In Case 78/70

Reference to the Court under Article 177 of the EEC Treaty by the Hanseatisches Oberlandesgericht Hamburg for a preliminary ruling in the action pending before that court between

DEUTSCHE GRAMMOPHON GESELLSCHAFT MBH, Hamburg,

and

METRO-SB-GROSSMÄRKTE GMBH & Co. KG, represented by the company Metro-SB-Großmärkte GmbH, Hamburg,

on the interpretation of the second paragraph of Article 5, Article 85 (1) and Article 86 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi, Presidents of Chambers, R. Monaco (Rapporteur), J. Mertens de Wilmars, P. Pescatore and H. Kutscher, Judges.

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and procedure

The facts which form the basis of the present dispute may be summarized as follows:

1. The company Deutsche Grammophon Gesellschaft (hereinafter referred to as 'DG') is a subsidiary of the company Philips Gloeilampen-Fabrieken, Eindhoven (Netherlands), and of the company Siemens AG, Berlin and Munich. Its principal products are gramophone records which it distributes directly or through its subsidiaries established in several EEC and EFTA States. Amongst its 99.55% owned subsidiaries is the company Polydor SA, Paris (hereinafter referred to as 'Polydor') with places of business in Paris and Strasbourg.

In Germany the records are sold directly through retailers and through two wholesale booksellers. DG sells records to those dealers at a price of DM 12·33

(plus VAT) and the controlled retail selling price is DM 19. The records are only supplied to dealers who have signed a written undertaking ('Revers') to observe the agreement on prices.

In the other EEC and EFTA countries, DG distributes its records by means of licensing agreements concluded with its own subsidiaries or with the subsidiaries of the company NV Philips Phonografische Industrie of Baarn (Netherlands), which is a subsidiary of Philips Gloeilampen-Fabrieken and of Siemens AG. In paragraph (1) these licensing agreements state in particular that DG assigns to the licensee the exclusive right to exploit its recordings in the territory covered by the agreement in a manner in accordance with normal commercial usage.

DG concluded such an agreement with its subsidiary Polydor of Paris.

2. From April to the end of October 1969 the undertaking Metro-SB-Großmärkte GmbH & Co. KG (hereinafter referred to as 'Metro') was supplied with Polydor records by DG and, since it was not bound by a pricing agreement, it sold those records to its customers at the price (plus VAT) of DM 14·85 in May 1969 and DM 13·50 in August 1969. In October 1969 DG discovered that it did not possess a written undertaking to observe the controlled prices. Since Metro refused to sign such an undertaking DG severed commercial relations. As a result of this, Metro obtained supplies of Polydor records through the undertaking Rosner & Co. of Hamburg, selling them to its customers for DM 11·95 plus VAT in January 1970 and for DM 12·95 plus VAT in February 1970.

The records in question had been pressed by DG in Germany and supplied to its subsidiary Polydor in Paris. Polydor had disposed of a number of those records to an undertaking operating in a third country which had supplied a proportion of them to the undertaking Rosner & Co. The latter in its turn resold those records to the undertaking Metro-SB-Großmärkte GmbH of Hamburg, which has a controlling interest in Metro.

3. DG considered that the sale of its records by the said undertaking constitutes an infringement of Article 85 of the Urheberrechtsgesetz (the German Copyright Law) and thereby of its right of exclusive distribution in the Federal Republic. It also considered that its right was not 'exhausted' in accordance with Article 17 (2) of the said Law since the goods were marketed abroad and not on the national territory. On 20 March 1970 it obtained an injunction under Article 97 of the Copyright Law from the Landgericht Hamburg prohibiting Metro-SB-Großmärkte from selling or from marketing in any other manner DG records bearing the designation 'Polydor' and having specific catalogue numbers.

On 7 April 1970 the undertaking Metro-SB-Großmärkte GmbH & Co. KG requested the Bundeskartellamt (the Federal Cartel Office) to review the system of controlled prices operated by DG and requested it to annul as an abuse the clause controlling prices and to prohibit the application of any such clause. At the same time Metro made an application to the Commission of the European Communities under Article 3 of Regulation No 17/62, requesting it to find that there was an infringement of Articles 85 and 86 of the Treaty and to require DG, Polydor Nederland NV and Polydor France to bring such infringement to an end.

