OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 28 APRIL 1971[1]

Mr President,
Members of the Court,

The facts giving rise to the request for a preliminary ruling made to you by the Hanseatisches Oberlandesgericht may be summarized as follows.

Deutsche Grammophon Gesellschaft mbH, Hamburg, ('DG'), the respondent in the main action for the issue of an injunction is a common subsidiary company of both Philips Gloeilampen-Fabrieken, Eindhoven, and Siemens AG, Berlin and Munich. It manufacturers records (for which purpose certain performers are bound to it by exclusive contracts) and it markets its products under a range of trade-marks. In the Federal Republic of Germany it distributes them directly to retailers and to two wholesale booksellers, who supply exclusively the retail book-trade. With regard to most of the records, the price to be paid by the final consumer is controlled; at any rate, the controlled price applies to all records distributed under the trade-mark 'Polydor'. For this purpose dealers are required to sign an appropriate undertaking. It is also provided therein that the controlled price also covers DG records acquired from third parties and that such products may only be imported from abroad with the consent of DG (in this connexion, consent is only granted if the retailer also undertakes to observe the fixed price). For its part, DG is obliged to supply only those dealers who sign the undertaking. Furthermore, it must ensure that the imposed price is fully adhered to and take action against any failure to do so. Distribution abroad is effected through subsidiary companies of DG or the Philips undertaking. This is so in France in particular where the limited liability company Polydor Paris (99.55% of whose capital is owned by DG) carries out marketing operations through its branches in Paris and Strasbourg. DG concluded a licensing agreement with it, whereby the licensee has *inter alia* the exclusive right within the territory covered by the agreement (that is, in France) to exploit DG recordings in accordance with normal commercial usage (that is, through retailers) and to employ the relevant trademarks. For this purpose, DG, in return for payment of the licence fee, supplies matrices by means of which reproductions are made. In exceptional cases records manufactured in the Federal Republic are also supplied to Polydor Paris.

In the period from April to October 1969 the undertaking Metro-SB-Großmärkte GmbH, Hamburg, the appellant in the main action, acquired Polydor records from Deutsche Grammophon but did not adhere to the controlled price. Since Metro was not prepared to sign an undertaking this resulted in the termination of business relations at the end of October 1969. Nevertheless, in January and February 1970 Metro succeeded in obtaining through a Hamburg wholesaler records with the Polydor trade-mark manufactured by DG in Germany. These records had clearly been supplied by DG to its Paris subsidiary. Subsequently they came into the possession of the Hamburg wholesaler by way of Polydor's branch in Strasbourg and a Swiss undertaking. Metro likewise sold these records to consumers at a price below that fixed by DG for the Federal Republic.

When Deutsche Grammophon learned of this, it obtained from Landgericht, Hamburg, on 20 March 1970, an injunction prohibiting Metro from selling or otherwise distributing Deutsche Grammophon records under the 'Polydor' label with specific serial numbers. The application and the court's decision

1 — Translated from the German.

were founded on the Gesetz über Urheberrecht und verwandte Schutzrechte (Law on Copyright and related protection rights) of 9 September 1965 which entered into force on 1 January 1966 and which, in accordance with the Convention of 26 October 1961 on the protection of practising performers, manufacturers of sound recordings and broadcasting undertakings, established for manufacturers of sound recordings a primary protection right related to copyright. (It should be stated in passing that of the Community countries it is only in Italy that a right of this nature exists—in accordance with Article 72 of the Law of 22 April 1941—whilst in the other Member States corresponding protection is ensured by the laws on unfair competition or by the acquisition by the record manufacturer of the primary right of the author or of the performer). The Landgericht, Hamburg, drew upon Articles 85 and 97 of the German Law, which provide as follows:

Article 85

'The manufacturer of a sound recording shall have the exclusive right of reproducing and distributing the recording.'

Article 97

'Any person unlawfully infringing a copyright or any other right protected in accordance with this law may be required by the injured party to put an end to the infringement and, if there is a likelihood of repetition, to desist therefrom and if the infringement occurs deliberately or negligently, to pay damages.'

