OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 26 May 1989 *

My Lords,

1. In these four cases (Case 395/87 *Ministère public* v *Tournier* and Joined Cases 110/88 *Sacem* v *Lucazeau*, 241/88 *Sacem* v *Debelle* and 242/88 *Sacem* v *Soumagnac*), the Court is asked to rule on the interpretation of Articles 30, 59, 85 and 86 of the EEC Treaty as regards the conduct of the French copyright management society, the Société des auteurs, compositeurs et éditeurs de musique (Sacem) in relation to French discothèque owners, and as regards the relationship between Sacem and the copyright management societies in other EEC Member States.

2. Before turning to these questions of interpretation, it is necessary to consider the legal and factual background to the disputes before the French courts, by looking at the relevant French law, the role and functioning of Sacem and the organization of its relations with other copyright management societies and with categories of customers such as discothèque owners.

The relevant French legislation

3. Under the Law of 11 March 1957 on literary and artistic property (as amended by the Law of 3 July 1985 on copyright and the rights of performers, of manufacturers of sound recordings and video tapes, and of broadcasting undertakings), the copyright vested in the author (i.e. the creator) of a work includes the right of performance ('droit de représentation') and the right of reproduction ('droit de reproduction'). Under Article 27 of the law, performance is defined as 'the communication of the work to the public by any process whatsoever . . . '. Under Article 28, reproduction is defined as 'the material fixing ("fixation matérielle") of the work by any method which permits indirect communication to the public' and includes mechanical recording. Article 30 provides for the transfer of the rights of performance and reproduction for consideration or otherwise. Article 31 *inter alia* provides that where an author transfers his copyright, the precise scope and purpose of the use to which the work may be put must be defined in the contract. This provision permits the author or his assigns to use the same right for different purposes. In practice, in consideration of a reproduction fee, the author of a musical work will assign his right of reproduction to a manufacturer of sound recordings with a view to manufacture and sale for private use only. If the record, tape or disc is thereafter played in public, for instance in a discothèque, café or shop, the author is entitled to receive from the owner of the establishment both a fee in relation to the performing right and a supplementary mechanical reproduction fee ('droit complémentaire de reproduction mécanique') in regard to the public use of the sound recording.

* Original language: English.

4. Article 33 of the Law of 11 March 1957 provides in principle that a global transfer of rights in respect of future works is null and void. An exception is however made in Article 43(2) in respect of a general performance contract ('contrat général de représentation'), defined as an agreement under which a professional organization of authors grants to an organizer of entertainments ('entrepreneur de spectacles') the right to perform for the duration of the agreement the present and future works contained in the organization's repertory in accordance with the conditions laid down by the author or his legal successors.

5. As regards the principles underlying the remuneration of authors, Article 35 of the Law of 11 March 1957 provides that the transfer of copyright 'must involve for the benefit of the author a proportionate share in the revenue received from the sale or use.' Fixed-rate remuneration is permitted only in exceptional cases, for instance where it is not possible in practice to determine the basis for the calculation of the author's share.

6. Title IV of the Law of 3 July 1985 lays down certain rules concerning the creation, dissolution and functioning of copyright management societies. Article 38, which *inter alia* requires such societies to make available to music users the entire repertory of authors and composers, whether French or foreign, represented by them, has been taken by commentators to require the societies to maintain a complete list of that repertory to be consulted by music users. Under Article 41, a copyright management society must send a copy of its annual accounts to the Minister for Culture and also inform him in advance of any proposed change to its statutes or its rules relating to the collection and distribution of royalties. There is no specific provision either in this law or elsewhere for any external control over the fixing by copyright management societies of the rates of remuneration for copyright.

7. Finally, it should be mentioned that under Article 426 of the Penal Code, 'any reproduction, performance or diffusion of a work of the human mind in breach of the rights of the author as defined and regulated by statute' amounts to the offence of copyright infringement.

The role and functioning of Sacem

8. The members of Sacem are authors and composers of musical works and also music publishers who exploit musical works by virtue of contracts with authors and composers. Under Articles 1 and 2 of its Statutes, by joining the Society, a member assigns to Sacem the exclusive right to exercise worldwide the rights of public performance and of mechanical reproduction in the works created or exploited by him. The specific function of Sacem is to collect and distribute the royalties due to its members in respect of the exercise of those rights. Sacem's subsidiary, the Société pour l'administration du droit de réproduction mécanique des auteurs, compositeurs et éditeurs (SDRM) is entrusted by Sacem with the exploitation of the right of mechanical reproduction; however, by virtue of an agency agreement, Sacem collects and distributes royalties due in respect of the supplementary mechanical

reproduction right mentioned earlier on behalf of SDRM.

9. The repertory of musical works managed by Sacem includes not only the works entrusted to it by its members but also the works managed by Sacem by virtue of reciprocal representation agreements concluded with copyright management societies in other countries, including societies in every other EC Member State, except Ireland, where performing rights are managed by the British Performing Right Society, and Luxembourg, which forms part of Sacem's own sphere of operations.

10. Essentially, in an agreement of this kind a copyright-management society undertakes, on a reciprocal basis, to manage the performing rights attached to the repertory of a foreign society within its sphere of operations (normally its national territory). To this end, it agrees to apply in relation to the collection and distribution of royalties due in respect of the foreign repertory the same terms and conditions as it applies to its own repertory, and to take any necessary proceedings in respect of infringement of copyright. It also agrees to transfer at least once a year to the foreign society the sums collected in respect of the use of the latter's repertory, and is entitled to deduct reasonable management costs from that amount. By virtue of reciprocal agreements with other societies throughout the world, Sacem controls in its sphere of operations the performing rights in practically the entire world repertory of protected musical works.

Relations between Sacem and the discothèques

11. Relations between Sacem and French discothèque owners are governed by a standard form general performance contract within the meaning of Article 43(2) of the Law of 11 March 1957 (see paragraph 4 above). Sacem grants a global licence to the discothèque owner to perform publicly any work belonging to the repertory (domestic and foreign) managed by Sacem by means of the so-called 'clause forfaitaire' (single-rate clause) which is worded as follows:

'In consideration of the right granted to the licensee to use the present and future works comprising the general repertory of Sacem for the whole duration of the contract in accordance with the conditions and methods of exploitation set out in the contract, the royalty laid down in Article 2 of the special conditions is required irrespective of the composition of the programmes of works actually performed in the establishment.'

The discothèque is required to pay a royalty in the form of a percentage of the total gross receipts of the establishment, defined as all the revenue received by the discothèque in return for the provision of a service or the sale of a product to the public, including revenue from entry charges and sales of food and drink, and including also VAT and service. The current percentage is 8.25%, which is made up of 6.60% in respect of the public performance right and 1.65% in respect of the supplementary mechanical reproduction right. The amount paid by the discothèque is subject to a guaranteed minimum monthly

payment fixed by Sacem by reference to the characteristics of the establishment.

