JUDGMENT OF THE COURT
13 July 1989 *

In Case 395/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the cour d'appel (Court of Appeal), Aix-en-Provence, for a preliminary ruling in the proceedings pending before that court between

Ministère public

and

Jean-Louis Tournier, the Director of the Société des auteurs, compositeurs et éditeurs de musique (Sacem), Neuilly,

Civil claimant: **Jean Verney,** of Juan-les-Pins,

on the interpretation of Articles 30, 59, 85 and 86 of the EEC Treaty,

THE COURT

composed of: T. Koopmans, President of Chamber, acting as President, G. F. Mancini, C. N. Kakouris, F. A. Schockweiler, J. C. Moitinho de Almeida, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs
Registrar: D. Louterman, Principal Administrator

* Language of the case: French.

after considering the observations submitted on behalf of:

J. Verney, the civil claimant in the main proceedings, by J. C. Fourgoux, of the Paris Bar, A. Paffenholz-Bompart, of the Grasse Bar, and, at the hearing, also by P. F. Ryziger, of the Paris Bar;

J.-L. Tournier, the defendant in the main proceedings, by O. Carmet, of the Paris Bar;

the Government of the French Republic, by R. De Gouttes and M. Giacomini, acting as Agents;

the Government of the Italian Republic, by L. Ferrari Bravo, acting as Agent, assisted by I. Braguglia, avvocato dello Stato;

the Government of the Hellenic Republic, by E. M. Mamouna, G. Crippa, S. Zissimopoulos and Y. Kranidiotis, acting as Agents;

the Commission of the European Communities, by its Legal Advisers G. Marenco and I. Langermann, acting as Agents;

having regard to the Report for the Hearing and further to the hearing on 8 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 26 May 1989,

gives the following

Judgment

1 By judgment of 2 December 1987, which was received at the Court on 23 December 1987, the cour d'appel, Aix-en-Provence, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 30, 59, 85 and 86 of that Treaty with a view to deciding whether certain trading conditions imposed on users by a national society managing copyright for authors, composers and publishers of music were compatible with those provisions.

2 The questions were raised in criminal proceedings instituted against Jean-Louis Tournier, the Director of the Société des auteurs, compositeurs et éditeurs de musique (hereinafter referred to as 'Sacem'), the society which manages copyright in musical works in France, on the basis of a complaint made by the operator of a discothèque at Juan-les-Pins, who also claims damages, on the ground that Sacem required him to make excessive, unfair or undue payments for the performance of protected musical works on his premises, thereby infringing certain provisions of French criminal law.

3 The juge d'instruction (examining magistrate), Grasse, before whom the complaint was brought, made an order that there was no case to answer, but the chambre d'accusation (preliminary criminal procedure chamber) of the cour d'appel, Aix-en-Provence, set that order aside. It required further information to be produced for the purpose, in particular, of pursuing the proceedings against the Director of Sacem. In the ensuing proceedings, the civil claimant requested that a number of questions be referred to the Court for a preliminary ruling, on the ground that the rate of the royalty demanded by Sacem should be considered in the light of the competition provisions of the EEC Treaty.

4 The civil claimant's complaints concern Sacem's general behaviour towards discothèques in France. He claimed first that the rate of royalties demanded by Sacem was arbitrary and unfair and therefore constituted an abuse of the dominant position held by that society. The level of royalties was appreciably higher than that applied in the other Member States and, moreover, the rates charged to discothèques bore no relation to those charged to other large-scale users of recorded music, such as television and radio stations.

5 He also claimed that discothèques used music of Anglo-American origin to a very considerable extent, a fact not taken into account in Sacem's method of calculating royalties, which is based on the application of a fixed rate of 8.25% to the turnover, including value-added tax, of the discothèque in question. The discothèque operators had to pay those very high royalties to obtain access to the whole of Sacem's repertoire even though only part of it was of any interest to them; Sacem had always refused to grant them access to just part of the repertoire, and they could not deal directly with the copyright-management societies in other countries since the latter were bound by 'reciprocal representation contracts'with Sacem and accordingly refused to grant direct access to their repertoires.