In addition, since Metro-SB-Großmärkte's objection to the injunction of the Landgericht Hamburg was dismissed by decision of 22 May 1970, Metro appealed to the Hanseatisches Oberlandesgericht which, by an order of 8 October 1970, decided to stay proceedings and put the following questions to the Court of Justice under Article 177 of the Treaty:

'(a) Is it contrary to the second paragraph of Article 5 or Article 85 (1) of the EEC Treaty to interpret

Articles 97 and 85 of the Federal Law of 9 September 1965 on copyright and related rights (Bundesgesetzblatt-BGBl I, p. 1273) to mean that a German undertaking manufacturing sound recordings may rely on its distribution rights to prohibit the marketing in the Federal Republic of Germany of sound recordings which it has itself supplied to its French subsidiary which, although independent at law, is wholly subordinate to it commercially?

(b) Is an undertaking manufacturing sound recordings to be regarded as abusing its distribution rights if the controlled retail price of the sound recordings is higher than the price of the original product reimported from another Member State and if the principal performers are bound by exclusive contracts to the manufacturer of the sound recordings (Article 86 of the EEC Treaty)?'

4. The order making the reference was filed at the Court Registry on 7 December 1970.

In accordance with Article 20 of the Protocol on the Statute of the Court the parties to the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities submitted written observations.

On hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without any preparatory inquiry.

DG, represented by Mr D. Ohlgart and Mr Wolter, Metro, represented by Mr H.J. Bartholatus and V. Gerosten, the Government of the Federal Republic of Germany, represented by Mr E. Bülow, and the Commission of the European Communities, represented by its Legal Adviser E. Zimmermann, presented oral argument at the hearing on 31 March 1971.

The Advocate-General delivered his opinion at the hearing on 28 April 1971.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

The observations submitted under Article 20 of the Protocol on the Statute of the Court may be summarized as follows:

A — *Observations submitted by DG*

DG maintains that the first question, as drafted, does not fall under Article 177 of the Treaty since it involves the interpretation of the internal law of a Member State and not of Community law. Even supposing that it might be understood as asking whether Article 85 of the Copyright Law conflicts with the second paragraph of Article 5 and Article 85 (1) of the Treaty or whether those articles prevail over the Copyright Law, the question is still inadmissible. In fact, the former case relates to the validity of a provision of national law and not of Community law, while in the latter case not only the interpretation but also the *application* of the Treaty is concerned. Subject to the possibility of 'recasting' the first question to bring it within Article 177 of the Treaty, it must thus be reduced to the following question:

'Is it contrary to the second paragraph of Article 5 or Article 85 (1) of the EEC Treaty that a German undertaking manufacturing sound recordings, which has under the legislation of a Member State the exclusive right to distribute such recordings, may rely on that right to prohibit the marketing in that State by a third party of products which it has previously supplied in another Member State to its subsidiary which is wholly

subordinate to it commercially although legally independent?'

Having made this statement DG makes the following observations:

(a) *The second paragraph of Article 5 of the Treaty*

The second paragraph of Article 5 of the Treaty is not a self-executing provision. It is a provision rendering the Member States subject to an obligation which can only be enforced through the procedure of Article 169 of the Treaty. It may be interpreted as governing or restricting national legislation on the protection of industrial property only at the risk of producing intolerable legal uncertainty. Article 36 of the Treaty in particular runs contrary to such an interpretation; in relation to the abovementioned general provision it must be considered as a 'particular law' which, in precisely the relevant sphere, creates an exception in favour of a particular national rule. It must furthermore be explained that the legal protection afforded to the rights of a manufacturer of sound recordings did not come into being after the entry into force of the Treaty but was in existence as long ago as 1910. DG refers to an expert opinion of Professor Philipp Möhring which accompanied its observations.

(b) *Article 85 (1) of the Treaty*

The concept of an 'agreement between undertakings' contained in this article is not applicable to the present case since it presupposes that there is competition between the undertakings in question which is capable of being restricted. It is precisely this element of competition which is absent from the relationship between DG and its subsidiary, Polydor; the situation is rather that of the accomplishment of separate tasks within the same economic entity. Furthermore, it must always be borne in mind that DG's action against Metro is not based on the licensing agreement concluded with Polydor but is founded exclusively on the provisions of the Copyright Law.