12. In practice, the majority of discothèque owners benefit from more favourable terms. More than three-quarters of the approximately 4 000 French discothèques belong to trade associations which have negotiated agreements with Sacem under which, in return for certain advantages, of which the most important are the exclusion of VAT from the basis of calculation and a 10% reduction on the remaining receipts, they undertake to assist Sacem specifically by the provision of copies of their tax returns and generally by the provision of information and support and by the amicable settlement of disputes. In addition, a number of individual discothèques which are not members of trade associations benefit from the exclusion of VAT from the basis of calculation in return for copying their tax declarations to Sacem.

13. Since 1978 there has been a determined revolt by a minority of French discothèque owners against the terms required by Sacem for the use of its repertory. The essential complaints of the discothèque owners were that Sacem charged excessively high rates, that it discriminated unfairly between discothèques and that it refused without objective justification to grant licences for the only category of its repertory in which the discothèques were interested, namely popular dance music of predominantly Anglo-American origin. Certain discothèque owners took these complaints to the French Commission de la concurrence which in an opinion issued on 17 November 1981 found that Sacem did interfere with the normal functioning of the market by discriminating between different categories of discothèque owners. However, in a further opinion issued on 13 March 1984, the same commission dismissed all the complaints, including that of discrimination. Complaints were also made to the Commission which in September 1987 commenced a formal investigation into the compatibility of the level of the royalty required by Sacem with Article 86 of the EEC Treaty.

14. Sacem has since 1978 instituted hundreds of proceedings in criminal and civil courts against rebel discothèque owners, seeking in some cases the conviction for copyright infringement of operators who have used its repertory without authorization and in other cases payment of royalties outstanding under licence agreements. In many of these proceedings the discothèque owners have relied on the EEC Treaty, notably Articles 85 and 86. However, the majority of French courts up to and including the Cour de cassation have ruled that Sacem's conduct does not infringe the Treaty. A number of other French courts have stayed proceedings pending the rulings in the cases now under consideration.

15. Three of the cases now before the Court, namely Joined Cases 110/88 and 241 and 242/88, concern discothèque owners, namely Mr Lucazeau, Mr Debelle and Mr Soumagnac, who played recordings of works protected by Sacem without benefit of a licence agreement. The discothèque owners were convicted of copyright infringement, but in civil proceedings for

payment of outstanding royalties to Sacem succeeded in having certain questions referred to this Court. Case 395/87 *Tournier* is unusual in that it derives from proceedings instituted by a discothèque owner, Mr Verney, against the managing director of Sacem, Mr Tournier, in which the discothèque owner seeks Mr Tournier's conviction of unfair trading practices contrary to provisions of French competition and criminal law and damages as a civil party.

The questions referred

16. The questions referred by the Cour d'appel, Poitiers, in Case 110/88 and by the tribunal de grande instance, Poitiers, in Cases 241 and 242/88 are in identical terms, as follows:

'(1) Does the imposition by Sacem, an association of music writers and publishers which occupies a dominant position in a substantial part of the common market and is bound by reciprocal representation contracts with copyright societies in other countries of the EEC, of aggregate royalties on the basis of 8.25% of the gross turnover of a discothèque amount to the direct or indirect imposition on those entering into contracts with it of unfair trading conditions within the meaning of Article 86 of the Treaty of Rome if that rate is manifestly higher than that applied by identical copyright societies in other Member States of the European Economic Community?

(2) Is the establishment by means of a set of "reciprocal representation agreements" of a *de facto* monopoly in the countries of the European Economic Community, enabling a copyright-management society pursuing its activities in a Member State to fix under a standard form contract a comprehensive royalty which must be paid by users before exploiting foreign works, liable to constitute a concerted practice covered by the prohibition in Article 85(1) of the Treaty?'

17. The questions referred by the cour d'appel, Aix-en-Provence, in Case 395/87, are rather wider in scope, as follows:

'(1) Is the amount of the fee or of the combined fees 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 countries of the EEC 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 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 which it manages, 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 sound-reproduction equipment 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?'

The issues before the Court

18. The questions put by the national courts are highly complex but in essence seek the guidance of the Court on the following issues:

(1) The compatibility with Articles 30 and 59 of the French legislation which permits Sacem to require from discothèques, after royalties for the manufacture and sale of sound recordings have already been paid, further royalties in respect of the public performance of the sound recordings where those further royalties are excessively high or must otherwise be regarded as unfair.

(2) The compatibility with Article 85 of the reciprocal representation agreements made between Sacem and the foreign (i.e. non-French) copyright-management societies and the refusal by the foreign societies to license directly the use of their repertories to French discothèque owners.

(3) The compatibility with Article 85 or Article 86 of Sacem's requirement that French discothèque owners pay a royalty for access to its whole repertory, regardless of their actual needs.

(4) The criteria to be applied by the national courts in determining whether the royalty required by Sacem for the public performance of sound recordings by French discothèques is excessively high and therefore abusive within the meaning of Article 86, and in particular whether the courts may have regard to the facts, if established, that the royalty is fixed in a discriminatory manner, and that the level of the royalty is unrelated to the sums actually distributed to authors and is several times higher, or alternatively manifestly higher, than that applied by copyright-management societies in other EEC Member States.

19. As regards the first issue identified above, which is raised only by the cour d'appel, Aix-en-Provence, in Case 395/87, and not by the other national courts, the applicability of Article 30 and Article 59 presupposes the existence of an element of inter-State trade or inter-State provision of services; thus, although it is not spelled out in the order for reference in that case, it appears that the national court must have assumed that the royalties for the manufacture and sale of the sound recordings referred to were paid in another Member State. As a further point on the first issue, it appears to me that the issue of unfair or excessive pricing is one that falls to be decided in terms of Article 86 rather than Article 30 or Article 59.

20. As regards the third issue, I take the view that Sacem's refusal to license anything other than its whole repertory also falls to be considered in terms of Article 86, since in essence this refusal concerns the conduct of a single dominant undertaking. In this context it should be mentioned that Article 86 includes as types of abuse the imposition of 'unfair trading conditions' (Article 86(a)) and the imposition of tying arrangements (Article 86(d)).

21. Taking these considerations into account, it is in my view possible from the seven questions referred by the national courts to distil four essential questions concerning the interpretation of the Treaty, as follows:

(1) Must Articles 30 and 59 of the EEC Treaty be interpreted as precluding the application of national legislation which treats as an infringement of copyright the public performance of musical works by means of sound recordings without payment of a royalty in a case where a royalty in respect of the manufacture and sale of the sound recordings has already been paid in another Member State?

(2) Must Article 85(1) of the EEC Treaty be interpreted as prohibiting the conclusion of agreements between copyright management societies established in different Member States whereby the societies undertake, on a reciprocal basis, the management of each others' repertories within their respective national territories, and the refusal by those societies to grant licences for the public performance of their repertories to music users in each others' national territories?

(3) Must Article 86 of the EEC Treaty be interpreted as prohibiting as an abuse the imposition by a copyright-management society occupying a dominant position in a substantial part of the common market of a requirement that its customers pay a royalty for access to its whole repertory, irrespective of the actual use of the repertory by those customers?

(4) What criteria should be applied by a national court in order to determine whether the royalty required by a copyright-management society occupying a dominant position in a substantial part of the common market for the public performance of its repertory is excessively high so that the imposition of that royalty constitutes an abuse of a dominant position within the meaning of Article 86? May the national court take into consideration whether the royalty was fixed in a discriminatory fashion; the relationship between the level of the royalty and the amount actually paid to authors; and the relationship between the level of the royalty and that required by copyright management societies for the public performance of their repertories in other Member States?

