without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.

Indeed, whilst copyright entails the right to demand fees for any exhibition of a cinematographic film, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organized in the Member States largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable.

In Case 62/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'Appel [Court of Appeal], Brussels, Second Civil Chamber, for a preliminary ruling in the action pending before that court between

S.A. COMPAGNIE GÉNÉRALE POUR LA DIFFUSION DE LA TÉLÉVISION, CODITEL, Brussels,

S.A. CODITEL BRABANT, Brussels,

S.A. COMPAGNIE LIÉGEOISE POUR LA DIFFUSION DE LA TÉLÉVISION, CODITEL LIÈGE, Liège,

appellants,

and

S.A. CINÉ VOG FILMS, Schaerbeek,

A.S.B.L. CHAMBRE SYNDICALE BELGE DE LA CINÉMATOGRAPHIE, St.-Josse-ten-Noode,

S.A. "LES FILMS LA BOÉTIE", Paris, a company incorporated under French law,

CHAMBRE SYNDICALE DES PRODUCTEURS ET EXPORTATEURS DE FILMS FRANÇAIS, Paris,

respondents,

in the presence of

INTERMIXT, a public utility undertaking, Brussels,

UNION PROFESSIONNELLE DE RADIO ET TÉLÉDISTRIBUTION, Schaerbeek,

INTER-RÉGIES, an intercommunal co-operative association, Brussels,

interveners,

on the interpretation of Article 59 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait, (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

Ciné Vog Films (hereinafter referred to as "Ciné Vog"), a cinematographic film distribution company, acquired under a

contract made on 8 July 1969 with the producer, the company "Les Films la Boétie" (hereinafter referred to as "La Boétie"), the exclusive right to show the film "Le Boucher" publicly in Belgium in all its versions in the form of cinema performances and television broadcasts. Exclusivity was given for a period of seven years starting from the first cinematographic showing in Belgium, which took place on 15 May 1970. The right to broadcast the film on Belgian television could not, however, be exercised until forty months after the first performance in Belgium.

At a later unspecified date La Boétie assigned the right to broadcast the film on television in the Federal Republic of Germany to the German television broadcasting station. The Belgian cable television companies, Coditel, picked up directly on their aerial at their reception sites in Belgium the film "Le Boucher" broadcast on 5 January 1971 in the Federal Republic of Germany on the first German television channel and distributed the film by cable to their subscribers, the film being contained in the German programme which they diffuse on a regular basis.

Upon the application of Ciné Vog and the Chambre Syndicale Belge de la Cinématographie, the Tribunal de Première Instance [Court of First Instance], Brussels, decided in a judgment of 19 June 1975 that, by acting as they did without the authorization of Ciné Vog, the three cable television companies were guilty of infringing the copyright held by Ciné Vog.

The cable television companies appealed against that judgment. They relied, *inter alia*, upon the incompatibility of the exclusive right granted by La Boétie to Ciné Vog and the exercise of that right with the provisions of the EEC Treaty on competition (Article 85), on the one hand, and on the freedom to provide services (Article 59), on the other. By a judgment of 30 March 1979, the Cour d'Appel, Brussels, ruled that, subject to the effect of Community law, under the copyright legislation the appellants required the authority of Ciné Vog to show the film "Le Boucher" on their networks on 5 January 1971.

The Cour d'Appel based its decision upon the Berne Convention on the Protection of Literary and Artistic Works in the revised Brussels version of 26 June 1948 approved by the Belgian Law of 26 June 1951 and in particular upon the first paragraph of Article 11 bis, which is worded as follows:

"Authors of literary and artistic works shall have the exclusive right of authorizing:

(i) The radio-diffusion of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) Any communication to the public, whether over wires or not, of the radio-diffusion of the work, when this communication is made by a body other than the original one;

(iii) The communication to the public by loudspeaker or any other similar instrument transmitting, by signs, sounds or images, the radio-diffusion of the work".

The Cour d'Appel ruled that that provision was applicable in the case before it and declared that the cable television undertakings must be considered as a body "separate" from the broadcaster of the film, namely the German broadcasting station, and that

the communication of the film to Belgian viewers was a communication "to the public" as understood in the said provision.

As regards Community law, the Cour d'Appel first of all held that a performing right is part of the specific subject-matter of copyright and that consequently Article 85 of the Treaty did not apply.

Having subsequently decided that the submission based upon Article 59 of the Treaty raised the problem of the interpretation of that provision, it decided to stay the proceedings and to refer to the Court of Justice the following two questions for a preliminary ruling under Article 177 of the Treaty:

"1. Are the restrictions prohibited by Article 59 of the Treaty establishing the European Economic Community only those which prejudice the provision of services between nationals established in different Member States, or do they also comprise restrictions on the provision of services between nationals established in the same Member State which however concern services the substance of which originates in another Member State?

2. If the first limb of the preceding question is answered in the affirmative, is it in accordance with the provisions of the Treaty on freedom to provide services for the assignee of the performing right in a cinematographic film in one Member State to rely upon his right in order to prevent the defendant from showing that film in that State by means of cable television where the film thus shown is picked up by the defendant in the said Member State after having been broadcast by a third party in another Member State with the consent of the original owner of the right?"