Indeed, in the case of copyright, as in the case of rights related thereto, it is national law itself which creates barriers. Likewise, in the present case there is no 'concerted practice' within the meaning of Article 85 (1) of the Treaty, since DG's proceedings against Metro are also based solely on the protection accorded by the Copyright Law. It is not founded on the concerted action of at least two undertakings but on unilateral behaviour. In other words, it is clear from the above that observance of the distribution rights for Germany is not ensured in the present case by the existence of one of the types of restrictive practice to which reference is made in Article 85 (1) of the Treaty.

(c) *Article 86 of the Treaty*

Article 86 of the Treaty must first of all be interpreted in conjunction with Articles 36 and 222 of the Treaty. Article 36 lays down limitations to the free movement of goods, in derogation from Articles 30 to 34 of the Treaty, so far as they are justified on grounds derived from the protection of industrial property; it cannot be doubted that copyright comes under the system of industrial property within the meaning of that article. Article 222 expressly states that the Treaty does not affect the law of the Member States governing the system of property ownership; it is likewise certain that industrial property forms part of that law.

Furthermore, there can be no question that a dominant position could arise in this case from the exclusive agreements concluded with performers or executants. First, in this connexion Article 61 of the Copyright Law and Article 11 of the Law on the Protection of Copyright and Related Rights (Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten) should be borne in mind; these prohibit the draw-

ing up of 'exclusive licences' between authors or authors' associations and record manufacturers; account should also be taken of Article 78 of the Copyright Law, which provides in this sphere for a 'compulsory quasi-licence'. In any event, leaving aside this latter provision, although a record manufacturer is entitled on the basis of exclusive agreements to prohibit his competitors from 'introducing' the same product onto the market, he may not prohibit them from recording the same piece of music in a different interpretation.

The position which the manufacturer occupies on the market therefore has nothing in common with the concept of a 'dominant position'. Furthermore, in the present case the soloists who took part in the recordings are not, with regard to most of the records, bound by exclusive contracts. If the Court were to decide to consider DG's situation case by case in relation to each record, it would have to verify the relevant facts, which it may not do since this relates to the *application* and not to the interpretation of Article 86 of the Treaty.

The existence of an 'abuse' of a dominant position must be discounted, first, where the holder of the right relies solely on the law and that law grants the holder absolute territorial protection.

Secondly, DG cannot be required to ensure the application of identical prices so long as national tax laws are divergent.

In adition, in this case the final price of the records in France is very little lower than that prevailing in Germany since existing differences are linked principally to the revaluation and devaluation of the currencies. Nor does the final price to the consumer differ substantially in the Member States (DG gives figures showing how the importation into Germany of records purchased in France can be profitable, particularly for intermediaries).

Finally, an abuse of a dominant position within the meaning of Article 86 is precluded in this case by the fact that in Germany there is a system of controlled prices which is not found in France.

B — *Observations of the undertaking 'Metro'*

Metro explains that according to the wording of Article 17 (2) of the Copyright Law it is the consent given by the holder of the right to the distribution of the protected product which occasions the exhaustion of that right, and not the fact that such distribution occurred on the national territory or abroad; it then makes the following observations:

(a) *The second paragraph of Article 5 of the Treaty*

The interpretation of Articles 85 and 17 of the Copyright Law, which prevent the reimportation of records marketed with the agreement of DG, conflicts with the second paragraph of Article 5 of the Treaty which is binding on both the national legislature and the national courts. Furthermore, since the German legislature adopted the Copyright Law after the ratification of the EEC Treaty it did not intend to prejudice the principle of commercial freedom as it considered that the question whether marketing occurred on the national territory or abroad does not affect the exhaustion of the right.

(b) *Article 85 of the Treaty*

The clause in the licensing agreement prohibiting the French party from selling the records outside the territory covered by the agreement, namely France, is by no means indispensable for the protection of the right granted by the Copyright Law and is not justified by the protection afforded to the exclusive right of distribution.

A limitation of this nature can only be intended to prevent the exhaustion of the right prescribed by Article 17 (2) of the Law.

Apart from the licensing agreement, DG and Polydor are engaged in a concerted

practice for the purpose of preventing records exported to France from being reimported into Germany. In both cases the objective is to enable DG to maintain its system of distribution and controlled prices and to ensure a high level of prices in Germany.

Both the abovementioned clause in the agreement and the concerted practice are contrary to Article 85 (1) of the EEC Treaty.