I shall deal with the questions in the order set out above.

The first question (Articles 30 and 59 of the EEC Treaty)

22. If the issue of excessive or unfair pricing is reserved for consideration in terms of Article 86, the first question becomes relatively straightforward. This question in essence asks whether national rules permitting the requirement of payment of a royalty for the public performance of sound recordings in respect of which a royalty in respect of manufacture and sale has already been paid in another Member State can be

said to amount to a restriction on the free movement of goods contrary to Article 30 or on the freedom to provide services contrary to Article 59.

23. It is clear that the receipt of a fee in respect of the manufacture or sale of a sound recording does not exhaust the possibilities of exploitation of the copyright in a musical work. As the Commission points out in its written observations in Case 395/87, the doctrine of exhaustion of rights developed in the Court's case-law is designed to prevent the owner of an industrial or intellectual property right from making use of the territorial scope of national legislation in order to benefit more than once from the sale of the article — such as a sound recording — in which his creative effort has found material form. The present cases, however, are concerned not with the sale of sound recordings but with the public performance of musical works, and public performance, by its nature, can be repeated an indefinite number of times.

24. It is a universal principle of copyright law (reflected, *inter alia*, in Articles 9 and 11 of the Berne Convention for the Protection of Literary and Artistic Works, to which all the EEC Member States are parties) that a copyright owner in a musical or similar work has the exclusive right to authorize both the reproduction of the work (i.e. by manufacture and sale) and its public performance, and that these two rights of exploitation can be exercised separately and cumulatively. This principle was recognized by the Court in its judgment of 17 May 1988 in Case 158/36 *Warner Brothers* v *Christiansen* [1988] ECR 2605 where it referrred to 'the two essential prerogatives of the author, the exclusive right of performance and the exclusive right of reproduction . . . ' (paragraph 13).

25. As regards Article 30, the Court's case-law acknowledges that in respect of certain types of literary and artistic works it is part of the essential function of copyright for the copyright owner or his assigns to require fees in respect of any public performance of the works. (See, as regards films, Case 62/79 *Coditel* v *Ciné Vog Films ('Coditel I')* [1980] ECR 881, paragraphs 12 to 14; as regards sound recordings, Case 402/85 *Basset* v *Sacem* [1987] ECR 1747). In the *Basset* case the Court considered the compatibility of the charging of the supplementary mechanical reproduction fee with Article 30. Taking the view that, in spite of its misleading name, the fee was to be regarded as part of the author's remuneration in respect of public performance, the Court ruled that:

'. . . even if the charging of the fee in question were to be capable of having a restrictive effect on imports, it does not constitute a measure having equivalent effect prohibited under Article 30 of the Treaty inasmuch as it must be regarded as a normal exploitation of copyright and does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States for the purposes of Article 36 of the Treaty' (paragraph 16).

26. It is clear that the same principles apply in relation to Article 59. In the *Coditel I* case (already cited) the Court ruled that:

'Whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States' (paragraph 15).

As already mentioned, the Court confirmed in the *Basset* case that the requirement of a fee in relation to the public performance of a sound recording could not be qualified as an arbitrary discrimination or a disguised restriction on trade.

27. I would therefore give the following answer to the first question:

Articles 30 and 59 of the EEC Treaty do not preclude the application of national legislation which treats as an infringement of copyright the public performance of musical works by means of sound recordings without payment of a royalty in a case where a royalty in respect of the manufacture and sale of the sound recordings has already been paid in another Member State.

The second question (Article 85 of the EEC Treaty)

28. The discothèque owners argue that the effect of the network of reciprocal agency agreements taken in conjunction with the refusal by each of the copyright-management societies to license the use of its repertory by music users outside its national territory is to segregate national markets and ensure a *de facto* monopoly for each society within its own national territory. In consequence, the French discothèque owners have no choice but to deal with Sacem on the terms laid down by the latter and do not have the possibility of seeking better terms from the foreign copyright management societies. They therefore argue that the agreements, taken together with the refusal to engage in direct licensing, must be viewed as incompatible with Article 85(1).

29. Article 85(1) prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. In particular, Article 85(1) prohibits agreements and other restrictive practices which share markets or sources of supply. Under Article 85(3), an agreement, decision or concerted practice is capable of benefiting from an exemption from the prohibition contained in paragraph 1 if it fulfils certain conditions.

30. A number of factors can be taken as agreed between the parties to the national proceedings. First, that the reciprocal agreements exist and that they must be

viewed as agreements between undertakings within the meaning of Article 85(1); secondly, that the agreements are non-exclusive in character (an exclusivity requirement having been deleted in the 1970s at the insistence of the Commission) and that it is therefore in principle possible for copyright management societies both to entrust the management of their repertories to more than one society in respect of the same territory and to engage in direct licensing in each others' territories. However, it is also not disputed that the consequence of the territorial limitation on the scope of each of these agreements is that the copyright-management societies, even if they wished to grant licences to customers in each others' territories, could in any event only license the use of their own repertories, but not the use of the repertories of other societies whose management has been entrusted to them by virtue of the reciprocal agreements. To give a concrete example, while it would in principle be possible for the German performing rights society GEMA to license the use of its own domestic repertory to music users in France, it could not compete with Sacem by offering the repertory of the British Performing Right Society or indeed Sacem's own domestic repertory which GEMA manages in Germany under a reciprocal representation agreement. It is furthermore agreed that to date no French discothèque owner has succeeded in obtaining a direct licence for the use of its repertory from a foreign copyright-management society and that so long as no such direct licensing takes place, each society will enjoy absolute exclusivity of fact within its own national territory. Thus, to return to the concrete example given above, a refusal by GEMA to license its own repertory to French discothèque owners means that Sacem need not fear competition from GEMA even in respect of the latter's own repertory. At the same time, even this element of potential competition appears to be illusory, since it is recognized by the parties that a direct licence limited to the repertory of a single copyright-management society is unlikely to be a commercially attractive proposition either for the society or for the discothèque owners.

31. Two points are disputed. The first is whether the refusal to engage in direct licensing is the result of a concerted practice, and thus capable of being caught by Article 85(1). The second is whether the reciprocal agreements and the refusal to license are in any event, having regard to the practical requirements of the management of performing rights in relation to discothèques, capable in practice of preventing, restricting or distorting competition on that market.

32. Sacem does not dispute the facts of market segregation and *de facto* exclusivity for each copyright management society, but, supported by the Commission, argues that these features are not the result of any practice prohibited by Article 85(1) but are rather a reflection of the economic realities of the particular market which make competition impracticable and which point inexorably to the need for management of performing rights on a territorial basis.