The judgment making the reference was received at the Court on 17 April 1979.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Coditel, represented by G. Kirschen, A. Braun and M. Waelbroeck, Advocates at the Brussels Bar, by the Union Professionnelle de Radio et Télédistribution, represented by Aimé De Caluwe, Advocate at the Brussels Bar, by Ciné Vog and the Chambre Syndicale Belge de la Cinématographie, represented by Paul Demoulin, Advocate at the Brussels Bar, by the Chambre Syndicale des Producteurs et Exportateurs de Films Français, represented by Jean Botson, Advocate at the Brussels Bar, and Paul Hagenauer, Advocate at the Cour d'Appel, Paris, by the Government of the Federal Republic of Germany, represented by Martin Seidel, acting as Agent, by the Government of the United Kingdom, represented by A. D. Preston, of the Treasury Solicitor's Department, acting as Agent, assisted by R. Jacob, Barrister, and by the Commission of the European Communities, represented by Erich Zimmermann, Legal Adviser, and by Mrs Marie-José Jonczy, a member of the Legal Service of the Commission, both acting as Agents.

Upon 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.

II — Written observations submitted to the Court

The first question

In the opinion of *Coditel*, the appellant in the main action, two types of service may call for consideration; these are the service provided by the foreign broadcasting station and the service provided by the Belgian intermediary. The service provided by the foreign broadcasting station fulfils the conditions for the Treaty to be applicable to it since the provider of the service is established in Germany and the recipients of the service, namely the television viewers, are established in the Federal Republic of Germany and also in neighbouring countries.

As regards the provision of services by the Belgian cable television distributors, the difficulty referred to by the Cour d'Appel stems from the fact that both the cable television distributor and the television viewers are in this case situated in Belgium. However, the effect of the words of Article 59 of the Treaty is not such that there must necessarily be a restriction upon the activity of a *person providing services* established in another Member State; it is necessary only that the restriction should have effect "in respect of" nationals established in another Member State. Such an interpretation conforms with the findings reached in other fields covered by the Treaty (Joined Cases 2 and 3/62, *Commission* v *Belgium and Luxembourg* [1962] ECR 425; Case 8/74, *Dassonville* [1974] ECR 837; Joined Cases 88 to 90/75, *SADAM* [1976] ECR 323; Case 82/77, *Van Tiggele* [1978] ECR 25; Case 190/73, *Van Haaster* [1974] ECR 1123).

The effect of the case-law of the Court is that the Treaty does not solely prohibit measures which prevent or which restrict the physical crossing of frontiers, but all measures, even if purely national, which are such as to affect trade between Member States even if only indirectly.

Pointers to such an extensive interpretation of the scope of Article 59 may be discerned in the judgments in the *Van Binsbergen* (Case 33/74, [1974] ECR 1299) and *Coenen* cases (Case 39/75, [1975] ECR 1547).

In conclusion, Coditel asks the Court to rule that Article 59 of the Treaty prohibits restrictions upon the provision of services between nationals established in one Member State which affect a service whose substance originates in another Member State, where such a restriction is likely to affect, directly or indirectly, actually or potentially, trade between Member States.

The *Union Professionnelle de Radio et Télédistribution*, an intervener in the main action, relying upon the authorities of the *Van Binsbergen* and *Coenen* judgments (cited above), submits observations on the same lines and adds that what matters is that the service should constitute a transnational link. For example, the Commission proposed in its commentary on the "General programme for the abolition of restrictions on the freedom to provide services", of 28 July 1960, a three-fold division of services within the meaning of Articles 59 and 60 of the Treaty, namely: services involving the movement of the person providing the service to the recipient thereof;

services involving the movement of the recipient to the person providing the service; and, finally, services not involving any movement of either the provider of the service or the recipient.

In the opinion of *Ciné Vog* and the *Chambre Syndicale Belge de la Cinématographie,* the respondents in the main action, the first question does not express an alternative but is a compound question containing two limbs each requiring a separate answer.

The answer to the first limb of the question must be in the negative, since Article 59 is not limited to the provision of services between nationals established in different Member States *(Van Binsbergen* and *Coenen* judgments, cited above).

However, in order for Article 59 to be applicable, the provision of services in question must contain a Community element. In the present case, the occupational activity of the cable television distributor is entirely located in one single Member State: the person providing the service and the recipient of it are established in Belgium, the signal was picked up when it was in Belgium, and the service of making the signal available to subscriber clients was performed entirely in Belgium.

As regards the second limb of the first question, the "substance" of a service is not taken into consideration by Article 59, and the concept is in this respect too imprecise for it to be held to be a material factor.

In fact the service provided by a broadcasting station and that provided by cable television distributors are separate services. It is immaterial that the *content* of the signal *broadcast* by the German broadcasting organization is the same as the *content* of the signal made available by the cable television distributors established in Belgium to their subscribers. On the other hand, it is important to state that the German broadcasting organization broadcasts a signal over the air while the cable television distributors profit from that signal by picking it up and distributing it over their cable networks to their clients. The service performed by the German broadcasting organization is that of making transmissions over the air, while the services performed by the cable television distributors are those of reception and diffusion. Restrictions which may be placed upon the services provided by the cable television distributors are extraneous to the services provided by the broadcasting organization which are performed freely and subject to no obstacles, save those inherent in their technical nature.

The *Chambre Syndicale des Producteurs et Exportateurs de Films Français,* a respondent in the main action, gives its views in a single general observation in which it reaches the same conclusion.

The *Government of the Federal Republic of Germany* points out that the restrictions prohibited by Article 59 of the Treaty may, under certain conditions, encompass those which affect the provision of services between persons established in one and the same Member State.

In order clearly to define the scope of the freedom to provide services one must determine how it differs from the right of establishment. A person who enters another Member State in order to undertake one or more business transactions there performs a service which transcends the national frame-

work, while a person who acquires in that Member State a domicile or a business seat in order to undertake such transactions is exercising the right of establishment pursuant to Article 52 of the Treaty and his activity is the domestic provision of services.