6 The cour d'appel observed in the first place that Sacem's activity covered the entire territory of France, which constitutes a substantial part of the common market, and that the conduct of which Sacem was accused was of such a nature as to affect trade between Member States. It then stated that Sacem held a dominant position on French territory since it held in fact, if not in law, an absolute monopoly over the management of its members' rights and was empowered by its foreign counterparts to manage their repertoires of musical works in France on the same conditions as its own. Finally, the cour d'appel observed that it was undisputed that, whilst the authority thus granted was not exclusive, no French discothèque or other undertaking whatsoever was in a position to establish direct contractual relations with a foreign copyright society.

7 Having regard to those considerations, the cour d'appel referred the following five questions to the Court for a preliminary ruling:

'(1) Is the amount of the royalty or of the combined royalties fixed by Sacem, which occupies a dominant position in a substantial part of the common market and enjoys a *de facto* monopoly in France in copyright management, and the charging of royalties connected therewith, compatible with Article 86 of the Treaty of Rome, or does it, on the contrary, amount to an abusive and restrictive practice through the imposition of conditions which are not negotiable and are inequitable?

(2) Does the organization, by means of a group of agreements known as reciprocal representation agreements, of a *de facto* monopoly in most countries of the European Community, enabling a copyright-management undertaking pursuing its activities in one Member State to fix arbitrarily and in a discriminatory fashion the level of royalties in such a way as to prevent users from selecting works from foreign authors without being obliged to pay royalties on the repertoires managed by the copyright-management society in that Member State, constitute a concerted practice in breach of Article 85(1) of the Treaty of Rome, thus facilitating the abuse of a dominant position within the meaning of Article 86 of that Treaty?

(3) Is Article 86 of the Treaty of Rome to be interpreted as meaning that it is an "unfair trading condition" for a copyright-management society occupying a dominant position in a substantial part of the common market and bound by reciprocal representation contracts to similar organizations in other EEC countries to fix a scale and rate of royalty which is several times greater than that applied by all copyright-management societies in the member countries of the EEC without any objectively justifiable ground and is unrelated to the sums redistributed to the authors, so that the royalty is disproportionate to the economic value of the service provided?

(4) Is the refusal by a society of authors and publishers enjoying a *de facto* monopoly in a Member State to permit users of phonograms to have access solely to the foreign repertoire managed by it, thereby partitioning the market, to be regarded as having as its object or at least as its effect the prevention, restriction or distortion of competition within the meaning of Article 85(1)?

(5) In view of the fact that the Court has already held that the placing at the public's disposal of a record or a book is inseparable from the circulation of the material form of the work, which results in exhaustion of the right to royalties, and despite the payment by the purchaser of the price of the record, which incorporates the royalty payable for the authorization to use the work, is the application of national legislation assimilating reproduction by means of phonograms to unlawful reproduction if the royalties for public performances fixed by the national [copyright-] management undertaking with a *de facto* monopoly are not paid compatible with Articles 30 and 59 of the Treaty if those royalties are excessive and discriminatory and if their amount is not determined by the authors themselves and/or would not be that which the

foreign copyright-management undertakings representing them would be liable to agree on directly?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts and procedure, the French law on copyright and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 It is appropriate to examine first the fifth question, dealing with Articles 30 and 59 of the Treaty, then the second and fourth questions, dealing with Article 85, and finally the interpretation of Article 86, which is the subject of the first and third questions.

The fifth question (Articles 30 and 59)

10 The fifth question raises two separate problems: first, whether Articles 30 and 59 of the Treaty prohibit the application of national legislation which treats as an infringement of copyright the public performance of protected musical works by means of sound recordings without the payment of royalties, where royalties have already been paid to the author, for the reproduction of the work, in another Member State; and secondly, the extent to which the answer to be given will be influenced by the rates of the royalties in question.