Furthermore, that court clearly found that DG's exclusive right to distribute its records in Germany was not exhausted by delivery to Polydor Paris. It thus found that the right had not been exhausted as provided in the following terms in Article 17 of the Copyright Law which is applicable by analogy:

'If the original or reproductions of a work are marketed with the consent of the person entitled to distribute them within the territory governed by this law, their further distribution shall be lawful'. In the view of the court this provision would only apply if distribution had taken place in the Federal Republic of Germany. Thus the sale of reimported records in Germany could be considered unlawful.

The appeal lodged by Metro against the injunction was unsuccessful: by a judgment of 22 May 1970 it was declared that all the arguments put forward against the order of the court were dismissed. Metro thereupon lodged an appeal against the judgment and thereby brought the matter before the Hanseatisches Oberlandesgericht. The principal ground of appeal put forward was that DG no longer had a right to distribute the records in question; on the contrary, that right had been exhausted when the latter were supplied to the French subsidiary. It was furthermore maintained that the contractual relationship between DG and its French licensee leads to a sharing of the market and hampers trade between Member States which, in conjunction with the system of controlled prices practised in the Federal Republic, enables the conclusion to be drawn that Articles 85 and 86 of the EEC Treaty have been infringed.

In view of these arguments the Oberlandesgericht, by an order of 8 October 1970, stayed proceedings and, in accordance with Article 177 of the EEC Treaty, referred the following questions for a preliminary ruling:

'(1) 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 in law, is wholly subordinate to it commercially?

(2) 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 prinicipal performers are bound by exclusive contracts to the manufacturer of the sound recordings (Article 86 of the EEC Treaty)?'

The parties to the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities expressed their views on these questions both orally and in writing.

Let us now consider what view appears appropriate with regard to these questions.

Legal consideration

I — Admissibility

In accordance with the observations submitted by certain of those concerned in the proceedings, I must begin my examination with comments as to the admissibility of the questions referred. Such comments may, however, be relatively brief.

1. This is particularly so as regards the fact that the questions have been referred in the context of a summary procedure, that is, in urgent proceedings for the grant of an injunction. In fact, as I have previously emphasized, this does not preclude a reference. This was indeed approved by the Court by implication in Case 29/69 ([1969] ECR, p. 419), and the matter may now end there. Whether national courts are moreover *bound* in accordance with the requirements of the third paragraph of Article 177 to make a reference for a preliminary ruling in such an urgent procedure is a question which may on the other hand be left open in the present context.

2. The second observation in the context of the examination as to admissibility concerns the wording of the first question. In this connexion objections have been expressed because, according to the wording of the question, it appears that the Court is asked to give a ruling on the *compatibility* of national provisions with Community law, or on the interpretation of the former. It is clear that those objections are not unfounded since the Court does not have such powers in the context of proceedings initiated under Article 177 of the EEC Treaty. That article only permits the interpretation of Community law and examination of the validity of acts of the institutions of the Community (and consequently not the application of national provisions or their interpretation).

Nevertheless there is no reason to dismiss the reference for a preliminary ruling as completely inadmissible. On the contrary, following the example of other proceedings, the Court can reinterpret the question which has been put and extract the essential element which is admissible in accordance with Article 177. Emphasizing this power of interpretation I shall therefore concern myself with the interpretation of Community law, particularly of Articles 5 and 85. In this respect it should merely be stated in addition that this must be done having regard for the facts noted by the court making the reference, these being that a German manufacturer of sound recordings, on the basis of its right of distribution, wishes to have prohibited the sale in Germany of records which it has supplied to its French subsidiary, which is independent in law but completely dependent economically, which records were placed on the market in France by the subsidiary, whose acts are imputable to the parent company.