Although the movement of services within a State is not referred to as such by Article 59 *et seq.*, certain restrictions which affect it may nevertheless have some effect upon the movement of services across frontiers. Such is the case when discriminatory prohibitions are imposed on a person providing a service within a State in his capacity as recipient of services covered by the Community rules. The movement of services across frontiers is affected if one of the rules regulating the national market in the provision of services creates discrimination in respect of the provision of earlier services involving the crossing of frontiers. It is irrelevant whether what is at issue here is strict discrimination or a material consequence of the rules in question. In fact, according to the Council's "General programme for the abolition of restrictions on freedom to provide services", of 18 December 1961, the movement of services is also affected when the effect of "any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action ... although applicable irrespective of nationality" — and therefore, *strictly speaking*, to nationals and foreigners alike — "is exclusively or principally to hinder the provision of services by foreign nationals," thus producing a greater material effect in relation to foreigners providing services.

In such cases the restrictions which produce such an effect may nevertheless be justified upon the basis of Articles 55 and 56 of the EEC Treaty.

Freedom to provide services within the meaning of Article 59 *et seq.* presupposes, however, that some sort of legal or commercial relationship exists between the person providing a service and the person receiving it, or at least, where there is unilateral provision of a service, deliberate conduct on the part of the person providing the service. The fact that goods cross a frontier "fortuitously", whether owing to circumstances of *force majeure* or to any other cause, does not constitute "trade". The diffusion of television broadcasts can only be regarded as a service extending beyond the purely national level within the meaning of Article 59 *et seq.* if the broadcasts are in fact meant to reach viewers beyond the frontier. The German Government believes that if the crossing of a frontier by a broadcast is but the unavoidable, incidental effect of a broadcast directed at the national territory alone, then one cannot speak of the provision of services intended for "nationals of another Member State", as Article 59 does.

The television programmes in question are in fact meant to be picked up within the national frontiers; in the Federal Republic of Germany, in particular, they are directed so as to cover the national territory.

In conclusion, the Government of the Federal Republic of Germany proposes that the Court should rule that:

"The restrictions prohibited by Article 59 of the EEC Treaty are not only those which directly hinder the provision of services between persons established in different Member States. On the

contrary, they may also include restrictions which directly affect only the provision of services between persons established in the same Member State, provided that such restrictions have at the same time a discriminatory effect upon the movement of services across frontiers."

The *Government of the United Kingdom* considers that neither of the two interpretations proposed in the first question is accurate, the first being too narrow and the second too wide.

It considers that Article 59 is concerned with the right of the nationals of Member States to provide services outside the States wherein they are established. The concept of the "substance" of a service is too vague to be used as the criterion for a wider interpretation.

The *Commission* first of all recalls that since the judgment in Case 155/73, *Sacchi* ([1974] ECR 409), there is no doubt that television signals as such come under the provisions of the Treaty on services. The service provided in this case is that provided by the broadcasting organization.

On the other hand, if one regards the service provided by the cable television distributor in the manner chosen by the Cour d'Appel, the transnational aspect is absent.

As regards the "substance" of the service, it is difficult to accept it as a criterion for determining the transnational nature of a service since its application would be problematical in practice.

When examining the service constituted by the television signal itself, the condition requiring the existence of remuneration must be considered pursuant to the first paragraph of Article 60 of the Treaty, bearing in mind that the recipients of that service are both television viewers and cable television distributors.

Radiodiffusion broadcasting organizations exercise a non-gratuitous economic activity. Their revenue comes either from advertising or from the licence fees paid by television viewers in the country where the broadcasting station is situated for the use of receivers, or from both. Furthermore, the word "normally" used in the first paragraph of Article 60 indicates that it is not a necessary requisite that *each* potential recipient of the service should give some consideration.

The complexity of the activity, as well as the participation of the cable television distributor in bringing the intangible service constituted by the television signal across frontiers, do not therefore allow the existence of a "transnational" provision of services to be ruled out for the simple reason that no remuneration is paid to the foreign broadcasting stations either by the cable television distributors or by the television viewers in return for that part of the service which crosses the frontier.

The cable television distributor, the person providing services in regard to its subscribers, is also the *recipient* of the television signals from another contry. Whilst the reasoning in respect of that relationship should not be any different from that regarding the relationship with the ultimate recipients who are the television viewers, it must *additionally* be pointed out that the lack of any direct remuneration is solely attributable to the fact that for the moment television broadcasting stations in the continental countries bordering on Belgium have waived a *right* which is expressly reserved to them under the Strasbourg European Agreement of 22 June 1960 on the protection of television broadcasts and the Protocol to that Agreement of 22 January 1965.

In conclusion, the Commission proposes that the first question should be answered as follows:

"Television signals broadcast by bodies exercising a non-gratuitous economic activity constitute the provision of services within the meaning of Article 59 of the Treaty where those signals are transmitted and picked up in the form of radio waves outside the territorial limits of the country where the broadcasting station is situated, there being no need for remuneration to be paid directly to the provider of the service by the recipients (cable television distributors and television viewers) located outside those limits."

The second question

Coditel points out that the Court's case-law on the application of Articles 30 and 36 to the exercise of industrial property rights may reasonably be applied *mutatis mutandis* to services. It refers to Cases 15 and 16/74, *Centrafarm* v *Sterling Drug & Winthrop* ([1974] ECR at pp. 1168 and 1199 to 1200), and 192/73, *Hag* ([1974] ECR 731 at p. 745).

It emphasizes that Article 59 of the Treaty became directly applicable upon the expiry of the transitional period *(Van Binsbergen* judgment, cited above). It is also accepted that Article 59 has a "horizontal direct effect" (judgment in Case 36/74, *Walrave & Koch* [1974] ECR 1405 at p. 1420; judgment in Case 13/73, *Donà* [1976] ECR 1333 at p. 1341; judgment in Case 90/76, *Van Ameyde* [1977] ECR 1091 at p. 1126), whereby private persons are, like Member States, bound to refrain from any measure which is liable to impede freedom to provide services.

