JUDGMENT OF THE COURT
9 April 1987 *

In Case 402/85

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

G. Basset, residing at Fréjus (France),

and

Société des auteurs, compositeurs et éditeurs de musique (SACEM), Paris,

on the interpretation of Articles 30, 36 and 86 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. F. O'Higgins and F. Schockweiler, Presidents of Chambers, G. Bosco, T. Koopmans, O. Due, K. Bahlmann, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: C. O. Lenz
Registrar: B. Pastor, Administrator

after considering the observations submitted on behalf of:

G. Basset, the appellant in the main proceedings, represented by P. Montier, of the Paris Bar,

Sacem, the respondent in the main proceedings, represented by O. Carmet and G. Kiejman, of the Paris Bar,

the Government of the French Republic, represented by E. Belliard and J. Myard, acting as Agents,

* Language of the Case: French.

the Government of the Italian Republic, represented by L. Ferrari Bravo, Head of the Servizio del Contenzioso Diplomatico, acting as Agent, assisted by O. Fiumara, Avvocato dello Stato,

the Commission of the European Communities, represented by G. Marenco, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 17 December 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 24 February 1987,

gives the following

Judgment

1 By a judgment of 20 November 1985, which was received at the Court on 5 December 1985, the cour d'appel (Court of Appeal), Versailles, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 30, 36 and 86 of the Treaty with a view to determining the compatibility with those provisions of the charging of a royalty known as a 'supplementary mechanical reproduction fee' on the public performance, by means of sound recordings, of works protected by copyright.

2 Those questions were raised in the course of proceedings between Mr Basset, who operates a discotheque in Fréjus, and the Société des auteurs, compositeurs et éditeurs de musique (SACEM). Asserting that works from its repertoire had been played in Mr Basset's discotheque without payment of the agreed royalties, Sacem brought proceedings against Mr Basset before the tribunal de grande instance (Regional Court), Draguignan, which ordered Mr Basset to pay the royalties in question. Mr Basset appealed on the ground that the contracts on which the claim for royalties was based were void as contrary to national and Community law on competition.

3 The cour d'appel, Versailles, to which the matter was remitted after a judgment of the cour d'appel, Aix-en-Provence, was quashed, held that Mr Basset's submissions were based primarily on the concepts of 'abuse of a dominant position' and 'unlawful agreement' and that it was necessary to consider those submissions in the light not only of French law but also of Community law, in particular Articles 85 and 86 of the Treaty.

4 With regard to the application of Article 85, the cour d'appel points out that SACEM has concluded reciprocal representation contracts with most foreign copyright-management societies under which each society authorizes the other to collect royalties on works from the repertoire of the foreign society, such royalties to be collected in each country in accordance with the normal conditions in that country. Although such contracts may be considered 'agreements between undertakings' for the purposes of Article 85, they do not have as their object or effect the distortion of competition within the common market. The system of reciprocal authority cannot affect the amount of copyright royalties in each country and is likely, by its nature, to reduce the cost of collecting and monitoring royalties, to the benefit of authors and of users of protected works.

5 With regard to Article 86, the cour d'appel considers that SACEM has a *de facto* monopoly and thus occupies a dominant position on the market. Mr Basset claims that SACEM has abused that dominant position in two respects: first of all, the rate of the royalty, 8.25% of the discotheque's gross turnover, is excessive in relation to the benefit provided; secondly, that rate of 8.25% includes a 'supplementary mechanical reproduction fee' of 1.65%, charged on the same basis as the rest of the royalty, that is to say the public use of sound recordings.

6 On the first point, the cour d'appel rejects the claim that the rate of 8.25% is an unfair price. It takes the view that that charge, although high in comparison with that applied in other countries, is not excessive in view of the fact that discotheques use a particularly large amount of music and if they could not use such music would be obliged to close immediately.

7 On the second point, the cour d'appel states first of all that under French legislation an author's rights to the exploitation of his work include the right of performance and the right of reproduction. Performance is defined as the communication of the work to the public, in particular its dissemination, by any means; reproduction is the fixation of a work in material form by any method which permits its communication to the public in an indirect manner, in particular by mechanical recording. In the case of music, the right of reproduction is normally assigned to the manufacturer of sound recordings, and the royalty is paid when the recordings are placed on the market. However, the royalty of 8.25% charged to discotheques by SACEM comprises the price of the performance right, in the amount of 6.60%, and a 'supplementary' reproduction royalty, in the amount of 1.65%.

8 The cour d'appel holds in that regard that the charging of both a performance royalty and a supplementary reproduction royalty is justified in French law, which allows an author to grant a manufacturer of sound recordings a right of reproduction relating only to the marketing of recordings for private use and to charge a supplementary mechanical reproduction fee to a person who, having acquired the recording, makes a public use of it which is not covered by the reproduction fee initially paid. However, the cour d'appel is uncertain whether the charging of the supplementary mechanical reproduction fee is compatible with Community law, in particular where sound recordings have been imported from another Member State where they were lawfully marketed and where the public dissemination of protected work gives rise only to a single royalty corresponding to the performance fee; in such circumstances the charging of combined royalties in France might have the effect of interfering with the free movement of goods.