33. In my view, it may not be possible to give a categorical answer at this stage to the issues which might arise under Article 85 in these cases. The cases are highly unusual ones. At first sight, we are confronted with an absolute exclusivity *de facto*, a total compartmentalization of the common market within national frontiers, and a complete absence of competition, all of which would, in any other sector, be manifestly incompatible with Article 85(1). On the other hand, the market is a wholly exceptional one, because of the unusual nature of the intellectual property rights in question, which are not only territorial in scope, regulated exclusively by national laws differing significantly among themselves, and incidentally subject to very long periods of protection, but which also require continuous supervision and management within the national territories if they are to be effectively exercised. Sacem urges, in this connection, that competition between copyright-management societies in different EEC Member States is not feasible and that the reciprocal agreements and refusal to engage in direct licensing cannot therefore in any real sense be said to prevent or restrict competition. Sacem points out that any copyright-management society wishing to do business in a national territory other than its own would need to establish a management system enabling it to negotiate contracts with customers, verify the factors forming the basis of the assessment of royalties, monitor the use of its repertory and take the necessary action in respect of infringements of its copyright. Faced with this prospect, each society can more cheaply and effectively ensure the management of its repertory by entrusting it to the society already established in that other territory. This arrangement also benefits the customer in that the reciprocal arrangements permit him to obtain access to the whole world repertory of music through negotiations with a single copyright-management society.

34. The extreme nature of the issue thus presented is demonstrated by the stark choice posed by the terms of Article 85 in this case. On the one hand, if it is to be established that there is no restriction or distortion of competition within Article 85(1), such a finding could in this sector only be based on a detailed analysis of the market. On the other hand, if it were found, in the light of that analysis, that there was such an effect, the agreements in question would seem incapable of an exemption under Article 85(3): for if they do affect competition they could not satisfy the final requirement under Article 85(3) because they would eliminate competition in respect of the entire market.

35. These are matters which in my opinion the Commission is under a duty to resolve by taking a position on the agreements which have been notified to it. The Commission is in any event better placed than the national courts to examine the market on a Community-wide basis. The Commission should also be in a position to decide whether the continuing exclusivity *de facto* is the result of a concerted practice among the performing rights societies of the Member States or whether such exclusivity results necessarily from the nature of the market in question.

36. In the absence of any formal response by the Commission, it may in any event be unnecessary for the national courts in the present cases to take a decision directly on the issues arising under Article 85. The validity of the reciprocal representation agreements and the existence of any concerted practice do not appear to be directly in issue before them. As is indicated by the national courts themselves in the terms in which they have put their questions, those matters appear relevant exclusively or primarily as reinforcing the dominant position held by Sacem under Article 86. For that purpose, it would be sufficient in my view for them to take account as matters of fact of the absolute exclusivity and total absence of competition, matters which are scarcely in dispute between the parties.

37. If it were considered necessary for the national courts to rule directly on the application of Article 85 in these cases, then the first issue for their consideration would be the refusal of the copyright-management societies to grant licences for the use of their repertories to users outside their own national territory. It would be for the national courts to decide whether this can be seen as an issue which has an independent significance apart from the reciprocal agreements, and if so, whether the refusal to grant direct licences is the result of a concerted practice between the societies as has been alleged by the discothèque owners in these proceedings.

38. In my view, the issue of direct licensing cannot be seen as separate from that of the reciprocal agreements. As I have already mentioned above, because of the territorial limitation on the scope of the reciprocal agreements, the copyright-management societies, even if they wished to grant licences to customers in each others' territories, could only license the use of their own repertories, and such restricted licences do not appear to be a commercially viable proposition. In my view, it follows that the refusal to grant direct licences must merely be seen as the logical consequence of the reciprocal agreements and it therefore appears unnecessary to consider whether that refusal is the result of a concerted practice.

39. If a different view were taken as to the significance of the issue of direct licensing, then the essential question for the national courts would be whether the conduct of the foreign copyright-management societies in refusing to grant direct licences to French discothèque owners is the result of conscious coordination or cooperation between the societies, or whether, on the contrary, it results from the independent decision of each society acting for its own account in response to an assessment of its individual interest. In deciding this question, it would in my view be legitimate for the national courts to take into account the cooperation which already exists between the copyright-management societies by virtue of the network of reciprocal representation agreements and the fact that an exclusivity requirement was only deleted from those agreements at a comparatively recent date (see Case 243/83 *Binon* v *AMP* [1985] ECR 2015, at paragraph 17). At the same time, the national courts would need to consider whether the parallel behaviour

can be satisfactorily explained by factors which do not involve the existence of a concerted practice (see Joined Cases 29 and 30/83 *Compagnie royale asturienne des mines SA and Rheinzink GmbH* v *Commission* [1984] ECR 1679, paragraph 16). In considering whether an alternative explanation exists, it would be necessary to take into account the special requirements of the management of performing rights in relation to discothèques which, Sacem argues, explain and justify the organization of that market on national lines (see paragraph 33 above).

40. The next issue for consideration by the national courts would be whether the reciprocal agreements (and, if considered relevant, the refusal to engage in direct licensing) are capable, having regard to the special requirements of the market for copyright management (referred to at paragraph 33), of preventing, restricting or distorting competition in that market. Finally, if they are satisfied that there is an actual or potential effect on competition, the national courts would need to consider whether the agreements might be capable of benefiting from an exemption under Article 85(3). If they do consider this to be a possibility, then they must stay the proceedings and wait for the decision of the Commission which, under Article 9(1) of Council Regulation No 17 (Official Journal, English Special Edition 1959-62, p. 87), is alone competent to grant or refuse exemptions.

41. I therefore propose that the second question should be answered as follows:

Article 85(1) of the EEC Treaty must be interpreted as prohibiting:

(a) the conclusion between copyright-management societies established in different Member States of agreements whereby the societies undertake, on a reciprocal basis, the management of each others' repertories within their respective national territories, if those agreements are capable, having regard to the special characteristics of the market for the management of performing rights, of preventing, restricting or distorting competition on that market;

(b) the refusal by copyright-management societies linked by a network of reciprocal representation agreements to license directly the use of their domestic repertories to music users in each others' national territories, if it is established that the refusal to license is the result of a concerted practice between those societies and if that refusal is capable, having regard to the special characteristics of the market for the management of performing rights, of preventing, restricting or distorting competition on that market.

The third and fourth questions (Article 86 of the EEC Treaty)

42. The third and fourth questions are concerned with the abuse of a dominant position within the meaning of Article 86 in relation to the global licence and the level of the royalty respectively. The national

courts do not seek any clarification of the notions of 'dominant position' and of the effect on trade of Sacem's conduct. It appears to be assumed by the national courts that these two conditions for the applicability of Article 86 are satisfied and there appears to be no reason to quarrel with those assumptions. None the less, I must preface the consideration of the issue of abuse with some general remarks about the nature of Sacem's dominant position.

The global licence

43. It should be stated at the outset that this is no ordinary dominant position. The fact that Sacem is the only copyright-management society of its type in France, that it has no reason to fear the competition of foreign societies, and that there is no substantial regulation of its activities by public authorities means that it enjoys a near-absolute freedom of action. There is moreover a clear inequality of bargaining power as between Sacem and the discothèques, which constitute a large number of geographically scattered small or medium-sized undertakings (albeit for the most part grouped in several trade organizations), who are completely dependent on music for their operation and have no choice of negotiating partner. While these factors do not in themselves point to the existence of any abuse, or require a higher standard of conduct from Sacem than from any other dominant undertaking, they do in my view point to the need for a particularly stringent examination by the national courts of the justification for the practices which are alleged to be abusive. The approach taken by a national court to the issue of justification would differ in accordance with its national legal rules. Where one national court might for instance operate a presumption, another might proceed in terms of a reversal of the burden of proof. The end result should, however, be similar, i.e. that the practices would fall to be justified by the dominant undertaking in question.

