

JUDGMENT OF THE COURT

17 May 1988 *

In Case 158/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the Østre Landsret, Copenhagen, for a preliminary ruling in the action pending before that court between

Warner Brothers Inc.,

Metronome Video ApS

and

Erik Viuff Christiansen

on the interpretation of Articles 30, 36 and 222 of the EEC Treaty with regard to the action taken by an owner of exclusive rights in Denmark to restrain hiring-out in Denmark of a video-recording marketed in another Member State by the same owner of the exclusive rights or with his consent, .

THE COURT

composed of: G. Bosco, President of Chamber, for the President, O. Due and J. C. Moitinho de Almeida (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, R. Joliet and F. Schockweiler, Judges,

Advocate General: G. F. Mancini

Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of:

Warner Brothers Inc. and Metronome Video ApS, by Johan Schlüter, of the Copenhagen Bar,

* Language of the Case: Danish.

Erik Viuff Christiansen by Niels Gangsted-Rasmussen, of the Copenhagen Bar,
the Danish Government, by Laurids Mikaelsen, Legal Adviser at the Danish
Ministry of Foreign Affairs, acting as Agent,

the United Kingdom, by S. J. Hay, of the Treasury Solicitor's Department,
London, acting as Agent,

the French Government, by Gilbert Guillaume, the Director of Legal Affairs at the
Ministry of Foreign Affairs, acting as Agent,

the Commission of the European Communities, by Johannes Føns Buhl and
Giuliano Marengo, members of its Legal Department, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on
1 October 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on
26 January 1988,

gives the following

Judgment

- ¹ By order dated 11 June 1986, which was received at the Court on 1 July 1986, the Østre Landsret referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 30 and 36 of the EEC Treaty, with a view to establishing the extent to which national copyright legislation regarding the hiring-out of video-cassettes is compatible with the free movement of goods.
- ² The question was raised in the context of proceedings brought by two companies, Warner Brothers Inc. (hereinafter referred to as 'Warner') and Metronome Video ApS (hereinafter 'Metronome'), against Mr Erik Viuff Christiansen.

- 3 Warner, the owner in the United Kingdom of the copyright of the film 'Never Say Never Again', which it produced in that country, assigned the management of the video production rights in Denmark to Metronome.

- 4 The video-cassette of the film was on sale in the United Kingdom with Warner's consent. Mr Christiansen, who manages a video shop in Copenhagen, purchased a copy in London with a view to hiring it out in Denmark and imported it into that Member State for that purpose.

- 5 On the basis of Danish legislation, which enables the author or producer of a musical or cinematographic work to take action to restrain the hiring-out of videograms of that work until such time as he gives his consent, Warner and Metronome obtained an injunction from the Copenhagen City Court prohibiting the defendant from hiring out the video-cassette in Denmark.

- 6 In the context of the proceedings referred to it, the Østre Landsret (Eastern Division of the High Court) decided to request the Court of Justice to give a preliminary ruling on the following question:

'Must the provisions of Chapter 2 in Title I of Part 2 of the EEC Treaty, on the elimination of quantitative restrictions between Member States, namely Articles 30 and 36, in conjunction with Article 222 of the Treaty, be interpreted as meaning that the owner of exclusive rights (copyright) in a video-recording which is lawfully put into circulation by the owner of the exclusive right or with his consent in a Member State under whose domestic copyright law it is not possible to prohibit the (resale and) hiring-out of the recordings is prevented from restraining the hiring-out of the video-recording in another Member State into which it has been lawfully imported, where the copyright law of that State allows such prohibition without distinguishing between domestic and imported video-recordings and without impeding the actual importation of video-recordings?'

- 7 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the applicable national legislation and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

- 8 In submitting the question the national court seeks to ascertain, in essence, whether Articles 30 and 36 of the EEC Treaty preclude the application of national legislation which gives an author the right to make the hiring-out of video-cassettes conditional on his authorization, where those video-cassettes have already been put into circulation with his consent in another Member State whose legislation allows the author to control their initial sale without giving him the right to prohibit them from being hired out.
- 9 It should be noted that, unlike the national copyright legislation which gave rise to the judgment of 20 January 1981 in Joined Cases 55 and 57/80 (*Musik-Vertrieb Membran v GEMA* [1981] ECR 147), the legislation which gives rise to the present preliminary question does not enable the author to collect an additional fee on the actual importation of recordings of protected works which are marketed with his consent in another Member State, or to set up any further obstacle whatsoever to importation or resale. The rights and powers conferred on the author by the national legislation in question comes into operation only after importation has been carried out.
- 10 None the less, it must be observed that the commercial distribution of video-cassettes takes the form not only of sales but also, and increasingly, that of hiring-out to individuals who possess video-tape recorders. The right to prohibit such hiring-out in a Member State is therefore liable to influence trade in video-cassettes in that State and hence, indirectly, to affect intra-Community trade in those products. Legislation of the kind which gave rise to the main proceedings must therefore, in the light of established case-law, be regarded as a measure having an effect equivalent to a quantitative restriction on imports, which is prohibited by Article 30 of the Treaty.
- 11 Consideration should therefore be given to whether such legislation may be considered justified on grounds of the protection of industrial and commercial property within the meaning of Article 36 — a term which was held by the Court, in its judgment of 6 October 1982 in Case 262/81 (*Coditel v Ciné-Vog* [1982] ECR 3381), to include literary and artistic property.
- 12 In that connection it should first be noted that the Danish legislation applies without distinction to video-cassettes produced *in situ* and video-cassettes