11 According to the judgment in Joined Cases 55 and 57/80 *Musik-Vertrieb Membran* v *GEMA* [1981] ECR 147, a copyright-management society acting on behalf of the copyright owner or his licensee may not rely on the exclusive exploitation right conferred by copyright to prevent or restrict the importation of sound recordings which have been lawfully marketed in another Member State by the owner himself or with his consent. No provision of national legislation may permit an undertaking which is responsible for copyright management and has a *de facto* monopoly on the territory of a Member State to charge a levy on products from another Member State where they have been put into circulation by the copyright owner or with his consent and thus to impose a charge on the importation of sound recordings which are already in free circulation in the common market as a result of the fact that they cross an internal frontier.

12 The problems, in relation to the requirements of the Treaty, involved in the observance of copyright in musical works made available to the public through their performance are not the same as those which arise where the act of making a work available to the public is inseparable from the circulation of the physical medium on which it is recorded. In the former case the copyright owner and the persons claiming through him have a legitimate interest in calculating the fees due in respect of the authorization to present the work on the basis of the actual or probable number of performances, as the Court held in Case 62/79 *Coditel* v *Ciné Vog Films* [1980] ECR 881.

13 It is true that the present case raises the specific question of the distinction between the conditions applicable to those two situations, in so far as sound-recordings are products covered by the provisions on the free movement of goods contained in Article 30 *et seq.* of the Treaty but are also capable of being used for public performance of the musical work in question. In such circumstances, the requirements relating to the free movement of goods and the freedom to provide services and those deriving from the observance of copyright must be reconciled in such a way that the copyright owners, or the societies empowered to act as their agents, may invoke their exclusive rights in order to require the payment of royalties for music played in public by means of a sound-recording, even though the marketing of that recording cannot give rise to the charging of any royalty in the country where the music is played in public.

14 As regards the abusive or discriminatory nature of the rate of royalty, that rate, which is fixed independently by Sacem, must be appraised in relation to the competition rules contained in Articles 85 and 86. The rate of royalty is not a matter to be taken into account in considering the compatibility of the national legislation in question with Articles 30 and 59 of the Treaty.

15 Accordingly, it must be stated in reply to the fifth question that Articles 30 and 59 of the Treaty must be interpreted as not preventing the application of national legislation which treats as an infringement of copyright the public performance of a protected musical work by means of sound recordings without payment of royalties, where royalties have already been paid to the author, for the reproduction of the work, in another Member State.

The second and fourth questions (Article 85)

16 The second question relates to the practice adopted by national copyright-management societies in the various Member States in relations with each other. It concerns, first, the organization by those societies of a network of reciprocal representation agreements and, secondly, those societies' collective practice of refusing to grant any access to their respective repertoires to users established in other Member States.

17 With regard to the first point, it is apparent from the documents before the Court that a 'reciprocal representation contract', as referred to by the national court, must be taken to mean a contract between two national copyright-management societies concerned with musical works whereby the societies give each other the right to grant, within the territory for which they are responsible, the requisite authorizations for any public performance of copyrighted musical works of members of the other society and to subject those authorizations to certain conditions, in conformity with the laws applicable in the territory in question. Those conditions include in particular the payment of royalties, which are collected for the other society by the society which it has empowered to act as its agent. The contract specifies that each society is to apply, with respect to works in the other society's repertoire, the same scales, methods and means of collection and distribution of royalties as those which it applies for works in its own repertoire.

18 Under the international copyright conventions, the owners of copyright recognized under the legislation of a contracting State are entitled, in the territory of every other contracting State, to the same protection against infringement of copyright, and the same remedies for such infringement, as the nationals of the latter State.

19 Consequently, it is apparent that reciprocal representation contracts between copyright-management societies have a twofold purpose: first, they are intended to make all protected musical works, whatever their origin, subject to the same conditions for all users in the same Member State, in accordance with the principle laid down in the international provisions; secondly, they enable copyright-management societies to rely, for the protection of their repertoires in another State, on the organization established by the copyright-management

society operating there, without being obliged to add to that organization their own network of contracts with users and their own local monitoring arrangements.