44. As already mentioned, by means of the 'clause forfaitaire' in the standard contract concluded with discothèque owners, Sacem requires the payment of a single fee for access to its whole repertory, irrespective of the type or number of musical works actually used by the discothèques. The discothèque owners argue that it is oppressive to require them to pay for access to the whole world repertory managed by Sacem when their needs could be met by access to only a certain part or parts of that repertory. It is not entirely clear from the file what the precise requirements of the discothèques are. In one place it is suggested that they seek access simply to certain foreign repertories managed by Sacem, notably the American and British; elsewhere, that they seek access to a certain category of musical works, i.e. popular dance music, predominantly but not exclusively of Anglo-American origin. In any event, they argue for something less than the global licence, and imply that such a lesser licence would be bound to be cheaper.

45. The Commission and the French Government, on the other hand, stress that the practical difficulties of breaking down the world repertory into marketable packages and the ensuing need for enhanced verification and monitoring would be likely to lead to higher, rather than lower costs for music users. They also point out the advantages of the global licence in that it offers discothèques complete freedom in the choice of musical works.

46. The Court has not yet had occasion to rule on the compatibility with Article 86 of a practice such as global licensing. However, in Case 127/73 *BRT* v *Sabam and NV Fonior* [1974] ECR 313 it was asked to consider *inter alia* whether the requirement by a copyright management society of the global assignment by its members of all their rights without any distinction between categories could be regarded as an abuse within the meaning of Article 86. In its judgment the Court ruled that in determining whether the society had imposed unfair conditions on its members, account should be taken of all the relevant interests with a view to striking a balance between the effective management of rights by the society and the requirement of maximum freedom for the members in disposing of their works; to that end, it was necessary to consider whether the disputed practices of the society exceeded the limit absolutely necessary for the attainment of its object (paragraphs 7-11). I suggest that a similar approach should be adopted here, except that the balance needs to be struck between the interests of the copyright-management society and a category of its customers, i.e. the discothèque owners.

47. United States courts, which have been faced with repeated anti-trust challenges to the global licensing practices (known as 'blanket licensing') of the American performing rights societies, Broadcast Music Inc. ('BMI') and the American Society of Composers, Authors and Publishers ('Ascap'), have also viewed the issue in terms of the balance to be struck between the benefits of 'blanket licensing', both to customers and in terms of effective copyright management, and the disadvantages in terms of restrictions on competition and on customers' freedom of choice. While allowance must be made for certain differences of emphasis resulting from the different legal and factual context, the American case-law provides some useful indications as to the evaluation of the competing interests involved.

48. In a landmark judgment given in 1979 in the case of *Columbia Broadcasting System* v *BMI and Ascap* (441 US 1, 60 L Ed 2nd 1, 99 S Ct 1551) the United States Supreme Court ruled that 'blanket licensing' could not be considered as a *per se* violation of the Sherman Act but must be evaluated in terms of a 'rule of reason' analysis. Under the rule of reason, a court is required to weigh up the pro-competitive effects of a practice against its anti-competitive effects in order to determine whether the practice unreasonably restrains trade in the relevant market. In applying that analysis to challenges made by different users to blanket licensing, the lower American courts have in general found in favour of the blanket licence. (See in particular *Buffalo Broadcasting Inc. and Others* v *Ascap and BMI*, United States Court of Appeal for the

Second Circuit, 18 September 1984, 744 F. 2nd 917; 223 US PQ (BNA) 478; Copy. L. Rep. (CCH) P25, 710; Fed. Sec. L. Rep. (CCH) P66, 204). Of particular interest is the case of *BMI* v *Moor-Law Inc.* (527 F. Supp. 758 (D. Del. 1981)) in which the performing rights organization brought a copyright infringement suit for the unauthorized use of its repertory by the defendant's night-club and the defendant counterclaimed that BMI had violated the anti-trust laws because its failure to offer a realistic alternative to the blanket licence constituted an illegal tie-in. Applying the rule of reason approach, the court *inter alia* found that the blanket licence deprived music users of control over their total obligations to BMI, in that the royalty paid was not calculated on the basis of factors over which they had control, such as the number of performances of a particular work, but less controllable factors such as (in that case) the expenses incurred by the club in providing live entertainment. On the positive side, the court stressed the simplicity and cost-effectiveness of the blanket licence as a means of marketing performing rights, as well as the flexibility which it offered to users, such as the defendant in that case, who could not identify in advance the compositions they would use. The court moreover found that there were no practicable alternatives to the blanket licence: in particular, the alternative of a licence based on the category of music used by the licensee would involve additional costs in respect of categorization, monitoring of use and resolution of disputes over the scope of the licence.

49. It is for the national courts in the present case to weigh up the benefits and disadvantages of the global licence, taking into account the particular context in which it is imposed. In so doing, the courts can have regard to the obvious convenience of the global licence as a vehicle for the marketing of performing rights, as well as to the flexibility which it offers to users such as discothèques who cannot predict their precise needs in advance. It is also for the national courts to consider whether there is a viable alternative to the global licence. In so doing it will be necessary at the outset to determine what the discothèques' real requirements are. If they only seek access to certain foreign repertories, then categorization costs are likely to be low but monitoring costs correspondingly higher. Creation of a new category of popular dance music, on the other hand, is likely to prove costly, at any rate initially, but, provided the category is widely enough defined, should not necessarily give rise to increased monitoring costs. Finally, the national courts should also, in my view, take into account a further factor which was considered relevant in the *Sabam* case mentioned above and also in certain American decisions, which is the relative bargaining power of the parties.

50. As regards the formulation of the answer to the third question, while I have sought to spell out the relevant considerations above, it may suffice to adopt the ruling in the *Sabam* case to which I have referred. I would therefore respond to the third question as follows:

Article 86 prohibits as an abuse the imposition by a copyright-management society which is in a dominant position in a substantial part of the common market of a requirement that its customers must pay a royalty for access to the whole repertory of the society, irrespective of the actual use of that repertory by the customers in question, if the imposition of that requirement exceeds what is necessary for the effective management of copyright.

'It is not impossible . . . that the amount of the royalty, or of the combined royalties, charged by the copyright management society may be such that Article 86 applies' (Case 402/85 *Basset* v *Sacem* [1987] ECR 1747).

In the *Basset* case, however, the Court was not asked to rule on the level of the royalties. In the present cases, the national courts specifically seek guidance on the criteria to be applied in determining whether or not the level of royalties is unfairly high.