In the present context further details are unnecessary since this general de-

scription of the request for an interpretation makes it possible to consider the question referred. For the rest, I should like to reserve for later consideration the further problems regarding admissibility which have been indicated by the Federal Government in connexion with the discussion of Article 85 of the EEC Treaty and by DG with regard to the examination of Article 86.

II — The answer to be given to the questions referred

1. The above discussion has already made clear that the present case is chiefly concerned with the problem of the so-called 'exhaustion' of national industrial property rights related to copyright as laid down in Article 17 of the German Copyright Law. The Oberlandesgericht, making the reference, has declared that the *wording* of that provision leaves open the question whether placing goods on the market abroad with the consent of the holder of the right also exhausts the latter's distribution rights in Germany. Apparently, in view of the principle of territoriality as it is widely understood in this field, the court is inclined to hold that the right is not thereby exhausted. On the other hand, however, because of the unclear wording of the Law in question, the lack of unanimity in the legislative provisions and the fact that the Law was enacted after the entry into force of the EEC Treaty, the court considered it necessary to pose the question in the light of the principles of the Treaty relating to this field. In my opinion, this can only mean that the court intends to seek an interpretation of the national law that will *conform to Community law*, if necessary at the expense of the principle of territoriality. If this is made clear there is at the same time no doubt that, contrary to the views of some of those concerned, there is no need to examine the question whether the provisions of the Treaty invoked by the court constitute *directly applicable* Community law, that is to say, rules of law which an individual can invoke against national legislation. On the contrary, it is merely necessary to examine the principles of the Treaty in the field with which we are now concerned precisely because it must be assumed, particularly in view of the principle contained in the second paragraph of Article 5, that the national legislature did not intend to disregard them and that the meaning of the provisions enacted by it must be interpreted accordingly.

Seen in this light, it must first be recognized that free, unhindered movement of goods must be regarded as a fundamental principle of the common market. Furthermore, one must bear in mind—as was done in the *Sirena* case, decided recently—the concept of the unity of the common market and its system of competition, which is intended to achieve the comprehensive prevention of distortions of competition and in particular to maintain competition between Member States. The relevant provisions in this respect are Articles 3 (a) and (f), 30 et seq. and 85 et seq. Speaking quite generally, their aim is to prevent the obstruction of trade by national or private means, and the partitioning of the market.

Obviously, national industrial property rights, that is to say, including copyright and related protection rights, appropriately formulated or interpreted, may operate against this objective since, as the argument of DG shows, they permit, under certain circumstances, a market to be partitioned at all levels of the economy, that is, the absolute control and blocking of trade between Member States. Now in order to justify this, reference is constantly made to Articles 36 and 222 of the EEC Treaty, that is, first, the provision whereby trade between Member States must be subject to restrictions in the interest of the protection of industrial and commercial property (Article 36), and, secondly, the provision whereby the EEC Treaty

leaves untouched the system of property ownership in Member States (Article 222). Such references certainly did have some value as arguments when this problem was first raised. However, since then it has been established by the case-law of the Court that there is room for considerable qualification in this respect, particularly in view of the reservation in Article 36 whereby the prohibitions or restrictions mentioned in that article 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. This line of decisions began with the *Grundig-Consten* judgment, with its findings regarding trade-mark law, and then was developed in the *Parke, Davis* case with pronouncements relating to patent law; it received confirmation recently with regard to trade-mark law in the abovementioned *Sirena* case. According to these decisions, the principle is that although the Treaty leaves the *existence* and substance of industrial property untouched (the national legislature decides these questions—cf. [1968] ECR 71) their *exercise* is completely subject to Community law (cf. [1966] ECR 345, [1968] ECR 71 and [1971] ECR 69).