20 It follows from the foregoing considerations that the reciprocalrepresentation contracts in question are contracts for services which are not in themselves restrictive of competition in such a way as to be caught by Article 85(1) of the Treaty. The position might be different if the contracts established exclusive rights whereby copyright-management societies undertook not to allow direct access to their repertoires by users of recorded music established abroad; however, it is apparent from the documents before the Court that exclusive-rights clauses of that kind which previously appeared in reciprocal representation contracts were removed at the request of the Commission.

21 The Commission points out, however, that the removal of that exclusive-rights clause from the contracts has not resulted in any change in the conduct of the management societies; they still refuse to grant a licence or to entrust their repertoire abroad to a society other than the one established in the territory in question. That statement raises the second problem raised in the question, namely whether the management societies have in fact retained their exclusive rights by means of a concerted practice.

22 In that connection the Commission and Sacem maintain that the management societies have no interest in using a method different from that of appointing as agent the society established in the territory concerned and that it does not seem realistic in those circumstances to regard the management societies' refusal to allow direct access to their repertoires by foreign users as a concerted practice. The discothèque operators, whilst recognizing that the foreign societies entrust the management of their repertoires to Sacem because it would be too burdensome to set up a system of direct collection of royalties in France, nevertheless consider that the societies have acted in concert in that regard. In support of that view, they refer to the letters which the French users have received from various foreign management societies refusing them access to their repertoires in substantially identical terms.

23 Concerted action by national copyright-management societies with the effect of systematically refusing to grant direct access to their repertoires to foreign users

must be regarded as amounting to a concerted practice restrictive of competition and capable of affecting trade between the Member States.

24 As the Court held in its judgment in Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, mere parallel behaviour may amount to strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of competition. However, concerted action of that kind cannot be presumed where the parallel behaviour can be accounted for by reasons other than the existence of concerted action. Such a reason might be that the copyright-management societies of other Member States would be obliged, in the event of direct access to their repertoires, to organize their own management and monitoring system in another country.

25 The question whether concerted action prohibited by the Treaty has actually been taken can thus only be answered by appraising certain presumptions and evaluating certain documents and other evidence. By virtue of the division of powers under Article 177 of the Treaty that is a task for the national courts.

26 Accordingly, it must be stated in reply to the second question that Article 85 of the EEC Treaty must be interpreted as prohibiting any concerted practice by national copyright-management societies of the Member States having as its object or effect the refusal by each society to grant direct access to its repertoire to users established in another Member State. It is for the national courts to determine whether any concerted action by such management societies has in fact taken place.

27 The fourth question concerns a different problem, namely that of the refusal by a copyright-management society to grant users in the territory in which it is established authorization for the public performance of musical works limited solely to the foreign repertoire which that society represents in the territory in question.

28 It is apparent from the documents before the Court that in the past French discothèques have sought access to certain foreign repertoires managed by Sacem, in particular the United States and United Kingdom repertoires, or at least access to certain categories of musical works which are particularly suitable for playing in discothèques and originate mainly in foreign countries. Sacem has always refused to grant authorization for partial use of the repertoire and therefore discothèques have had to pay high royalties corresponding to the use of the whole repertoire even though they play only a part of it.

29 The French Government and the Commission have drawn the Court's attention to the practical difficulties which fragmenting the repertoire as a whole into different marketable sub-divisions would entail. Discothèques would lose the advantage of total freedom in choosing the musical works which they played; furthermore, differentiation between protected musical works which were or were not allowed to be played might result in more extensive surveillance and thus involve higher costs for the users of music.

30 The Court has already given its views, in its judgment in Case 127/73 *BRT* v *Sabam and Fonior* [1974] ECR 313, on the general nature of contracts concluded by a national copyright-management society with its individual members and on the compatibility of the practice followed in that regard with Article 86 of the Treaty. The issue in the present case, however, is the general nature of the contracts entered into by the society with a certain category of users of recorded music and the compatibility of such contracts with Article 85.