The level of the royalty

51. As the Commission points out in its written observations in these cases, there is a natural tendency on the part of a monopoly to charge a monopoly price, i.e. a price which maximizes its profit and which is higher than it would be able to charge in a competitive market. While from the economic point of view such behaviour is perfectly rational, it may result in the imposition of unfairly high prices on customers or consumers. Article 86 specifically prohibits unfair prices as an abuse, and the Court has ruled that an abuse of a dominant position within the meaning of Article 86 may consist in the imposition of a price which is excessive in relation to the economic value of the service provided (Case 26/75 *General Motors* v *Commission* [1975] ECR 1367).

52. The Court has moreover already ruled, in relation to the level of the royalty applied by Sacem to the French discothèque owners, that:

53. There is a consensus in the observations made to the Court in these cases that the test laid down in Case 27/76 *United Brands* v *Commission* [1978] ECR 207 for determining whether a price is excessive in relation to the economic value of the benefit conferred is inapplicable in the present context. In that judgment, the Court indicated (in relation to a product rather than a service) that it is necessary to consider whether the difference between the costs actually incurred in producing the product and the price actually charged is excessive and, if the answer to that question is in the affirmative, whether a price has been imposed which is unfair in itself or when compared with competing products (paragraph 252 of the judgment). It is pointed out that it is inappropriate in the present context to proceed on the basis of a comparison between the costs of production and the selling price because it is impossible to determine the cost of the creation of a work of the imagination such as a musical work. It is moreover impossible to compare the level of the royalties charged by Sacem with that of competitors because there are none.

54. In the face of the perceived inadequacy of the established method, the national courts mention three possible criteria for determining whether the level of the royalty is excessive, namely, discrimination, the relationship between the level of the royalty and the amount paid to authors, and a comparison with the level of royalties charged by Sacem's counterparts to discothèque owners in other Member States. Sacem rejects those criteria, and notably that of comparison with rates in other Member States, and proposes a number of criteria of its own, of which the most significant are the importance for discothèques of music and therefore of access to the repertory, the cost of that access as a proportion of the total costs borne by discothèques, and comparison with royalties charged by Sacem to other categories of music users in France. I shall consider in turn the criteria mentioned by the national courts and those proposed by Sacem and then go on to consider whether there are other criteria which may assist the national courts in evaluating the level of the royalty.

(i) *The criteria mentioned by the national courts*

55. The issue of discrimination is raised in the second and fifth questions referred by the national court in Case 395/87. It is not however clear from the order for reference in that case in what respect the level of the royalty might be considered to be discriminatory. Four hypotheses might therefore be considered:

(1) The royalty is discriminatory because it is in effect fixed in accordance with the discothèque owner's ability to pay rather than in accordance with actual use of the Sacem repertory.

(2) The royalty is discriminatory having regard to the levels charged by copyright management societies in other EEC Member States.

(3) The royalty is discriminatory because different levels are applied to different categories of discothèque owners. In this context it will be recalled that the majority of discothèque owners pay a reduced royalty by virtue of special arrangements made between their trade organizations and Sacem, and that certain other individual discothèques also benefit from favourable terms.

(4) The royalty is discriminatory having regard to the level charged to other categories of music users.

56. The first hypothesis raises the same issue as that of the global licence which has already been considered above (at paragraphs 44 to 49). The relevance of the levels of royalties charged in other Member States in determining whether the royalty charged by Sacem is excessive is considered below (at paragraphs 60 to 63); but in any event, the difference between the levels cannot be regarded as the consequence of discrimination by Sacem since it has no responsibility for fixing the levels in other

Member States. If, in referring to discrimination, the national court has in mind the fact that Sacem charges different royalties to different categories of discothèque owners, then I am of the view that such conduct does not amount to an indication that the standard royalty of 8.25% of total receipts is excessive, but might amount to the distinct abuse of discrimination within the meaning of Article 86(c), i.e. 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. In deciding whether discrimination in this sense is taking place, the national court will need to consider as a question of fact whether there is an objective justification for the difference in treatment between different categories of discothèque owners. The crucial issue in this regard is whether the discothèque owners who enjoy more favourable treatment provide a genuine and adequate consideration for that special treatment.

57. As regards the fourth hypothesis, the Court has indicated in the *United Brands* judgment (already cited) that it is possible to infer whether a price is excessive *inter alia* by examining prices for comparable goods. In the present context, it therefore appears legitimate for the national courts to consider the level of royalties paid by other important music users — such as radio and television stations — for access to Sacem's repertory; if a significant disproportion is found between the royalties paid by those other users and the discothèque owners, that may be an indication that the level of fees charged to the latter is excessive. In carrying out such a comparison, it will of course be necessary for national courts to have regard to the fact that the majority of discothèque owners pay less than the standard rate of 8.25%. I would add that differences of treatment between the discothèque owners and other music users which lack objective justification might also amount to a distinct abuse under Article 86(c) (see paragraph 56 above).

58. The relevance of the amount of the royalty paid to authors as a criterion for evaluating whether or not the royalty is unfair is raised in the third question referred by the national court in Case 395/87. It is not clear whether in referring to the amount paid to 'authors' the national court means 'authors' in the narrow sense of composers of musical works ('compositeurs et auteurs') or in the wide sense of all copyright owners. From figures provided by Sacem to the Commission, it appears that in 1986 the total revenue received from discothèques was some FF 250 million, of which some FF 83 million (after deduction of administrative and other costs) found its way to members of Sacem, including publishers and sub-publishers; of this FF 83 million, FF 27.6 million was paid specifically to composers. Although this latter figure ignores the amounts which were paid to foreign composers via Sacem's counterparts in other countries, the proportion actually paid to composers none the less appears small.

59. However, I do not consider that the issue of the amount specifically paid to composers is helpful in determining the fairness or otherwise of the royalty paid by

the discothèques. The reason for this is that the copyright in a musical work is typically owned and exploited by a number of different persons for a number of different purposes. Each copyright owner, whether he is a composer in the narrow sense, or a music publisher or a producer of sound recordings, will have a claim to remuneration from royalties received in respect of the musical work as the counterpart for his creative effort or of his investment. To focus on the amount of the royalty actually paid to one category of copyright owners, i.e. composers, can in my view only be misleading. On the other hand, the relationship between the level of the royalty and the amount actually paid to copyright owners as a whole is in my opinion relevant to evaluating the fairness of the royalty, and I will return to this issue shortly (see paragraphs 69 to 73 below).

60. Turning to the criterion of comparison with the rates of royalties charged in other EEC Member States, I would say at the outset that I regard this method as of potential, but not immediate, usefulness to the national courts. The difficulty with this comparative method is that it is necessary to devise an objective means of comparison between the rates charged in the different Member States. This is no easy task, given the differences in national legislation and in the methods of assessment and collection of royalties used by the different copyright-management societies. As regards national legislation, for instance, of the Member States only France and Belgium require an additional payment for the right of mechanical reproduction, a factor which will necessarily boost the overall level of the royalty charged in those countries. As regards the methods of assessment and collection, while Sacem requires a fixed percentage of total revenue, other copyright-management societies fix their royalties on a flat-rate basis by reference to factors such as the size of the discothèque, the number of seated places, the entry price or the price of the most popular drink.