Consequently, the main problem in the present case also is to differentiate between the existence of rights and the exercise of rights. As the Commission rightly stresses, the capacity to manufacture and to effect the initial distribution of the protected product certainly comes within the sphere of the existence of the right, since it ensures for the holder the benefit to which he is entitled. On the other hand, it seems doubtful whether the principle of territoriality, to which reference is constantly made in connexion with industrial property rights, also forms part of the substance and is of the essence of such rights. In my view, it is significant that here we are faced with an ambiguous concept the contours of which cannot be discerned with absolute clarity, and on which there is clearly no unanimity. It is occasionally said that the principle of territoriality states (in accordance with the Paris Convention) that the protection granted in one State is independent of protection rights conferred in other States. Moreover, it is also formulated to mean that the effects of protection rights are restricted to the territory of the State in which the rights are granted, although the national legislature may make the legal effects dependent on facts which occur abroad.[1] In any event this permits it to be said that in spite of the principle of territoriality the holder of trade-mark rights who uses the same trade-mark internally and abroad cannot prohibit the import of a product by virtue of his domestic trade-mark if he has supplied the product with the trade-mark and placed it on the market abroad.[2] With regard to copyright, reference may be made in this context to a recent decision of the Austrian Oberster Gerichtshof according to which the right of a manufacturer of sound recordings is exhausted (that is, it is not possible to prohibit imports) if the holder of the right has placed the product on the market or if it has been placed on the market abroad by an authorized exporter or by a licensee.[1] With regard to the well-known (and much criticized) *Voran* judgment of the Bundesgerichtshof of 29 February 1968, the only recent decision of a supreme court embodying the converse view, according to which, in the case of the species protection right ('Sortenschutzrecht') which is related to patent rights, if the product is placed on the market abroad by the holder of the right that is not relevant to the exhaustion of the right, but it should not be forgotten that the relevant Seeds Law expressly makes the export of protected species dependent on the specific consent of the holder

1 — Cf. Ulmer in 'Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1970, p. 380.
2 — Cf. Judgment of the Bundesgerichtshof in the celebrated *Maja* Case: 41 BGHZ 84.

of the species protection right and that therefore the exhaustion of the right cannot occur if the product is merely placed on the market.

In view of this situation there is in fact much to be said for the view that the principle of territoriality, which is so uncertain in outline, does not form part of the existence of the right. In any event this applies to the particular problem of the main action, namely, a situation in which, as the Oberlandesgericht has held, a legal person connected with the holder of the right has placed the goods in question on the market abroad. Here it should be decisive that the objective of the industrial property right was attained when the goods were first placed on the market, since it was possible to use the monopolistic opportunity for gain. On the other hand, it would undoubtedly go beyond the objective of that right if the holder was permitted to control further marketing, in particular to prohibit re-importation, and the free movement of goods was impeded. Thus in view of the reservation contained in Article 36, the fundamental aims of the Treaty and the principles of the common market, and in spite of the guarantee of the subsistence of industrial property rights, in a situation such as that in the present case it may be held that the right has been exhausted, and the exercise of the distribution right is thus precluded.

Nevertheless, there is one final objection to be considered, put forward in particular by the Federal Government. It is derived from Article 99 (3) of the First Preliminary Draft Convention for the European Patent for the common market, which provides: 'After the transitional period laid down in this Article (at least five years from the entry into force of the convention) regardless of the provisions of national law laid down in the Contracting States, the rights attaching to patents granted for the same invention in two or more Contracting States to the same legal or physical person or to legal or physical persons who have economic connexions shall not extend to acts concerning a product covered by the said patents which are done on the territory of one of the said Contracting States after the proprietor of the patents, or his licensee, has lawfully placed that product on the market in one of these States'.

Thus the national limitations on such rights are to subsist during a transitional period and will not be eliminated until its expiry, with the result that those rights are exhausted when the patent holder places the protected product on the market in a Member State. Hence the Federal Government maintains that this transitional provision would have been devoid of purpose if the exhaustion of the rights already ensued from the Treaty provisions examined above.