Coditel comments that both Ciné Vog and the German television channel are the assigns of the original owner of the copyright; as there is therefore a common origin there are grounds for applying by analogy the rule in the *Hag* judgment (cited above). Such an application leads to the conclusion that the restriction upon diffusion in Belgium is not objectively justified but constitutes an unlawful obstacle to the freedom to provide services. The restriction in issue arises from the fact that the Berne Convention is interpreted by the Cour d'Appel, Brussels, as allowing Ciné Vog to forbid the diffusion in Belgium, via a cable diffusion network, of films broadcast in Germany.

One possible objection, based upon the lack of a legal relationship between the person providing the service, in this case the German broadcasting station, and the recipients of the service, in this case the Belgian television viewers, is not a crucial one. The provision of services does not necessarily imply the existence of a legal relationship between the provider and the recipient of a service; furthermore, such a requirement is scarcely compatible with economic reality in industries such as the newspaper, radio and television industries in which revenue is often largely generated by advertising, which is nevertheless calculated according to the number of recipients actually reached.

In conclusion, Coditel proposes that the Court should answer the second question as follows:

"It is not in accordance with the provisions of the Treaty on freedom to provide services for the assignee of the performing right in a cinematographic film in one Member State to rely upon

his right in order to prevent the showing of that film in that State by means of cable diffusion of television where the film thus shown has been broadcast in another Member State by a third party with the consent of the original owner of the right."

The *Union Professionnelle de Radio et Télévision* feels that the effect of the case-law of the Court is that although the existence of an industrial property right or of a right akin to copyright escapes as such from the prohibitions laid down in the Treaty, the exercise thereof may still be covered by the prohibitions enacted by the Treaty. By relying upon copyright legislation Ciné Vog cannot therefore re-create restrictions which are incompatible with the Treaty.

Ciné Vog and the *Chambre Syndicale Belge de la Cinématographie* examine the second question on a subsidiary basis only, since in their opinion the first limb of the first question requires an answer in the negative.

They claim that if it is accepted that Article 59 of the EEC Treaty may in principle apply here to the services provided by the cable television distributors, then it must be acknowledged that the requirement that the licence of the author or of his assign be obtained is on no account a restriction prohibited by Article 59 because that requirement does not cause any discrimination which the provisions of Article 59 intended to abolish.

The restrictions to be abolished pursuant to Articles 59 and 60 include "all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service" (cf. judgment in Case 22/74, *Van Binsbergen* [1974] ECR 1299; judgment in Case 39/75, *Coenen* [1975] ECR 1547).

The requirement that the licence of the author be obtained is a general one; provision is made for it in an international agreement which binds *inter alia* the nine Member States and it does not entail any discrimination from the point of view of the nationality of the person providing the cable diffusion service or from the point of view of his place of establishment.

A person providing a service must make sure that the service he performs is itself lawful. For example, a cable television distributor established in Belgium cannot diffuse over its network to its subscribers a film the content of which has been judged by a Belgian court to be offensive to public morality, whilst in neighbouring countries the film is shown freely creating the possibility that the film may be transmitted by a broadcasting organization in a neighbouring Member State.

The subject-matter of the service should cause the person providing it to ensure that he fulfils all the conditions for that service to be lawful. In the present case the licence of the author is a condition which does not cause any discrimination intended to be abolished by Article 59 of the Treaty.

The cable television distributors established in Belgium have, moreover, been at pains to obtain that licence for the music contained in a cinematographic film. They have entered into a

contract for this purpose with the Société Belge des Auteurs, Compositeurs et Éditeurs (SABAM) [Belgian Association of Authors, Composers and Publishers]. By that contract, renewed on 1 December 1977, they are obliged to pay a fee of Bfrs 30 for each basic subscription of Bfrs 2 000.

In conclusion, Ciné Vog and the Chambre Syndicale Belge de la Cinématographie propose that the Court should answer the second question as follows:

"The requirement that a licence be obtained from the owner of the television performing right in a film in order to communicate that film to the subscribers of a cable television diffusion network in the Member State of that owner when the film is broadcast by television from another Member State is not a restriction upon the freedom to provide services such as was intended to be abolished by Article 59 of the EEC Treaty. That licence does not in fact cause any discrimination to the detriment of the person providing the service and the necessity for it is derived from an international agreement which is not incompatible with Article 59 of the EEC Treaty."

In the opinion of the *Government of the Federal Republic of Germany,* the answer to the second question should be in the affirmative.

National legislation prohibiting, to the advantage of the owner of the right, the re-transmission by an unauthorized third party of a film picked up from another Member State must be regarded as a limitation, recognized by Community law, on the free movement of services. It forms part of rules which are applicable without distinction to national broadcasts and to those received from another Member State and which limit the free movement of services at the organizational level.

According to Article 60 of the Treaty services transcending national boundaries shall be provided "under the same conditions as are imposed by that State on its own nationals". The fact that Articles 56 and 66 of the Treaty taken together leave Member States the power to maintain discriminatory restrictions to the detriment of those who provide services extending beyond national boudaries must be understood to mean that Member States are all the more justified in adopting general rules which are not discriminatory.

If the entitlement of the owner of a right to prohibit the re-transmission of films were to be considered, contrary to the view of the German Government, as a restriction upon the movement of services within the meaning of Article 59 *et seq.,* it would nevertheless be justified by applying by analogy the combined provisions of Article 36 and of Articles 56 and 66 of the EEC Treaty.