31 Copyright-management societies pursue a legitimate aim when they endeavour to safeguard the rights and interests of their members *vis-à-vis* the users of recorded music. The contracts concluded with users for that purpose cannot be regarded as restrictive of competition for the purposes of Article 85 unless the contested practice exceeds the limits of what is necessary for the attainment of that aim. Those limits may be exceeded if direct access to a sub-division of a repertoire, as advocated by the discothèque operators, could fully safeguard the interests of authors, composers and publishers of music without thereby increasing the costs of managing contracts and monitoring the use of protected musical works.

32 The result of that appraisal may differ from one Member State to another. It is for the national court to make the necessary findings of fact in each individual case.

33 Consequently, it must be stated in reply to the fourth question that the refusal by a national society for the management of copyright in musical works to grant the users of recorded music access only to the foreign repertoire represented by it does not have the object or effect of restricting competition in the common market unless access to a part of the protected repertoire could entirely safeguard the interests of the authors, composers and publishers of music without thereby increasing the costs of managing contracts and monitoring the use of protected musical works.

The first and third questions (Article 86)

34 It must be observed at the outset that by virtue of the very terms of Article 86, the imposition of any unfair trading conditions by an undertaking holding a dominant position constitutes an abuse of that position.

35 The first question seeks to determine what criteria must be applied in order to determine whether a national copyright-management society which holds a dominant position in a substantial part of the common market is imposing unfair trading conditions; it emphasizes the point that the conditions are not negotiable and are unfair. The third question asks more specifically whether a reply to the first question may be based on the criterion to which much importance is attached by the discothèque operators, and which is embodied in the wording of the question, namely the relationship between the rate applied in France and that applied by the copyright-management societies in other Member States.

36 Sacem contends that the methods used in the various Member States to determine the basis of assessment for the rate of royalty are dissimilar, since royalties calculated on the basis of the turnover of a discothèque, as in France, are not comparable with those determined by reference to the floor area of the establishment in question, as in other Member States. If it were possible to neutralize those differences of method by means of a comparative examination based on the

same criteria, the conclusion would be that the differences between the Member States in the level of royalties are minor.

37 Those contentions have been contested not only by the discothèque operators but also by the Commission. The latter stated that in conducting an inquiry into royalties charged to French discothèques by Sacem it asked all the copyright-management societies dealing with music in the Community to inform it of the royalties charged to a national discothèque with specific characteristics as regards the number of places, area, opening hours, location, cost of entry, cost of the most popular drink and total annual receipts including tax. The Commission concedes that this method of comparison does not take account of the appreciable differences which may exist from one Member State to another regarding the number of people who go to discothèques, which depends on various factors such as climate, social habits and historical traditions. Nevertheless, if a royalty is many times higher than that charged in other Member States then it is clearly inequitable, and that, the Commission says, was the finding indicated by its inquiry.

38 When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.

39 Sacem has claimed that certain circumstances justify that difference. It referred to the high prices charged by discothèques in France, the traditionally high level of protection provided by copyright in France, and the peculiar features of French legislation whereby the playing of recorded musical works is subject not only to a performing right but also to a supplementary mechanical reproduction fee.

40 Circumstances of that kind cannot account for a very appreciable difference between the rates of royalty charged in the various Member States. The high level of prices charged by discothèques in a particular Member State, even if substantiated, may be the result of several factors, one of which might, in turn, be the high level of royalties payable for the use of recorded music. As regards the level of protection provided by national legislation, it must be noted that copyright in musical works includes in general a performing right and a reproduction right, and the fact that a 'supplementary reproduction fee' is payable in some Member States, including France, in the event of public dissemination does not imply that the level of protection is different. As the Court held in its judgment in Case 402/85 *Basset* v *Sacem* [1987] ECR 1747, the supplementary reproduction fee may be seen, disregarding the concepts used by French legislation and practice, as constituting part of the payment for an author's rights over the public performance of a recorded musical work and therefore fulfils a function equivalent to that of the performing right charged on the same occasion in another Member State.