imported from another Member State. The determining factor for the purposes of its application is the type of transaction in video-cassettes which is in question, not the origin of those video-cassettes. Such legislation does not therefore, in itself, operate any arbitrary discrimination in trade between Member States.

- 13 It should further be pointed out that literary and artistic works may be the subject of commercial exploitation, whether by way of public performance or of the reproduction and marketing of the recordings made of them, and this is true in particular of cinematographic works. The two essential rights of the author, namely the exclusive right of performance and the exclusive right of reproduction, are not called in question by the rules of the Treaty.
- 14 Lastly, consideration must be given to the emergence, demonstrated by the Commission, of a specific market for the hiring-out of such recordings, as distinct from their sale. The existence of that market was made possible by various factors such as the improvement of manufacturing methods for video-cassettes which increased their strength and life in use, the growing awareness amongst viewers that they watch only occasionally the video-cassettes which they have bought and, lastly, their relatively high purchase price. The market for the hiring-out of video-cassettes reaches a wider public than the market for their sale and, at present, offers great potential as a source of revenue for makers of films.
- 15 However, it is apparent that, by authorizing the collection of royalties only on sales to private individuals and to persons hiring out video-cassettes, it is impossible to guarantee to makers of films a remuneration which reflects the number of occasions on which the video-cassettes are actually hired out and which secures for them a satisfactory share of the rental market. That explains why, as the Commission points out in its observations, certain national laws have recently provided specific protection of the right to hire out video-cassettes.
- 16 Laws of that kind are therefore clearly justified on grounds of the protection of industrial and commercial property pursuant to Article 36 of the Treaty.

- 17 However, the defendant in the main proceedings, relying on the judgments of 22 January 1981 in Case 58/80 (*Dansk Supermarked v Imerco* [1981] ECR 181) and of 20 January 1981 (*Musik-Vertrieb Membran v GEMA*, cited above), contends that the author is at liberty to choose the Member State in which he will market his work. The defendant in the main proceedings emphasizes that the author makes his choice according to his own interests and must, in particular, take into consideration the fact that the legislation of certain Member States, unlike that of certain others, confers on him an exclusive right enabling him to restrain the hiring-out of the recording of the work even when that work has been offered for sale with his consent. That being so, a maker of a film who has offered the video-cassette of that film for sale in a Member State whose legislation confers on him no exclusive right of hiring it out (as in the main proceedings) must accept the consequences of his choice and the exhaustion of his right to restrain the hiring-out of that video-cassette in any other Member State.
- 18 That objection cannot be upheld. It follows from the foregoing considerations that, where national legislation confers on authors a specific right to hire out video-cassettes, that right would be rendered worthless if its owner were not in a position to authorize the operations for doing so. It cannot therefore be accepted that the marketing by a film-maker of a video-cassette containing one of his works, in a Member State which does not provide specific protection for the right to hire it out, should have repercussions on the right conferred on that same film-maker by the legislation of another Member State to restrain, in that State, the hiring-out of that video-cassette.
- 19 In those circumstances, the answer to be given to the question submitted by the national court is that Articles 30 and 36 of the Treaty do not prohibit the application of national legislation which gives an author the right to make the hiring-out of video-cassettes subject to his permission, when the video-cassettes in question have already been put into circulation with his consent in another Member State whose legislation enables the author to control the initial sale, without giving him the right to prohibit hiring-out.

Costs

- 20 The costs incurred by the Danish Government, the United Kingdom, the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are,

in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Østre Landsret, Copenhagen, by order of 11 June 1986, hereby rules:

Articles 30 and 36 of the EEC Treaty do not prohibit the application of national legislation which gives an author the right to make the hiring-out of video-cassettes subject to his permission, when the video-cassettes in question have already been put into circulation with his consent in another Member State whose legislation enables the author to control the initial sale, without giving him the right to prohibit hiring-out.

Bosco	Due	Moitinho de Almeida	Koopmans	
Everling	Bahlmann	Galmot	Joliet	Schockweiler

Delivered in open court in Luxembourg on 17 May 1988.

J.-G. Giraud

Registrar

A. J. Mackenzie Stuart

President