(c) *Article 86 of the Treaty*

Few undertakings have a really dominant position in the field of sound recordings. DG is indeed one of them and it uses this position to prevent, by means of Article 85 of the Copyright Law, the reimportation of its products into Germany.

This affects trade between Member States, and DG has the power to impose excessively high selling prices in the various countries. It is quite impossible for the trade to throw off this domination because the best-known performers are bound by exclusive contracts. Metro supplies, in a schedule to its observations, information on the 'celebrity' of the relevant performers.

In these circumstances the exercise of the right of distribution constitutes an abuse of a dominant position which is prohibited by Article 86 of the EEC Treaty.

C — *Observations of the Government of the Federal Republic of Germany*

The Federal Government explains first of all that in its view it is not certain that the sole possible interpretation of Article 17 (2) of the Copyright Law is that based on the principle of 'territoriality' which guided the court making the reference. In this connexion it recalls that legal writers also put forward another interpretation to the effect that the exclusive right is exhausted when the objects reproduced are marketed abroad by the holder of the right or by a third party under a licence which is also valid for the national territory.

The Federal Government observes with regard to the jurisdiction of the Court that the fact that the proceedings in the main action are interlocutory proceedings does not preclude recourse to the procedure of Article 177 of the Treaty. The first question is admissible as drafted since, according to its wording, it would involve the Court in a consideration of national law. For this reason the question must be interpreted as follows:

'Is it contrary to the second paragraph of Article 5 and Article 85 (1) of the EEC Treaty that an undertaking manufacturing sound recordings should prevent, on the basis of a right related to copyright, the resale of reimported sound recordings previously supplied by it to its subsidiary which is wholly subordinate to it commercially although legally independent?'

(a) *The second paragraph of Article 5 of the Treaty*

The second paragraph of Article 5 of the Treaty is not a self-executing provision. Furthermore, in adopting Article 85 of the Copyright Law the Federal Government has not infringed that provision. It is clear in particular from Articles 36 and 222 of the Treaty that the Member States have in fact retained the power to settle independently their own systems of idustrial property and may thus within the framework of this power afford legal protection to situations which were not previously covered or which were governed in a different way.

(b) *Article 85 (1) of the Treaty*

The Federal Government queries first whether an agreement concluded between a parent company and its subsidiary—which from an economic point of view is wholly dominated by the former—may be described as an 'agreement' within the meaning of Article 85 (1) of the Treaty. In any event, where the parent company can give mandatory instructions to its subsidiary, the very

fact that there is no competition between the two undertakings excludes the application of Article 85 (1). Even assuming that the two undertakings would conclude between themselves agreements within the meaning of Article 85 (1) of the Treaty all the conditions for the application of that article would have to be investigated *in concreto*. Similarly, it would be necessary to check whether the exercise of the exclusive right regarding reimportations into Germany actually rests on a 'concerted practice', that is to say, on a harmonization of action and behaviour which is not accidental but deliberate and intentional.

The Federal Government concludes that the situation described in the first question does not conflict with the second paragraph of Article 5 of the Treaty. Nor does it conflict with Article 85 (1) of the Treaty in that the economic dominion exercised by the parent undertaking over its subsidiary is such that there is no competition between them. If this were not so, everything would depend on the wording of the licensing agreements and on the other relevant circumstances of the present case.

(c) *Article 86 of the Treaty*

The Federal Government does not rule out the possibility of a dominant position in the relevant sector but considers this to exist only in exceptional cases. It is furthermore related to a number of factors such as the wording of each exclusive agreement, the type of music in question—light music or instrumental music—and so on.

Likewise, the question whether a manufacturer of sound recordings may be said to 'abuse' a dominant position depends on a number of factors. Differences between delivery prices in the various Member States do not by themselves prove such an abuse: it must be ascertained whether they are justified by differences in production costs, taxation, and so on. In addition it is necessary to confirm whether the final price is in fact the same in the Member States in question.

The Federal Government concludes that differences in prices and the conclusion of exclusive agreements do not in themselves constitute an abuse of a dominant position within the meaning of Articlie 86 (1) of the EEC Treaty and that evidence of an abuse requires the confirmation of other factual circumstances.