In fact, it cannot be denied that this deduction is impressive. At the same time, however, it should not be decisive. When I say this I am not thinking of the fact that this preliminary draft deals with *patent* law questions whereas the present case concerns copyright and related protection rights, for this distinction is irrelevant since copyright is certainly more closely related to a patent right than to a trade-mark right, for example. However, we should not forget that the provision cited is merely a *preliminary draft* which has been prepared by experts, that is, that it does not represent the last word of the governments and is therefore not an authentic interpretation of the EEC Treaty. Moreover, it seems significant that the draft states that it should be indicated in the preamble to the Convention that 'the Contracting States do not intend by this Convention to prejudice the provisions of the treaties establishing the European Communities'. Accordingly, regardless of this preliminary draft, it must finally be held with regard to the partial aspect of the first question that has been discussed so far that a proper interpretation of the EEC Treaty leads to the conclusion that on the basis of the facts set out in the order

making the reference national industrial property rights must be held to be exhausted.

2. However, the meaning of Article 85 of the EEC Treaty must also be discussed in relation to another aspect within the context of the first question. The answer to be given to it could be of particular relevance if the conclusion reached so far did not have to be followed, that is, if the matter did not have to rest with the consideration of the conduct of the holder of the protection right in isolation but it was in addition necessary to examine the agreements concluded by the holder.

In this respect also reference may be made in advance to previous decisions and the examination thereby cut short. Thus it is established, as far as trademark law is concerned, that trade-marks must not be used for purposes which are pursued by means of an agreement which is to be regarded as unlawful, that they cannot be misused in a manner which is contrary to the cartel law of the Community (cf. [1966] ECR 299). The same idea recurs in the abovementioned judgment in the *Sirena* case where it is also stressed that the exercise of industrial property rights may come within the prohibitions laid down in Articles 85 and 86 and that competition law applies if the exercise of industrial property rights is the subject, the means or the consequences of a restrictive practice.

This should be followed in the present case. Since the application of Article 85 depends in particular on the existence of an agreement between undertakings, a decision by associations of undertakings or concerted practices, the court making the reference must first determine how the matter stands.

In this respect the agreement concluded between DG and Polydor Paris, that is to say, the licensing agreement mentioned at the outset, is of particular importance. As the Commission has rightly stressed, various points of view must be examined in this respect. First, it must be borne in mind that it is obviously an agreement between a parent company and a subsidiary, that is, a contract between two participants in the market which probably do not compete with one another since the subsidiary does not act independently but is subject to the instructions and control of the parent company. If this is in fact the situation, if there is merely a distribution of tasks within a single economic entity, it does not adversely affect competition and Article 85 does not apply—the Commission has already rightly so held in two negative clearances of 18 June 1969 (OJ L 165 1969 p. 15) and 30 June (OJ L 147 1969, p. 24) on similar facts. Secondly, in the case of licensing agreements relating to industrial property rights, with regard to the territorial limitation of the powers of the licensee and a corresponding prohibition on supply to areas outside the territory covered by the agreement, it must be borne in mind that, particularly in view of the practical impossibility of a comprehensive use, especially of copyright, by the holder himself, assignment and divisibility, that is to say, exploitation by others, is of the essence of the right and forms part of its existence. Thus territorial restrictions come within the scope of an industrial property right and when the licensor includes them in the licence he does not, properly speaking, exceed the scope of his right. For this reason too the application of Article 85 to a situation like that in the present case may be ruled out and the licensing agreement may be irrelevant in competition law. Article 85 would perhaps apply if it created an obligation on the licensee to impose marketing restrictions on his *customers*, that is, if the agreement contained provisions restricting competition which were intended to become the subject of contracts between the subsidiary and its customers. Accordingly, within the framework of the first question in the request for interpretation the court making the reference should be further answered to

the effect that if an examination of the facts in the light of the criteria described above reveals the existence of an agreement coming within Article 85 of the EEC Treaty, the assertion of an industrial property right is also prohibited and its exercise must be regarded as an abuse if it is used to achieve the purposes of agreements in restriction of competition concluded by the holder of the right.

