Term of protection of copyright in the EU is not set to revive rights that were in the public domain

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Patricia Mariscal (Elzaburu)

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In a recent decision (case C-169/15), the Court of Justice of the European Union has ruled that Directive 93/98/EEC harmonising the term of protection of copyright in the EU does not have the effect of restoring or reviving rights that, prior to its entry into force (1 July 1995), were for any reason in the public domain in all the EU Member States. In that regard, it is irrelevant whether the loss of rights prior to that date was due to application of a national law requiring formalities that do not comply with the Berne Convention in order to maintain the rights in a work.

The main proceedings prompting the reference for a preliminary ruling were between the Dutch company Montis Design, the holder of rights (we shall go on to see which rights) in a dining room chair –Chaplin– and an armchair –Charly-, and the company Goossens, the owner of a number of furniture stores in Holland. The proceedings concerned the sale of the "Beat" chair model, which allegedly infringed the copyright in Montis' chair and armchair.

Both pieces of furniture had been registered by Montis as international designs since 1988. According to the Dutch law in force at the time (Articles 21.3 and 24 of the Uniform Benelux Law), designs or models of outstanding artistic character could simultaneously enjoy design and copyright protection, although the extinction of the design rights once the 5-year term of protection had elapsed meant that the copyright was also extinguished unless the holder of the design or model submitted a special declaration seeking to maintain their copyright.

Since Montis never submitted such a declaration, both its design rights and copyright would have been extinguished in 1993.

The Hoge Raad's uncertainties as to the potential application of Directive 93/98 were set out in three questions for referral: First, whether the term of protection referred to in Article 10, in conjunction with Article 13.1 of Directive 93/98, is applicable to designs that were initially protected by copyright pursuant to national law, but which lapsed before 1 July 1995 on the ground that a formal requirement for their protection had not been satisfied. Second, whether, if the first question is answered in the affirmative, Directive 93/98 must be construed as precluding a rule of national legislation under which the copyright in a work of applied art that lapsed before 1 July 1995 on the ground that a formal requirement had not been satisfied is still deemed to have lapsed. And third, where it is considered that the copyright is to be revived, from what date would the revival occur?

According to the CJEU, the term of 70 years p.m.a. established by Directive 93/98 cannot apply to the chairs at issue since neither of the two requirements laid down in Article 10.2 are satisfied, i.e., the works must be protected in at least one Member State on 1 July 1995, and they must meet the criteria for protection under Directive 92/100.

The wording of Article 10.2 of Directive 93/98 certainly leaves little room for uncertainty: "*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 (...)*". If, as was demonstrated in the main proceedings, the works in question were not protected in any Member State on 1 July 1995, the 70-year p.m.a. term of protection laid down in the Directive cannot apply to them. As the CJEU states, it is impossible to extract different legal consequences from a law that the EU legislature has established so clearly. Nevertheless, the fact that the basis on which this term cannot be applied is the failure to satisfy a formal requirement established by a rule of national law that apparently does not comply with the Berne Convention, or thus with EU law, commands attention. This is not overlooked by the CJEU, who reasoned that the EU was not obliged to apply the principles of the Berne Convention until 1996. This argument is not entirely convincing, since the conflict between EU and national legislation would in any case have arisen after that time.

Despite arriving at opposite conclusions, both the Court of Justice and the Advocate General departed from the premise that the Dutch law, which subjected the copyright protection of a number of designs to the submittal of a declaration and payment of a fee, was incompatible with the Berne Convention. It is nevertheless worth noting –since the case concerns a chair and an armchair- that the specific rules on designs provided for in the Convention have not been taken into account. Article 2.7 reserves to the laws of the Member States the authority to regulate all issues concerning the requirements for protection of works of applied art, designs and models. This freedom enables the protection of such works to be subject to conditions that might not respect any of the principles established *iure conventionis*, such as the absence of formalities. Article 2.7 constitutes an exception to the general rule of thumb laid down in Article 5.2, and renders legislation such as the Dutch law compatible with the Berne Convention. The conclusion of this argument is the same as the one drawn by the Court: Article 10.2 of Directive 93/98 does not preclude legislation such as the Dutch law. However, the CJEU's line of reasoning is not dependent on the special regulatory features of designs, which suggests that it applies to all kinds of works. If, instead of a chair and an armchair, the subject matter at issue had been a literary work, could the same conclusion have been reached? In such a case, even applying the CJEU's reasoning, the work would likely have been able to enjoy the extended 70-year term of protection, since it might have been easier to demonstrate that the rights in that work were in force in some other Member State.