9 With a view to resolving those problems the cour d'appel referred two questions to the Court for a preliminary ruling in order to determine whether Articles 30 and 36 or Article 86 of the Treaty must be interpreted as meaning that 'a national copyright management society, which enjoys a *de facto* monopoly for the protection of its repertoire and is connected by reciprocal representation contracts with foreign copyright-management societies established *inter alia* in Member States of the Community, may not charge users a royalty (called a supplementary mechanical reproduction fee) on the public performance of works from the repertoires of those foreign societies by means of sound recordings in free circulation on the territory of those Member States, the charging of which is provided for and

authorized by the law of the State where the sound recordings are used but not in the Member States from which they are imported'.

10 Reference is made to the Report for the Hearing for the substance of the French legislation on literary and artistic property and a summary of the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 It should be recalled first of all that sound recordings are products to which the free movement of goods applies and that Article 30 of the Treaty therefore prohibits the application of national legislation allowing a copyright-management society, on the basis of the exclusive exploitation right which it exercises on behalf of the copyright holder, to prevent the distribution of sound recordings imported from another Member State. However, Article 36 of the Treaty provides that Article 30 does not preclude restrictions on imports justified on grounds of the protection of industrial and commercial property, an expression which includes copyright protection, in particular in so far as it is exploited commercially by means of licences. According to the second sentence of Article 36, such restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

12 It appears from the judgment of the national court that the 'supplementary mechanical reproduction fee' with which the preliminary questions are concerned is charged not on the importation or marketing of records or other sound recordings but by reason of their public use, for example by a radio station, in a discotheque or in a device such as a juke-box installed in a public place. The problem raised by the national court lies in the fact that in such circumstances that royalty is charged in addition to a performance royalty.

13 The national court asks whether Articles 30 and 36 or Article 86 of the Treaty prohibits the charging of such an aggregate fee where the sound recordings were manufactured and marketed in a Member State where there is no such aggregation

of fees and only a performance royalty is charged on the public use of a recorded work. That is the hypothesis that must be examined.

14 It is undisputed that, as is normally the case with regard to copyright management, on the basis of the applicable international conventions, the aggregation of a performance fee and a supplementary mechanical reproduction fee charged on the public use in France of a recorded musical work takes place whether the records are of French origin or are manufactured or marketed in another Member State. It is true that public use in another Member State may give rise only to the collection of a performance royalty in favour of the author and the record manufacturer, but that circumstance does not imply that the amount of the royalty charged or its function are different from those of the royalties charged in France on such use.

15 In other words, disregarding the concepts used by French legislation and practice, the supplementary mechanical reproduction fee may thus be analysed as constituting part of the payment for an author's rights over the public performance of a recorded musical work. Moreover, the amount of that royalty, like that of the performance fee strictly so called, is calculated on the basis of the discotheque's turnover and not the number of records bought or played.

16 It follows 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.

17 The answer to the first question must therefore be that Articles 30 and 36 of the EEC Treaty, on a true construction, do not preclude the application of national legislation allowing a national copyright-management society to charge a royalty called a 'supplementary mechanical reproduction fee', in addition to a performance royalty, on the public performance of sound recordings, even where such a

supplementary fee is not provided for in the Member State where those sound recordings were lawfully placed on the market.

18 With regard to the second question, it follows from the foregoing considerations concerning the application of Article 36 of the Treaty that the fact that a copyright-management society utilizes the possibilities made available to it by national legislation in that regard does not in itself constitute abusive conduct for the purposes of Article 86 of the Treaty.

19 It is not impossible, however, that the amount of the royalty, or of the combined royalties, charged by the copyright-management society may be such that Article 86 applies. The national court, which has exclusive jurisdiction to establish the facts of the case under the procedure for interpretative rulings under Article 17 of the Treaty, held that SACEM must be regarded as an undertaking occupying a dominant position within the common market. It follows that if that undertaking were to engage in abusive practices, in particular by imposing unfair conditions, its conduct would be contrary to Article 86.

20 In the event, however, the national court considered that the amount of the royalties charged by SACEM to discotheques in France was not unfair. In its written observations the Commission indicated that it was carrying out a general inquiry into the royalties charged by SACEM to French discotheques, covering both the rate of those royalties and the basis on which they are assessed. However, the amount of the royalties is not one of the issues referred by the national court to this Court.

21 The answer to the second question must therefore be that the prohibitions laid down in Article 86 of the EEC Treaty, properly construed, do not apply to the conduct of a national copyright-management society simply because it charges a royalty called a 'supplementary mechanical reproduction fee', in addition to a performance royalty, on the public performance of sound recordings, even where

such a supplementary fee is not provided for in the Member State where those sound recordings were lawfully placed on the market.

Costs

22 The costs incurred by the Government of the French Republic, the Government of the Italian Republic and the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the cour d'appel, Versailles, by judgment of 20 November 1985, hereby rules:

(1) Articles 30 and 36 of the EEC Treaty, on a true construction, do not preclude the application of national legislation allowing a national copyright-management society to charge a royalty called a 'supplementary mechanical reproduction fee', in addition to a performance royalty, on the public performance of sound recordings, even where such a supplementary fee is not provided for in the Member State where those sound recordings were lawfully placed on the market.

(2) The prohibitions laid down in Article 86 of the EEC Treaty, properly construed, do not apply to the conduct of a national copyright-management society simply because it charges a royalty called a 'supplementary mechanical reproduction fee', in addition to a performance royalty, on the public performance of sound recordings, even where such a supplementary fee is not

provided for in the Member State where those sound recordings were lawfully placed on the market.

Mackenzie Stuart O'Higgins Schockweiler Bosco

Koopmans Due Bahlmann Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 9 April 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President