61. As the Commission points out, probably the only way of discounting those differences so as to arrive at a valid comparison is to compare data on the basis of the royalty charged to a standard, notional discothèque. The Commission has carried out one such exercise in the framework of its continuing investigation into the level of the royalty charged by Sacem. It requested each of the copyright management societies to calculate the annual royalty payable by a notional discothèque, and provided sufficient details (total revenue, size, etc.) so as to enable each society to apply its own method of assessment. The results of this exercise were submitted in the form of a table to the Court. They show that the notional discothèque would pay the highest amount in France (100%) followed closely only by Italy (91.37%). The amounts payable in other Member States, such as Germany (6.7% of the French amount) the United Kingdom (12.24%) and Luxembourg (19.04%) are markedly lower. As regards Luxembourg, where performing rights are managed by Sacem, it is notable that the royalties payable by discothèques are estab-

lished on a flat-rate basis and that the activities of copyright management societies, including the fixing of royalties, are subject to the supervision of the Minister for the National Economy (Grand-ducal regulation of 26 October 1972, [1972] *Mémorial*, p. 1495).

62. Sacem rightly criticized the shortcomings of the Commission's comparative exercise at the hearing. It pointed out that the table contains several errors: for instance, the fact that the daily rate quoted by the Portuguese society is cited as the annual royalty which is payable, and that the Commission ignores the fact that the Germany society, GEMA, in most cases applies a 50% increase to the royalty which it charges in order to take account of music recorded by the discothèque for its own use. The Commission's calculations also take no account of rebates, which are particularly important in France where some 80% of discothèques in fact pay only 6.26% of their total revenue, and not the basic rate of 8.25%. The figures further take no account of the fact, mentioned above at paragraph 60, that only France and Belgium among the EEC countries make an additional charge in respect of the mechanical reproduction right. Most importantly — a criticism which the Commission itself accepts — a single comparative exercise is clearly insufficient to give an overall picture of the possible disparities, particularly in view of the fundamental difference between the method of assessment used by Sacem as against the societies in other Member States. Before such an overall picture can be obtained, it would be necessary to carry out a number of comparative exercises, using as a basis notional discothèques with a variety of different parameters.

63. If, when such comparative exercises had been carried out, the results did establish the existence of disparities in the level of royalties, then those disparities might be a prima facie indication for a national court of a possible abuse, although the mere existence of such disparities would not of course be conclusive. If the results indicated that the level of royalties was substantially higher in France than in other Member States, then in my view there would be a strong inference of abuse, and the burden on Sacem to justify the level of the royalty which it charges would be correspondingly greater (see paragraph 43 above).

(ii) *The criteria proposed by Sacem*

64. Rejecting the comparison with the level of royalties charged in other Member States, and the other criteria mentioned by the national courts, Sacem proposes certain other criteria including the importance of music to the discothèques, the cost of the royalty as a proportion of the total costs borne by discotheques, and comparison with the royalties charged to other categories of music users in France.

65. The criterion of the importance of music to the business in question is superficially attractive, since it appears only logical that those who need music more should be prepared to pay more for it.

However, it appears to me that the usefulness of the criterion breaks down in a situation where a given category of users is completely dependent for its functioning on the supply of music and where because of the absence of competition that category must, in effect, pay whatever price is required of it. This is the situation of the French discothèques.

66. Sacem argues that the cost of the royalty to the discothèques amounts on average to about 10% of total outgoings, that it is lower than other expenses such as labour, and that it should be regarded as a reasonable proportion. However, similar objections can be made to this as to the first criterion. In a situation of total dependency on one supplier, it is not possible to say at what point the cost of obtaining the supply becomes unreasonable to the purchaser: he simply has to pay or cease functioning. It should also be borne in mind that the system of collection used by Sacem, namely a percentage of total turnover, makes it impracticable for a discothèque operator to attempt to influence or even confidently to predict the level of his financial commitment to Sacem. The system of global licensing and the practical impossibility of direct access to foreign copyright management societies moreover makes it impossible for him to seek to economize by reducing his dependency on the Sacem repertory.

67. Sacem goes to some lengths to set out the rates of royalty charged to other important music users such as radio and television networks, arguing that the differentials between the rates paid by different categories of users reflect the importance of music to the functioning of each category However, as the Commission agent forcefully pointed out at the hearing, even if Sacem's system of charging is internally coherent, this does not demonstrate that it is fair to its customers: it is possible that the charges imposed on each category, while in proportion to each other, are all unfairly high. Sacem's suggested criterion is therefore of limited usefulness. As already mentioned, a manifest disproportion between the charges borne by different categories might, on the other hand, indicate that a given charge is excessive (see paragraph 57 above).

(iii) *Other possible criteria*

68. Examination of the criteria suggested by the national courts and by Sacem has produced little of immediate concrete assistance for the national courts. In my view, in order to provide a firm basis for an evaluation of the royalty in relation to the value of the benefit conferred it is necessary to go back to the type of objective economic test laid down by the Court in the *United Brands* judgment.

69. I accept, of course, that the precise method established there, i.e. comparison between the cost price and the selling price in order to determine the profit margin, cannot be directly transposed to the present context. However, having regard to the Court's approach in the *Sabam* case, to which I have already referred, I do consider

that it is feasible for national courts to determine whether the royalty is excessive by an objective method consisting in a comparison between the level of the royalty (taking account for this purpose of the total revenue generated by the royalty) on the one hand, and the necessary costs of the effective management of performing rights and the need to ensure reasonable remuneration of copyright owners on the other hand.

70. In carrying out this evaluation it will be necessary for national courts to have regard to the costs structure of Sacem. The most recent figures made available in these proceedings relate to 1986 and are derived from Sacem's General Report (Rapport d'Activité) for that year and from correspondence between Sacem and the Commission. It appears from those documents that in 1986 Sacem's total revenue from royalties from all sources was some FF 1.1 billion. Of this sum, about FF 250 million, or about 25%, derived from discothèques of both the fixed and the mobile sort, making discothèques the most important single source of revenue next to the radio and television sector. Of that revenue of FF 250 million, 33 1/3%, or some FF 83 million, was retained by Sacem for management and running costs, leaving, after deduction of certain other expenses, a net sum of FF 150 million for distribution. Of this net sum, about FF 83 million was distributed to Sacem members, and about FF 46.8 million was remitted to the foreign copyright management societies with which Sacem has reciprocal representation agreements. About FF 20 million remained undistributed because the relevant copyright owners could not be identified.

71. It is of course for the national courts to evaluate the costs structure and to draw any necessary conclusions. However, from the abovementioned figures two points appear to merit particular consideration; the first is the proportion of gross revenue retained by Sacem to cover management costs; and the second is the proportion of net revenue distributed to foreign copyright-management societies.