The Government of the Federal Republic of Germany states that it is not unaware that, in the case of industrial and commercial property rights held to be "of the same origin", the legal effect of the Court's case-law is that the holder of the property right cannot avail himself of the right of prohibition given to him by national legislation in the context of trade within the Community.

These principles cannot, however, be applied to copyright since that would entirely deprive copyright of its substance. Unlike a trade-mark, the right in which is exhausted upon marketing, copyright as a basic principle comprises a lasting right of prohibition which derives from its function in terms of property, remuneration and reputation which is not exhausted when the right is exploited.

In the opinion of the Government of the Federal Republic of Germany the answer to the second question should therefore be in the affirmative.

The *Government of the United Kingdom* is of the opinion that the very nature of copyright rights prevents them from being discriminatory and states that those rights are not the sort of restriction struck down by Article 59 at all. It points out that a specific subject-matter of copyright protection is the entitlement of the proprietor to prevent the unauthorized use of his material for cable television. That specific right is recognized by the Berne Copyright Convention to which all Member States are parties. It is inconceivable that Article 59 should destroy a part of the specific subject-matter of the copyright protection.

The *Commission* considers that the Court's interpretation of Article 36 in regard to the protection of industrial and commercial property rights must also apply to literary and artistic property rights.

The Court has interpreted Article 36 as meaning that the existence of exclusive rights given by the legislation of Member States is not affected by the Treaty but that the exercise of those rights may, however, fall within the scope of application of the Treaty rules on the free movement of goods and on competition (judgment in Case 78/70, *Deutsche Grammophon* v *Metro-SB-Großmärkte* [1971] ECR 502; judgment in Case 15/74, *Centrafarm* v *Sterling Drug* [1974] ECR 1147; judgment in Case 119/75, *Terrapin* v *Terranova* [1976] ECR 1061).The effect of this is that the holder of an industrial property right protected by the laws of a Member State may not rely upon those laws to resist the importation of a product which has been lawfully placed on the market in another Member State by the holder himself or with his consent.

The reasons for this are primarily based upon the principle of the exhaustion of an industrial and commercial property right which itself is based upon the view that the holder receives his remuneration upon the sale of the protected product. For this reason the right of the holder ceases from the moment when he places the product on the market.

When applying these principles to copyright it is important to bear in mind some particular features of literary and artistic property. Unlike exclusive industrial and commercial property rights such as patents and trade-marks, we are here concerned with the protection of a personal creation (an immaterial right). The protection given by copyright takes account of this feature; it is both wider and more varied. The concept of copyright comprises the prerogatives of the author, which are inalienable, rights of distribution when there is a material medium and of performance if there is no material medium.

The application of the exhaustion principle is justified as regards copyrights whose subject-matter is the distribution of a *material medium* (written works, sound-recordings, films, artistic creations). That involves goods which are traded in and are scarcely any different from products made under licence or marketed under a trade-mark. The author — like a patentee or the owner of

a trade-mark — receives his remuneration upon the sale of his work in a material form. The Commission refers to the judgments in Cases 155/73, *Sacchi* ([1974] ECR 428), and 78/70, *Deutsche Grammophon* ([1971] ECR 499).

On the other hand, that principle may not be applied to *copyrights where there is no material medium.* These are essentially performing rights. If there is no material medium the criterion of marketing cannot be used to determine the extent of the exclusivity of the right.

Such copyrights are distinguished by the fact that they are not exhausted at the first performance of the works they protect. The different forms of performance are independent of one another and each performance gives rise to copyright and therefore to remuneration.

The Commission observes that in general performing right is the author's preserve and that the exercise of that right is possible only if he gives his consent. If consent is not given the author may prohibit the performance. The Commission thinks that the requirement of consent is intended to enable the author to negotiate a fair remuneration.

Since the use of the author's intangible rights give rise to the provision of services — and not to the movement of goods — the question arises whether the exception laid down in Article 36 is applicable to them. Academic writers are virtually all agreed that the guarantee afforded to industrial and commercial property rights in Article 36 of the Treaty must also apply to copyright.

The Commission shares that view. It states that whilst it is true that the provisions of the Treaty on the freedom to provide services do not contain any express reference to the protection of literary and artistic property, that omission may not however be interpreted as meaning that the authors of the Treaty intended to remove from those rights the protection which they gave to industrial and commercial property in Article 36. Article 36 is in fact, as far as the guaranteed existence of those rights is concerned, the expression of a general principle which is not confined to Title I, Chapter 2, on the free movement of goods; it must also apply to the freedom to provide services to the extent to which literary and artistic property rights may give rise to the provision of a service.

The Commission feels that the question referred to the Court is relevant only if the cable diffusion of a film picked up from a broadcasting station and simultaneously transmitted to subscribers constitutes a broadcast which requires the authority of the owner of the right.

It gives a summary of the national laws on the subject.

Belgium and Luxembourg do not have legislation of their own. Those countries apply the Berne Convention in regard to nationals and foreigners alike.

Case-law in the Federal Republic of Germany approaches the problem of cable diffusion of television from the point of view of the television viewer. Moreover, it gives weight to the fact that cable diffusion of television provides normal reception in areas where this

would not otherwise be possible because of the existence of buildings.

In the United Kingdom and Ireland cable diffusion companies are authorized by law to transmit broadcasts by the national broadcasting organizations without being obliged to pay any remuneration. In the case of the re-transmission of broadcasts of foreign broadcasting organizations, a decision by the Performing Rights Tribunal may declare such re-transmission to be exempt from payment, or grant the owner appropriate remuneration.

In France Article 27 of the Law of 11 March 1957 contains only a general provision regulating the right to broadcast which does not distinguish between a transmission and a re-transmission. The interpretation of that provision is controversial.

