty requires each Member State to grant all Community nationals the same term of protection as its own nationals, even though the latter receive a shorter term of protection in other Member States. Clearly, the prohibition of discrimination will often have the effect, in the absence of complete harmonization, that nationals of Member State A will be better protected in Member State B than vice versa. But the issue does not fall to be decided in these cases and it is clear that no serious consequence would ensue (except for the manufacturers of unauthorized recordings) if the protection granted to German performers, in respect of performances given in the territory of a State that is not a party to the Rome Convention or in respect of performances given before that Convention's entry into force, were extended to performers who are nationals of other Member States.

22 — See Mohring Nicolini, *Urheberrechtsgesetz*, commentary on Paragraph 125, at pp. 694 and 695.

The direct effect of Article 7, first paragraph

32. I turn now to the issue of direct effect. In my view, it is clear from the considerations set out above that the Treaty provisions which prohibit discrimination must be capable of being invoked by performers in the circumstances of the present cases. There is of course no doubt that the prohibition of discrimination laid down in Articles 52, second paragraph, and 60, third paragraph, produces direct effect: see as regards the former *Reyners* v *Belgium* [23] and as regards the latter *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid.* [24] Those cases show that the adoption of legislative measures was superfluous, as far as concerns the prohibition of discrimination on grounds of nationality, in view of the direct effect of the Treaty provisions. [25]

33. The Court's case-law also suggests that the first paragraph of Article 7 has direct effect in so far as it prohibits discrimination within the scope of application of the Treaty. In *Kenny* v *Insurance Officer* [26] the Court described that provision as being 'directly applicable' (meaning, presumably, that it has direct effect), while in *Blaizot* v *University of Liège* [27] the Court referred expressly to the

23 — Case 2/74 [1974] ECR 631, at paragraphs 24 and 25.

24 — Case 33/74 [1974] ECR 1299, at paragraph 27.

25 — See paragraph 30 of *Reyners* and paragraph 26 of *Van Binsbergen*.

26 — Case 1/78 [1978] ECR 1489, at paragraph 12.

27 — Case 24/86 [1988] ECR 379, at paragraph 35.

direct effect of Article 7. More importantly, it is clear from a number of judgments, including *Cowan*, [28] *Barra* v *Belgium* [29] and *Raulin*, [30] that national courts are under a duty to disapply national provisions that are contrary to Article 7. It is equally clear that that duty arises not only in proceedings against the State but also in litigation between individuals. [31]

A factual difference between Case C-92/92 and Case C-326/92

34. A final issue that remains to be explored is whether any significance attaches to an obvious factual difference between Case C-92/92 and Case C-326/92: in the former case the performer, Phil Collins, has remained the proprietor of the performer's rights and has granted an exclusive licence to a producer of phonograms to exploit those rights in Germany; in the latter case the performer, Cliff Richard, has assigned his rights to a British company, which has reassigned them to a German company. I am satisfied that that difference is not relevant to the issue of discrimination. Although in Case C-326/92 the direct victim of the discriminatory German legislation is a German company, the indirect victim will, on the assumption that royalties are paid to the performer by EMI Electrola, be Cliff Richard himself. Even in the case of an outright assignment without any provision for the payment of royalties, it would be wrong in principle to discriminate on the basis of the nationality of the performer and original right-holder. If such discrimination were permitted, it would mean that the exclusive right granted to a German performer would be an assignable asset, potentially of considerable value, while a British performer's exclusive right would have virtually no assignable value, since it would be extinguished on assignment. Thus the indirect victim of the discrimination would always be the performer himself. It would in any case be illogical, in the circumstances of the present cases, to distinguish between a performer's right which has been the subject of an exclusive licence and a performer's right which has been the subject of an assignment.

Conclusion

35. I am therefore of the opinion that the questions referred to the Court by the Landgericht München I in Case C-92/92 and the Bundesgerichtshof in Case C-326/92 should be answered as follows:

By virtue of the first paragraph of Article 7 of the Treaty, the courts of a Member State must allow performing artists who are nationals of other Member States to oppose the unauthorized reproduction of their performances on the same terms as the nationals of the first Member State.

28 — See note 10.

29 — Case 309/85 [1988] ECR 355, at paragraphs 19 and 20 in particular.

30 — Case C-357/89 [1992] ECR I-1027, at paragraphs 42 and 43.

31 — See Case 13/76 *Donà* v *Mantero* [1976] ECR 1333, at paragraphs 17 to 19; see also A. Arnull, *The General Principles of EEC Law and the Individual*, 1990, p. 18.