D — *Observations submitted by the Commission of the European Communities*

The Commission sets out the reasons which in its view led the German court to apply Article 177 of the Treaty, even though the proceedings in the main action are interim proceedings. After noting that the first question might be interpreted as requesting the Court to give a ruling on German law, it observes that the Court nevertheless has the power to isolate the essential points for the purposes of the interpretation of the Treaty.

The Commission recalls the provisions of Articles 17 (2) and 85 (1) of the Copyright Law and states that there is no definite and unanimous view of the ambit of Article 17 (2). In this connexion it is futile to invoke the principle of 'territoriality', which properly speaking merely implies that the protection to be accorded by the courts over the national territory must be assessed in accordance with the rules of national law; it does not however prevent a State from making this protection dependent on external factors. The Commission considers the question from the point of view of other national laws and observes that the principle of territoriality makes it possible for the holder of a right to prohibit 'parallel imports' and that its application to the present case leads to the sharing and partitioning of the markets. In the case of copyright this consequence is all the more evident (as compared with patent

or trade-mark rights) since that right may be extended to other countries without any formality.

(a) *The second paragraph of Article 5 of the Treaty*

The prohibition on importation or distribution of imported products conflicts in particular with the principles set out in Article 3 (a) and (f) of the Treaty, namely, free movement of goods and the institution of a system ensuring freedom of competition within the common market.

The Treaty does not intend to prohibit restrictions on competition arising from the existence of industrial property rights or literary or artistic property rights but, in Article 36, it outlines the boundary between the existence of those rights, which is recognized by the Treaty, and the exercise of those rights in a way which is contrary to one of the fundamental objectives of the Treaty. The power conferred upon the holder of the exclusive right to prohibit the distribution in one Member State of protected articles which have been lawfully marketed in another Member State involves an exercise of the said right which does not accord with those objectives since its effect is to impede the free movement of goods between Member States.

It does not appear that such a prohibition follows from a legislative measure directly infringing Article 30 et seq. of the Treaty. Article 85 of the Copyright Law does not directly govern the question and at all events it merely opens an option in favour of holders of the right, leaving them to avail themselves of it and enforce their wishes. Although in this connexion there is no reason to apply Article 30 et seq. of the Treaty, in that the German law does not contain a prohibition on imports which is not covered by Article 36 of the Treaty, the disputed interpretation nevertheless conflicts with the obligation on the States to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.

The problem is thereby raised as to whether the second paragraph of Article 5 has been observed or infringed. The Commission emphasizes the scope and objectives of that article and recalls that all national authorities, including the courts, are obliged to observe it. An interpretation of Article 85 of the copyright Law conferring the power in question on the proprietor of the copyright would furthermore fail to take account of the fact that that provision was adopted after the entry into force of the Treaty.

(b) *Article 85 (1) of the Treaty*

(i) With regard to the *licensing agreements* the Commission considers that according to their wording they do not exceed the limits of DG's rights and that the facts of the case do not allow a finding to be made as to whether restrictions on competition were agreed or form the subject-matter of a concerted practice.

Since they were concluded between a parent undertaking and its subsidiaries, whose capital is almost entirely owned by the parent undertaking, these agreements do not fall under Article 85 (1) of the Treaty. Article 85 (1) might be relevant if it were found that those agreements contain clauses restricting competition which would of necessity form the subject-matter of agreements drawn up between the subsidiaries and their customers, but this cannot be deduced with certainty from the licensing agreements.

(ii) With regard to the *agreements on price fixing* ('*Revers*'), the Commission points to a clause (Clause II (2)) which in its view is equivalent to a prohibition on imports capable of affecting trade between Member States and restricting competition within the common market. In this case the proceedings initiated by DG against Metro are not based on a clause of this nature but are founded directly on Article 85 of the Copyright

Law. Taking account of the fact that DG has fixed the level of final prices in Germany, has in practice prohibited its customers from importing DG records into Germany without its authorization and is itself actively engaged in enforcing observance of the imposed prices and promptly taking action against any infringement which comes to its notice, the conclusion must be that in this case it is relying upon Article 85 of the Copyright Law merely to enforce an agreement falling within Article 85 (1) of the Treaty.

(c) *Article 86 of the Treaty*

The Commission expresses its opinion on the concept of a 'dominant position' and then sets out the criteria according to which the court making the reference must determine the position of DG on the German market. It considers the position of that undertaking on the said market and the special nature of the market in sound recordings and concludes that DG, together with another undertaking (the Phonogram Ton GmbH), occupies a dominant position on that market.