In the Netherlands Article 12 (4) of the Law on Copyright provides that the publication, by wire or otherwise, of a work diffused by radio or television is not to be considered as an independent broadcast if it is made simultaneously with the broadcast by the organization which made the broadcast.

Italy and Denmark do not have any provisions dealing with the problem.

In the United States re-transmissions by a cable system are subject to a form of compulsory licence, which nevertheless provides remuneration.

In the opinion of the Commission this description of the legal situation in the various Member States shows that the question of the status of cable diffusion of television in regard to copyright remains largely unsettled. British and Irish legislation basically denies to owners of broadcasting rights the right to prohibit re-transmission by cable. American legislation has adopted the same solution but makes provision for remuneration. Discussions within the Berne Union, which have not yet reached any clear outcome, are continuing. They may be summarized as follows: in the case of the *simultaneous re-transmission of original broadcasts* it is accepted that it is left to each legislature to interpret what it understands by the concepts of "body other than the original one", "public" and "communication to the public" contained in paragraph (1) (ii) of Article 11 bis of the Berne Convention. As regards the *re-diffusion of national programmes,* it has been pointed out that in a case where a broadcasting organization is subject to a legal obligation to ensure reception of its programmes by all the nationals of the country in question, the act of diffusing television by cable cannot be dissociated from the act of broadcasting, even if the cable diffusion is carried out by an organization other than the original one. However, the cable re-transmission of *foreign programmes* must be regarded as a communication to the public within the meaning of Article 11 bis of the Berne Convention.

It can be seen from the foregoing that cable re-transmission is assessed differently depending on whether a national programme is involved or one received from abroad. Where programmes from another Member State are involved — which is the case here — such a distinction requires, however, some comments regarding Community law. Whilst it is in fact understandable that this distinction is made within the Berne Union, it cannot be accepted in

Community law. The latter requires that restrictions on the free movement of goods or, where appropriate, on freedom to provide services are applicable without distinction to services provided within a Member State and to those provided from another Member State. In the case of the exception based upon copyright, it must be of general application since it would otherwise be, in the words of Article 36 of the Treaty, "a means of arbitrary discrimination" or "a disguised restriction on trade between Member States". In an analogous situation concerning trade-marks the Court underscored in Case 119/73, *Terrapin* v *Terranova* ([1976] ECR 1061), the obligation upon Member States not to differentiate, as regards the application of legislation conferring an exclusive right, between the criteria which are valid within the Member State and those which are applied to imports.

The Commission concludes from this that, on the basis of the options left to it by the Berne Convention, the Cour d'Appel, Brussels, cannot make a distinction between the transmission by cable of programmes of national television organizations (which cable diffusion undertakings are obliged to transmit in full) [1] and the transmission by cable of programmes coming from television organizations of another Member State. In the event that the Cour d'Appel does not consider that the transmission by cable of *Belgian* television programmes is not a new broadcast giving rise to copyright, it cannot treat the transmission of television programmes coming from another Member State in any other way.

The Commission acknowledges that the Cour d'Appel, Brussels, has held that because Ciné Vog's right has its origin in a "legal situation under which it enjoys protection *erga omnes*", it falls outside "the considerations pertaining to contracts and concerted action to which the words of the Treaty refer". However, in view of the case-law of the Court of Justice — *inter alia* in Case 40/70, *Sirena* v *Eda* ([1971] ECR 82), in which the Court clearly laid down the distinction to be made between the existence of an exclusive right conferred by national law as a legal entity and the contractual exercise of that right, particularly by means of licences — the situation may also be viewed in a different way.

The content of the contract of 8 July 1969 shows in fact that La Boétie did not actually transfer its copyright to Ciné Vog. The producer authorized Ciné Vog to exploit the film in question in Belgium and the Grand Duchy of Luxembourg. That authorization covered a specific territory only, it was limited in time and gave rise to payments to be made in proportion to the return obtained from cinema performances. That contract therefore fulfilled all the requirements with regard to a *licence* contract. This also holds good if Ciné Vog is regarded as the owner of the performing right for Belgium.

In those circumstances it is not impossible that the provisions of the Treaty on competition, in particular Article 85, may be applicable.

In order to resolve the question referred to the Court, it is furthermore necessary

1 — Article 20 of the Royal Decree of 24 December 1966, Moniteur Belge of 24 January 1967.

to examine the contractual relationship between the original owner (La Boétie) and the German broadcasting organization. It is necessary to know whether the consent given to German television to broadcast the film also extended to the re-transmission of the broadcast by cable. In the event that the original owner gave his consent to re-transmission by cable, Ciné Vog could no longer assert its performing right.

Finally, the Commission examines the feasibility of a Community solution, bearing in mind the special characteristics, in fact and in law, of cable television.

It considers that it is a matter of finding a way of reconciling the principle of freedom to provide services with the protection of the specific subject-matter of the copyright in question. In doing this it must be borne in mind that cable television is a relatively new technique of which the copyright laws in force in the different Member States, except in the United Kingdom and Ireland, have not been able to take account because they came into force before this new technique emerged. This is also true of the Berne Convention. Discussions both in Member States and within the Berne Union demonstrate that the problems involved are far from finding definitive solutions.

On a practical point, it should be noted that the cable diffusion companies concerned are not even in a position to obtain the authority of copyright owners in all cases. Television station programmes, simultaneously re-transmitted by cable, are in fact known to the public only a short time before the broadcast itself. Therefore it is generally impossible for cable diffusion companies to secure the consent of the owners of the performing rights. That means that as long as Member States have not introduced a system of obligatory licences into their national law or as long as there are no copyright management companies exploiting cinematographic rights, the requirement of the authorization or the consent of the copyright owner in the event of the re-transmission by cable of a film being broadcast makes it impossible to carry on this activity in many cases.