41 Sacem also contends that the customary methods of collection are different, in that certain copyright-management societies in the Member States tend not to insist on collecting royalties of small amounts from small users spread over the country, such as discothèque operators, dance organizers and café proprietors. The opposite tradition has developed in France, in view of the wish of authors to have their rights fully observed.

42 That argument cannot be accepted. It is apparent from the documents before the Court that one of the most marked differences between the copyright-management societies in the various Member States lies in the level of operating expenses. Where — as appears to be the case here, according to the record of the proceedings before the national court — the staff of a management society is much larger than that of its counterparts in other Member States and, moreover, the proportion of receipts taken up by collection, administration and distribution expenses rather than by payments to copyright holders is considerably higher, the possibility cannot be ruled out that it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence the high level of royalties.

43 It must therefore be concluded that a comparison with the situation in other Member States may provide useful indications regarding the possible abuse of a dominant position by a national copyright-management society. Accordingly, the answer to the third question must be in the affirmative.

44 The arguments presented before the Court by the discothèque operators and Sacem related also to other criteria not mentioned in the questions submitted by the national court which might serve to establish the unfairness of the rate of royalty. The discothèque operators drew attention to the difference between the rate applied to discothèques and that applied to other large-scale users of recorded music, such as radio and television stations. However, they did not suggest any basis on which a reliable and consistent comparison could be made, and the Commission and the governments which submitted observations did not express any view on that point. Accordingly, the Court is unable to consider that criterion in the present preliminary-ruling proceedings.

45 Another problem raised was whether the fact that a blanket or flat-rate royalty was charged should be taken into account in deciding whether or not the amount of royalty was fair for the purposes of Article 86. In that regard reference need merely be made to the considerations set out above in reply to the fourth question. The fact that a flat-rate royalty is charged can only be criticized by reference to the prohibition contained in Article 86 if other methods might be capable of attaining the same legitimate aim, namely the protection of the interests of authors, composers and publishers of music, without thereby increasing the costs of managing contracts and monitoring the use of protected musical works.

46 By virtue of the foregoing, it must be stated in reply to the first and third questions that Article 86 of the Treaty must be interpreted as meaning that a national copyright-management society holding a dominant position in a substantial part of the common market imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

Costs

47 The costs incurred by the French, Italian and Greek Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, 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,

in reply to the questions submitted to it by the cour d'appel, Aix-en-Provence, by judgment of 2 December 1987, hereby rules:

(1) Articles 30 and 59 of the Treaty must be interpreted as not preventing the application of national legislation which treats as an infringement of copyright the public performance of a protected musical work by means of sound recordings without payment of royalties, where royalties have already been paid to the author, for the reproduction of the work, in another Member State.

(2) Article 85 of the EEC Treaty must be interpreted as prohibiting any concerted practice by national copyright-management societies of the Member States having as its object or effect the refusal by each society to grant direct access to its repertoire to users established in another Member State. It is for the national courts to determine whether any concerted action by such management societies has in fact taken place.

(3) The refusal by a national society for the management of copyright in musical works to grant the users of recorded music access only to the foreign repertoire represented by it does not have the object or effect of restricting competition in the common market unless access to a part of the protected repertoire could entirely safeguard the interests of the authors, composers and publishers of music without thereby increasing the costs of managing contracts and monitoring the use of protected musical works.

(4) Article 86 of the Treaty must be interpreted as meaning that a national copyright-management society holding a dominant position in a substantial part of the Common Market imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

Koopmans Mancini Kakouris

Schockweiler Moitinho de Almeida Díez de Velasco Zuleeg

Delivered in open court in Luxembourg on 13 July 1989.

J.-G. Giraud
Registrar

T. Koopmans
President of Chamber, acting as President