With regard to the problem of an 'abuse' of its position on the market, the Commission draws attention to the provisions of Article 86 (a) and (d). It emphasizes, with regard to paragraph (a), the importance of a marked difference between prices (in the present case, production prices) which cannot be explained by reference to objective criteria and, with regard to paragraph (d), the disadvantage to which trading partners are subjected because the much higher selling price prevailing in Germany prevents German dealers, especially those having their place of business near to the French frontier, from selling DG records in France. In short, the abuse of a dominant position may in this case affect trade between Member States.

On the basis of these observations the Commission proposes the following answers to the questions referred to the Court:

(1) The legislative provisions of a Member State, or their interpretation by the courts, which confer upon the holder of an exclusive right to a sound recording the power to prohibit importation or distribution within a country of copies which the holder of the right or its dependent undertaking has distributed in another Member State jeopardize the attainment of the objectives of the Treaty. Such a right is not inherent in the industrial and commercial property safeguarded by Article 36 of the Treaty. Decisions of the courts in favour of the exercise of such a right are contrary to the obligation imposed upon the Member States by the second paragraph of Article 5 of the Treaty.

(2) Article 85 of the Treaty is applicable where, in pursuance of an exclusive right to reproduce and distribute sound recordings, the reimportation from one Member State of sound recordings distributed by the holder of the right or its dependent undertaking in another Member State is prohibited, and where the holder of the right has concluded with dealers in the importing country agreements requiring the latter to refrain from distributing the imported products except with the consent of the former and at the imposed price.

(3) A manufacturer of sound recordings who holds a right related to copyright does not occupy a dominant position within the meaning of Articles 86 of the Treaty merely because it may prohibit third parties from manufacturing copies and distributing them within a Member State.

A dominant position exists where the holder of the right has, in a substantial part of the common market, alone or jointly with an undertaking belonging to the same group, an important share of the market and where the position on the market of other distributors of similar products is appreciably weaker. With regard to a dominant position it may be important that the principal performers are bound to the record manufacturer by exclusive contracts.

Abuse of a dominant position may be said to occur where the holder of the right maintains prices in the Member State in which it occupies such a position which are appreciably higher than those charged in other Member States and where this difference is not explicable on objective grounds (transport costs, taxation etc.). In those circumstances the prohibition on the reimportation of original products from other Member States also constitutes an abuse.

Grounds of judgment

1 By an order of 8 October 1970, which was received at the Court Registry on 7 December 1970, the Hanseatisches Oberlandesgericht, Hamburg, referred to the Court of Justice, under Article 177 of the Treaty establishing the European Economic Community, certain questions on the interpretation of the second paragraph of Article 5, Article 85 (1) and Article 86 of the Treaty.

The first question

2 In the first question the Court is asked to rule whether it is contrary to the second paragraph of Article 5 or Article 85 (1) of the EEC Treaty to interpret Articles 97 and 85 of the German Law of 9 September 1965 on copyright and related rights to mean that a German undertaking manufacturing sound recordings may rely on its exclusive right of distribution to prohibit the marketing in the Federal Republic of Germany of sound recordings which it has itself supplied to its French subsidiary which, although independent at law, is wholly subordinate to it commercially.

3 Under Article 177 the Court, when giving a preliminary ruling, is entitled only to pronounce on the interpretation of the Treaty and of acts of the institutions of the Community or on their validity but may not, on the basis of that article, give judgment on the interpretation of a provision of natonal law. It may however extract from the wording of the questions formulated by the national court those matters only which pertain to the interpretation of the Treaty, taking into account the facts communicated by the said court.

4 It is clear from the facts recorded by the Hanseatisches Oberlandesgericht, Hamburg, that what it asks may be reduced in essentials to the question whether the exclusive right of distributing the protected articles which is conferred by a national law on the manufacturer of sound recordings may, without infringing Community provisions, prevent the marketing on national territory of products lawfully distributed by such manufacturer or with his consent on the territory of another Member State. The Court of Justice is asked to define the tenor and the scope of the relevant Community provisions, with particular reference to the second paragraph of Article 5 or Article 85 (1).

5 According to the second paragraph of Article 5 of the Treaty, Member States 'shall abstain from any measure which could jeopardize the attainment of the objective of this Treaty'. This provision lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme.