These facts lead the Commission to ask whether this state of national copyright law must be accepted without more ado at the Community level. In its opinion it is first of all incumbent on the national legislatures to solve this problem. But it is also possible to imagine the Community taking steps to harmonize national laws on the subject. These possibilities do not however deprive the Court of Justice of the jurisdiction to determine — by interpreting the relevant provisions of Community law — whether the obstacle to freedom to provide services in the Community constituted by the performing right in question is justified by the specific subject-matter of that right. The answer cannot be found in the laws of any one single Member State. This question requires a general answer, based upon existing national laws, and taking account of the requirements of Community law.

The Commission believes that the protection of the specific subject-matter of the performing right in question — concerning the simultaneous

retransmission by cable of the original broadcast — does not require that the owner of that right should have a right to give his authorization, with the result that he can prohibit re-transmission. As the owner has consented to the initial broadcast, his legitimate interest may be regarded as satisfied if national law entitles him to receive fair remuneration from the cable diffusion company which made the simultaneous re-transmission.

In conclusion, the Commission is of the opinion that in its answer to the second question of the Cour d'Appel, Brussels, the Court should hold that the assignee of the performing rights in a cinematographic film in Belgium, Ciné Vog, was not entitled to prohibit Coditel from showing that film in that State by means of cable diffusion; on the other hand, Belgian law may entitle the owner of the right in question to claim a fair remuneration for the showing of the film by means of cable re-transmission.

Should the Court not share that conclusion and consider that Community law does not preclude the national law of a Member State from entitling the owner of a performing right in a film to prohibit simultaneous re-transmission by cable, the Commission proposes that the Court should make it evident in its answer that the rule of national law must be applied without distinction to all cable re-transmissions, to those of broadcasts by national television stations as well as to those of broadcasts from another Member State and, furthermore, that if the original owner has given his consent to the initial broadcast as well as to the re-transmission by cable in another Member State, the owner of the performing right in that State may no longer forbid that re-transmission.

III — Oral procedure

At the sittings on 13 and 14 November 1979 oral observations were submitted by Coditel and Intermixt, represented by G. Kirschen, A. Braun and M. Waelbroeck, of the Brussels Bar: Ciné Vog and the Chambre Syndicale Belge de la Cinématographie, represented by P. Demoulin, of the Brussels Bar; La Boétie and the Chambre Syndicale des Producteurs et Exportateurs de Films Français, represented by J. Botson, of the Brussels Bar; the Union Professionnelle de Radio et Télédistribution, represented by A. de Caluwe, of the Brussels Bar; Inter-Régies, represented by J. Dijck, of the Antwerp Bar; the Government of the Federal Republic of Germany, represented by M. Seidel, acting as Agent; the Government of the United Kingdom, represented by R. Jacob, Barrister of Gray's Inn, instructed by A. D. Preston, of the Treasury Solicitor's Department, acting as Agent; and the Commission of the European Communities, represented by M.-J. Jonczy and E. Zimmermann, acting as Agents.

During the sitting *Coditel* observed that when it is compelled to relay over the air broadcasts coming from a foreign station when that station cannot be relayed, received in Belgium and re-transmitted further afield, it has to fall back on radio transmissions. Such relay broadcasts are

authorized and assisted by the Régie des Télégraphes et Téléphones. The cable diffusion companies believe that in such cases they are re-transmitting and pay royalties. This was not the case at the time of the broadcast which gave rise to the dispute.

In Europe there are two principal colour reception systems, the P.A.L. system and the S.E.C.A.M. system. In Belgium television sets are designed for the P.A.L. system. Where cable television distributors receive colour picture signals transmitted via the French S.E.C.A.M. system they convert them into signals which can be received by a P.A.L. set. There is no actual de-coding of the signal into pictures and sounds but the nature of the signal is changed.

The Advocate General delivered his opinion at the sitting on 13 December 1979.

Decision

1 By a judgment of 30 March 1979, which was received at the Court on 17 April 1979, the Cour d'Appel, Brussels, referred two questions to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Article 59 and other provisions of the Treaty on freedom to provide services.

2 Those questions were raised during an action brought by a Belgian cinematographic film distribution company, Ciné Vog Films S.A., the respondent before the Cour d'Appel, for infringement of copyright. The action is against a French company, Les Films la Boétie, and three Belgian cable television diffusion companies, which are hereafter referred to collectively as the Coditel companies. Compensation is sought for the damage allegedly caused to Ciné Vog by the reception in Belgium of a broadcast by German television of the film "Le Boucher" for which Ciné Vog obtained exclusive distribution rights in Belgium from Les Films la Boétie.

3 It is apparent from the file that the Coditel companies provide, with the authority of the Belgian administration, a cable television diffusion service

covering part of Belgium. Television sets belonging to subscribers to the service are linked by cable to a central aerial having special technical features which enable Belgian broadcasts to be picked up as well as certain foreign broadcasts which the subscriber cannot always receive with a private aerial, and which furthermore improve the quality of the pictures and sound received by the subscribers.

4 The court before which the claim was made, the Tribunal de Première Instance, Brussels, declared that it was unfounded as against Les Films le Boétie, but it ordered the Coditel companies to pay damages to Ciné Vog. The Coditel companies appealed against that judgment. That appeal was declared inadmissible by the Cour d'Appel to the extent to which it was brought against the company Les Films la Boétie, which is not now therefore a party to the dispute.