It may also be pointed out that the court making the reference must not, of course, confine its examination to the agreement mentioned but must possibly also include the agreement concluded between DG and German dealers (the so-called 'dealers' undertakings'). Although no question was posed about them in the order making the reference the facts set out permit me to refer to these agreements. The limits of the procedure for giving a preliminary ruling are not thereby disregarded, but criteria for a meaningful and comprehensive solution of the case at issue are merely revealed. In fact, it is possible that the court making the reference, in examining these dealers' undertakings, may come to the conclusion that they are relevant to competition law. This seems possible because the tied dealers can only import records from abroad with the consent of DG and this consent is only granted if the system of controlled prices is observed. In practice this may amount to a prohibition on imports since it takes away any incentive to effect imports. Moreover, it must be observed that DG is under a duty to proceed against infringements of the system of controlled prices, that is, it is also under a duty to prevent the marketing of imported records by means of the powers granted to it by Article 85 of the German Copyright Law. It is impossible immediately to dismiss the view of all this as an appreciable restriction of competition and of trade between Member States. If its existence is established (and this is ultimately a matter for the court making the reference to decide) than DG must be prohibited from exercising its industrial property rights for the purpose of achieving this restriction of competition. With these remarks the consideration of the first question may finally come to a close.

3. The second question relates to Article 86 of the EEC Treaty. As you know, in this respect the court making the reference wishes to know whether the exercise of its distribution right by the manufacturer of sound recordings can be regarded as an abuse if the controlled retail price of the recordings is higher than the price of the same product reimported from another Member State and the leading performers are bound by exclusive contracts to the said manufacturer.

Before this question is answered a comment must be made on an objection raised by DG. It maintains that doubts exist as to the admissibility of the question because the national court has not revealed the facts from which the dominant position of DG is deduced. It further contends that the Court of Justice is not permitted within the context of proceedings for a preliminary ruling to establish the criteria in this respect which the Commission has proposed. As is immediately apparent, these objections cannot be sustained. In fact, when an order requesting a preliminary ruling merely inquires about certain aspects of Article 86 of the EEC Treaty, it does not seem necessary to prove that Article 86 is relevant at all for the consideration of the situation presented to the national court. That is a question of what is pertinent to the decision, for which, according to previous case-law, no justification has ever been required. Nor can it possibly be said in the present case that Article 86 has obviously been invoked in error by the national court. If this observation is valid for the first objection, I see no obstacle, with regard to the second objection, to making pronouncements on the question of the dominant position and, if the Court so wishes, establishing certain criteria in

this respect, even though the court making the reference has not expressly so requested. As a supplementary interpretation this may be regarded as permissible in the interests of a proper disposal of the order making the reference, just as in other cases, provided that the Court confines itself to a genuine interpretation and does not go into the application of the law. Thus the submissions, particularly by the Commission, regarding the interpretation of Article 86 beyond the express wording of the question, should not be disregarded.

However, let us now turn directly to the answer to the question referred. In this respect it must first be brought to mind from the relevant case-law on Article 86 of the EEC Treaty in relation to a situation such as that involved in the present case that the mere fact that an undertaking holds industrial property rights and a corresponding entitlement to their conservation does not constitute a dominant position. Nevertheless, if an economic study of the market leads to discovery of the existence of a dominant position in that market and if that dominant position is used for the purpose of an abuse within the meaning of the second paragraph of Article 86 by the exercise of industrial property rights, in certain circumstances there may be an abuse of those rights. This was established in the *Sirena* case mentioned above. Moreover, reference may be made in this respect to the judgment in the *Parke, Davis* case where it was noted that the use made of a patent might degenerate into an abuse of the protection afforded and that such use might contribute to a dominant position (cf. [1968] ECR 72).