6 According to Article 85 (1) of the Treaty 'The following shall be prohibited 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'. The exercise of the exclusive right referred to in the question might fall under the prohibition set out by this provision each time it manifests itself as the subject, the means or the result of an agreement which, by preventing imports from other Member States of products lawfully distributed there, has as its effect the partitioning of the market.

7 If, however, the exercise of the right does not exhibit those elements of contract or concerted practice referred to in Article 85 (1) it is necessary, in order to answer the question referred, further to consider whether the exercise of the right in question is compatible with other provisions of the Treaty, in particular those relating to the free movement of goods.

8 The principles to be considered in the present case are those concerned with the attainment of a single market between the Member States, which are placed both in Part Two of the Treaty devoted to the foundations of the Community, under the free movement of goods, and in Article 3 (g) of the Treaty which prescribes the institution of a system ensuring that competition in the common market is not distorted.

9 Moreover, where certain prohibitions or restrictions on trade between Member States are conceded in Article 36, the Treaty makes express reference to them, providing that such derogations shall not constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

10 It is thus in the light of those provisions, especially of Articles 36, 85 and 86, that an appraisal should be made as to how far the exercise of a national right related to copyright may impede the marketing of products from another Member State.

11 Amongst the prohibitions or restrictions on the free movement of goods which it concedes Article 36 refers to industrial and commercial property. On the assumption that those provisions may be relevant to a right related to copyright, it is nevertheless clear from that article that, although the Treaty

does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property.

12 If a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.

That purpose could not be attained if, under the various legal systems of the Member States, nationals of those States were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between Member States.

13 Consequently, it would be in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a Member State, in such a way as to prohibit the sale in that State of products placed on the market by him or with his consent in another Member State solely because such distribution did not occur within the territory of the first Member State.

The second question

14 In the second question the Court is asked to rule whether a manufacturer of sound recordings abuses his exclusive right of distributing the protected articles if the selling price imposed is, within the national territory, higher than the price of the original product reimported from another Member State and if the principal performers are tied to the record manufacturer by exclusive contracts.

The expression 'abuses his right' contained in this question refers to the abuse of a dominant position within the meaning of Article 86 of the Treaty.

15 That article prohibits 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States'.

16 It is clear from this provision that the action prohibited by it presupposes the existence of a dominant position within the common market or in a substantial part of it. A manufacturer of sound recordings who holds a right related to copyright does not occupy a dominant position within the meaning of Article 86 of the Treaty merely by exercising his exclusive right to distribute the protected articles.

17 Since that article requires that the position to which it refers should extend to a 'substantial part' of the common market this further requires that the manufacturer, alone or jointly with other undertakings in the same group, should have the power to impede the maintenance of effective competition over a considerable part of the relevant market, having regard in particular to the existence of any producers marketing similar products and to their position on the market.

18 If recording artists are tied to the manufacturer by exclusive contracts consideration should be given, *inter alia*, to their popularity on the market, to the duration and extent of the obligations undertaken and to the opportunities available to other manufacturers of sound recordings to obtain the services of comparable performers.

19 For it to fall within Article 86 a dominant position must further be abused. The difference between the controlled price and the price of the product reimported from another Member State does not necessarily suffice to disclose such an abuse; it may however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse.

Costs

20 The costs incurred by the Government of the Federal Republic of Germany 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 action pending before the national court, costs are a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties to the main action, of the Federal Republic of Germany and of the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty establishing the European Economic Community, especially Articles 3, 5, 36, 85, 86 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the question referred to it by the Hanseatisches Oberlandesgericht, Hamburg, pursuant to an order of that court of 8 October 1970, hereby rules:

1. **It is in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a Member State, in such a way as to prohibit the sale in that State of products placed on the market by him or with his consent in another Member State solely because such distribution did not occur within the territory of the first Member State.**

2. (a) **A manufacturer of sound recordings who holds an exclusive right of distribution under national legislation does not occupy a dominant position within the meaning of Article 86 of the Treaty merely by exercising that right. The position is different when having regard to the circumstances of the case he has the power to impede the maintenance of effective competition over a considerable part of the relevant market.**

   (b) **The difference between the controlled price and the price of the product reimported from another Member State does not necessarily suffice to disclose an abuse of a dominant position; it may, however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 8 June 1971.

A. Van Houtte
Registrar

R. Lecourt
President