5 The facts of the case bearing upon the outcome of the dispute were summarized by the Cour d'Appel as follows. By an agreement of 8July 1969 Les Films la Boétie, acting as the owner of all the proprietary rights in the film "Le Boucher", gave Ciné Vog the "exclusive right" to distribute the film in Belgium for seven years. The film was shown in cinemas in Belgium starting on 15 May 1970. However, on 5 January 1971 German television's first channel broadcast a German version of the film and this broadcast could be picked up in Belgium. Ciné Vog considered that the broadcast had jeopardized the commercial future of the film in Belgium. It relied upon this ground of complaint both against Les Films la Boétie, for not having observed the exclusivity of the rights which it had transferred to it, and against the Coditel companies for having relayed the relevant broadcast over their cable diffusion networks.

6 The Cour d'Appel first of all examined the activities of the cable television diffusion companies from the point of view of copyright infringement. It considered that those companies had made a "communication to the public" of the film within the meaning of the provisions applying in this field and that, as regards copyright law and subject to the effect thereon of Community law, they therefore needed the authorization of Ciné Vog to relay the film over their networks. The effect of this reasoning by the Cour d'Appel is that the authorization given by the copyright owner to German

television to broadcast the film did not include authority to relay the film over cable diffusion networks outside Germany, or at least those existing in Belgium.

7 The Cour d'Appel then went on to examine in the light of Community law the argument of the Coditel companies that any prohibition on the transmission of films, the copyright in which has been assigned by the producer to a distribution company covering the whole of Belgium, is contrary to the provisions of the EEC Treaty, in particular to Article 85 and Articles 59 and 60. After rejecting the argument based on Article 85, the Cour d'Appel wondered if the action undertaken against the cable television diffusion companies by Ciné Vog infringed Article 59 "in so far as it limits the possibility for a transmitting station established in a country which borders on Belgium, and which is the country of the persons for whom a service is intended, freely to provide that service".

In the opinion of the appellant companies, Article 59 must be understood to mean that it prohibits restrictions on freedom to provide services and not merely restrictions on the freedom of activity of those providing services, and that it covers all cases where the provision of a service involves or has involved at an earlier stage or will involve at a later stage the crossing of intra-Community frontiers.

8 Believing that that submission bears upon the interpretation of the Treaty, the Cour d'Appel referred to the Court of Justice the following two questions:

"1. Are the restrictions prohibited by Article 59 of the Treaty establishing the European Economic Community only those which prejudice the provision of services between nationals established in different Member States, or do they also comprise restrictions on the provision of services between nationals established in the same Member State which however concern services the substance of which originates in another Member State?

2. If the first limb of the preceding question is answered in the affirmative, is it in accordance with the provisions of the Treaty on freedom to provide services for the assignee of the performing right in a cinematographic film in one Member State to rely upon his right in order to prevent the defendant from showing that film in that State by means of cable television where the film thus shown is picked up by the defendant

in the said Member State after having been broadcast by a third party in another Member State with the consent of the original owner of the right?"

9 According to its wording the second question is asked in case the answer to the first limb of the first question should be in the affirmative; but the Cour d'Appel evidently had in mind an answer stating that in principle Article 59 *et seq.* of the Treaty apply to the provision of the services concerned because only in that case can the second question have any meaning.

10 The Court of Justice will first of all examine the second question. If the answer to this question is in the negative because the practice it describes is not contrary to the provisions of the Treaty on freedom to provide services — on the assumption that those provisions are applicable — the national court will have all the information necessary for it to be able to resolve the legal problem before it in conformity with Community law.

11 The second question raises the problem of whether Articles 59 and 60 of the Treaty prohibit an assignment, limited to the territory of a Member State, of the copyright in a film, in view of the fact that a series of such assignments might result in the partitioning of the Common Market as regards the undertaking of economic activity in the film industry.

12 A cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the Treaty are not the same as those which arise in connexion with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records.

13 In these circumstances the owner of the copyright in a film and his assigns have a legitimate interest in calculating the fees due in respect of the authorization to exhibit the film on the basis of the actual or probable number of performances and in authorizing a television broadcast of the film only after

it has been exhibited in cinemas for a certain period of time. It appears from the file on the present case that the contract made between Les Films la Boétie and Ciné Vog stipulated that the exclusive right which was assigned included the right to exhibit the film "Le Boucheur" publicly in Belgium by way of projection in cinemas and on television but that the right to have the film diffused by Belgian television could not be exercised until 40 months after the first showing of the film in Belgium.

14 These facts are important in two regards. On the one hand, they highlight the fact that the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work. On the other hand, they demonstrate that the exploitation of copyright in films and the fees attaching thereto cannot be regulated without regard being had to the possibility of television broadcasts of those films. The question whether an assignment of copyright limited to the territory of a Member State is capable of constituting a restriction on freedom to provide services must be examined in this context.

15 Whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States.

16 The effect of this is that, whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organized in the Member States largely on the

basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable.

17 The exclusive assignee of the performing right in a film for the whole of a Member State may therefore rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another Member State, without thereby infringing Community law.

18 Consequently the answer to the second question referred to the Court by the Cour d'Appel, Brussels, should be that the provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.

19 It is clear from the answer given to the second question that Community law, on the assumption that it applies to the activities of the cable diffusion companies which are the subject-matter of the dispute brought before the national court, has no effect upon the application by that court of the provisions of copyright legislation in a case such as this. Therefore there is no need to answer the first question.

Costs

20 The costs incurred by the Government of the Federal Republic of Germany, the Government of the United Kingdom 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,

THE COURT,

in answer to the questions referred to it by the Cour d'Appel, Brussels, by judgment of 30 March 1979, hereby rules:

The provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 18 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER

(see case 52/79, p. 860)