In addition, there are also criteria in the *Sirena* case for determining when a dominant position is to be inferred. They are also of use in the present proceedings. According to these criteria, the position of producers and distributors of similar products must be taken into account and it must be asked whether the undertaking which is alleged to occupy a dominant position has the necessary power to impede effective competition in a considerable part of the relevant market. Thus, as the Commission rightly added, it must be considered whether it is possible for an undertaking, by virtue of its share of the market (including the shares of other undertakings belonging to the same group), its know-how, its raw materials, its capital and its exclusive rights, to determine prices for a substantial part of the common market (such as the territory of a Member State) or to control production and distribution, and whether an undertaking has scope for independent action and can act to a large extent without regard to competitors, customers or suppliers. With regard to the present case and the question of competing suppliers the economic study indicated must show, in particular, whether the record manufacturers and their shares of the market are at all comparable with one another or whether there can be any question of division of the market according to the type of music and performers. Obviously the latter cannot be excluded, and in particular it may be assumed that a dominant position may arise in sectors of the market from exclusive contracts with certain performers. This may be so despite the fact that according to Article 78 of the Copyright Law such exclusive contracts have merely a contractual effect and do not affect property rights.[1] Nevertheless, as some of those concerned have rightly stressed, it will be possible to hold that a dominant position exists on the basis of such exclusive contracts in rare cases only, for example, if the performers in question are unusually successful and numerous exclusive contracts exist.

If on the basis of the abovementioned criteria the court making the reference finds that there is a dominant position,

1 — Cf. Möhring-Nicolini. Kommentar zum Urheberrechtsgesetz, 1970, Note 2 to Article 78.

previous decisions (in the *Parke, Davis* and *Sirena* cases) also make it clear that its abuse cannot be conclusively deduced from established differences in prices, although they may be a factor determining the existence of a situation in which there is an abuse of a dominant position if they are particularly great and cannot be justified objectively. At this point it is unnecessary to go into the intricacies of the respective contentions of the parties to the present case, which are very detailed in this respect. However, it should be observed, in the context of our task of interpretation, that it is necessary to consider not only the manufacturer's selling prices but also the retail prices, and to be aware that the different burdens of value added tax (11% in the Federal Republic, 33.1/3% in France) must be taken into account and that different costs may be due to the marketing structure and to the amount of the copyright royalties to be paid to the Gesellschaft für musikalische Aufführungs- .und mechanische Vervielfältigungsrechte (the German Performing Rights Society).

If the court making the reference finally comes to the conclusion that the differences in price are considerable and disproportionate, and constitute decisive evidence of an abuse of a dominant position within the market, according to previous case-law the use of industrial property rights for the purposes of partitioning the market and the maintenance of the price difference must be held to constitute an abuse and fall within the prohibition of Article 86 of the EEC Treaty. Thus we have virtually exhausted the scope of what can be said in answer to the second question without actually going into the application of the law. Everything else must be left for decision by the national court.

III — Summary

The questions referred by the Hanseatisches Oberlandesgericht may therefore be answered as follows:

1. The right of the holder of an exclusive right in sound recordings to prohibit the importation or distribution of reproductions in the domestic market which the holder of that protection right or an undertaking dependent on the holder has placed on the market in another Member State does not form part of the existence of industrial and commercial property within the meaning of Article 36 of the EEC Treaty and does not accord with the fundamental principles of the Treaty as laid down in the provisions regarding the free movement of goods and the system of competition.

2. If the holder of an exclusive right in sound recordings has concluded agreements which come within Article 85 of the EEC Treaty it cannot, in order to achieve the aims of those agreements; exercise its exclusive right and, in particular, cannot prohibit the distribution of reproductions imported from another Member State which the holder of that right or an undertaking dependent on the holder has placed on the market in another Member State.

3. If the holder of a protection right in sound recordings occupies a dominant position within the meaning of Article 86 of the EEC Treaty (in which

connexion it may be of importance that it has engaged numerous famous performers under exclusive contracts) the fact that in the Member State in which it occupies the dominant position it applies prices which, without any objective justification, are considerably above the price level in other Member States must be regarded as important evidence of abuse of that dominant position. In such a case, the exercise of the right comprised in the industrial property right to prohibit distribution in order to prevent the importation of products originating in other Member States also constitutes an abuse.