72. As regards management costs, it appears that Sacem deducts the same proportion — i.e. 33 1/3% — from all fees whether they are to be distributed to its own members or to foreign societies. It is striking that the amount retained for management costs — FF 83 million — is the same as that distributed to Sacem's own members and almost double the amount distributed to foreign societies. Management costs appear to be threefold, consisting in the costs of licensing (i. e. contracting with the discothèques), of collection of royalties and of distribution, including the monitoring of the use of music. In view of the use of a standard form contract and global licence, there is every reason to expect that actual licensing costs should be low. Similarly, the fact that the great majority of discothèques has agreed to forward tax returns to Sacem in return for concessions on the rate of the royalty should reduce the actual costs of collection. As regards the costs of monitoring the use of music, Sacem has revealed in correspondence with the Commission,

which the latter made available to the Court in response to a written question, that every year it carries out in half of the permanent discothèques and a quarter of the seasonal ones an on-the-spot check in the course of which it monitors for a two-hour period the works actually played in the discothèque. On-the-spot checks are clearly labour-intensive and are therefore likely to be costly. It is in my view open to the national courts to consider whether such checks are necessary and effective in the light of their objective, which is to assist in the fair distribution of royalties between the copyright owners, or whether it would be sufficient for Sacem to rely on other means such as the returns from disc-jockeys which, in accordance with the standard contract, each discothèque is in any event required to provide. In this context it is relevant that, according to the correspondence referred to above which also extended to Sacem's counterparts in other EEC Member States, Sacem is the only copyright management society which relies systematically on checks carried out on the spot, the others relying on returns from disc-jockeys, sometimes combined with occasional samples, or even on information collected from extraneous sources, such as the frequency of use on radio and television.

73. If it is correct that French discothèques use predominantly popular music of Anglo-American origin (and it will be for national courts to determine as a question of fact whether that is the case), then one would expect to find that the greater part of the net sum available for distribution would be distributed to the British and American performing rights societies. The figures referred to above in fact indicate that in 1986 of that net sum over 50% was distributed to Sacem members and just under 25% to foreign societies. The amount transferred to the foreign societies does not take account of certain sums which must also be regarded as revenue from the exploitation of foreign musical works, namely the amounts due to French sub-publishers, adaptors, etc. of foreign works who receive their part of the royalty directly from Sacem. Nor is the total amount of some FF 46.8 million broken down as between the different foreign societies (although Sacem informed the Commission that the British Performing Right Society received about FF 11.6 million, and the German GEMA, about FF 5.4 million). The national courts may therefore need to consider, having regard to the actual use of foreign repertories, whether the proportion of revenue from the royalties distributed to the foreign copyright management societies provides an indication that the level of the royalties is excessive.

74. Accordingly, I would give the following answer to the fourth question:

In determining whether the level of the royalty imposed on a category of its customers by a copyright-management society which is in a dominant position in a substantial part of the common market is excessively high so that the imposition of that royalty constitutes an abuse within the meaning of Article 86 of the EEC Treaty, a national court may have regard to whether the level of the royalty is disproportionate:

(a) in relation to the royalties imposed by the same society on other categories of customers;

(b) in relation to the necessary costs of the effective management of copyright and to the need to ensure reasonable remuneration for copyright owners.

The existence of substantial disparities between the level of the royalty imposed by the dominant copyright-management society and those imposed by copyright-management societies in other Member States (if established by objective methods of comparison) will give rise to a strong inference that the royalty imposed by the dominant society is excessive, with the consequence that it will be incumbent upon that society to justify the level of the royalty.

Conclusion

75. In conclusion, I would give the following answers to the questions posed by the cour d'appel, Poitiers and by the tribunal de grande instance of Poitiers in Joined Cases 110/88, 241 and 242/88:

(1) Article 85(1) of the EEC Treaty must be interpreted as prohibiting:

(a) the conclusion between copyright-management societies established in different Member States of agreements whereby the societies undertake, on a reciprocal basis, the management of each others' repertories within their respective national territories, if those agreements are capable, having regard to the special characteristics of the market for the management of performing rights, of preventing, restricting or distorting competition on that market;

(b) the refusal by copyright-management societies linked by a network of reciprocal representation agreements to license directly the use of their domestic repertories to music users in each others' national territories, if it is established that the refusal to license is the result of a concerted practice between those societies and if that refusal is capable, having regard to the special characteristics of the market for the management of performing rights, of preventing, restricting or distorting competition on that market.

(2) Article 86 of the EEC Treaty prohibits as an abuse the imposition by a copyright-management society which is in a dominant position in a substantial part of the common market of a requirement that its customers must pay a royalty for access to the whole repertory of the society, irrespective of the actual use of that repertory by the customers in question, if the imposition of that requirement exceeds what is necessary for the effective management of copyright.

(3) In determining whether the level of the royalty imposed on a category of its customers by a copyright-management society which is in a dominant position in a substantial part of the common market is excessively high so that the imposition of that royalty constitutes an abuse within the meaning of Article 86 of the EEC Treaty, a national court may have regard to whether the level of the royalty is disproportionate:

(a) in relation to the royalties imposed by the same society on other categories of customers;

(b) in relation to the necessary costs of the effective management of copyright and to the need to ensure reasonable remuneration for copyright owners.

The existence of substantial disparities between the level of the royalty imposed by the dominant copyright-management society and those imposed by copyright-management societies in other Member States (if established by objective methods of comparison) will give rise to a strong inference that the royalty imposed by the dominant society is excessive, with the consequence that it will be incumbent upon that society to justify the level of the royalty.

76. I would give the following answers to the questions posed by the cour d'appel, Aix-en-Provence in Case 395/87:

(1) Articles 30 and 59 of the EEC Treaty do not preclude the application of national legislation which treats as an infringement of copyright the public performance of musical works by means of sound recordings without payment of a royalty in a case where a royalty in respect of the manufacture and sale of the sound recordings has already been paid in another Member State.

(2) Article 85(1) of the EEC Treaty must be interpreted as prohibiting:

(a) the conclusion between copyright-management societies established in different Member States of agreements whereby the societies undertake, on a reciprocal basis, the management of each others' repertories within their respective national territories, if those agreements are capable, having regard to the special characteristics of the market for the management of performing rights, of preventing, restricting or distorting competition on that market;

(b) the refusal by copyright-management societies linked by a network of reciprocal representation agreements to license directly the use of their domestic repertories to music users in each others' national territories, if it is established that the refusal to license is the result of a concerted practice between those societies and if that refusal is capable, having regard to the special characteristics of the market for the management of performing rights, of preventing, restricting or distorting competition on that market.

(3) Article 86 of the EEC Treaty prohibits as an abuse the imposition by a copyright-management society which is in a dominant position in a substantial part of the common market of a requirement that its customers must pay a royalty for access to the whole repertory of the society, irrespective of the actual use of that repertory by the customers in question, if the imposition of that requirement exceeds what is necessary for the effective management of copyright.

(4) In determining whether the level of the royalty imposed on a category of its customers by a copyright-management society which is in a dominant position in a substantial part of the common market is excessively high so that the imposition of that royalty constitutes an abuse within the meaning of Article 86 of the EEC Treaty, a national court may have regard to whether the level of the royalty is disproportionate:

(a) in relation to the royalties imposed by the same society on other categories of customers;

(b) in relation to the necessary costs of the effective management of copyright and to the need to ensure reasonable remuneration for copyright owners.

The existence of substantial disparities between the level of the royalty imposed by the dominant copyright-management society and those imposed by copyright-management societies in other Member States (if established by objective methods of comparison) will give rise to a strong inference that the royalty imposed by the dominant society is excessive, with the consequence that it will be incumbent upon that society to justify the level of the royalty.