ORDER OF THE COURT (Sixth Chamber)
30 April 1998 *

In Joined Cases C-128/97 and C-137/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale di Roma, Sezione Distaccata di Tivoli, for a preliminary ruling in the criminal proceedings before that court against

Italia Testa (C-128/97),

and

Mario Modesti (C-137/97),

third party: **Società Italiana degli Autori ed Editori (SIAE),**

on the interpretation of Articles 30, 36, 85 and 86 of the EC Treaty in the light of national legislation relating to the management of copyright,

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, G. F. Mancini, P. J. G. Kapteyn (Rapporteur), G. Hirsch and K. M. Ioannou, Judges,

* Language of the case: Italian.

Advocate General: G. Cosmas,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By orders of 5 February and 19 February 1997, received at the Court on 11 April and 28 March 1997 respectively, the Pretura Circondariale di Roma, Sezione Distaccata di Tivoli (District Magistrates' Court, Rome, Tivoli Division) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 30, 36, 85 and 86 of that Treaty in the light of national legislation relating to the management of copyright.

2 The orders were made in two sets of criminal proceedings, one against Italia Testa, (Case C-128/97), which ran a radio station, and the other against Mario Modesti, (Case C-137/97), the owner of a radio station, for having broadcast musical compositions without being entitled to do so and having unlawfully copied magnetic tapes and records.

3 Three questions have already been referred to the Court for a preliminary ruling by the Pretura Circondariale di Roma, Sezione Distaccata di Tivoli, as a result of those proceedings; they were the subject of the orders of the Court of 25 June 1996 in Case C-101/96 *Italia Testa* [1996] ECR I-3081 and 19 July 1996 in Case C-191/96 *Modesti* [1996] ECR I-3937.

4 In those cases the national court considered that the dispute before it raised questions concerning the interpretation of the EC Treaty, and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) May the national legislation conferring on the SIAE (Italian Society of Authors and Publishers) the exclusive right to manage copyright impede or prevent the import or export of sound recordings which have been lawfully marketed in another State?

(2) In the context of the Single Market, characterised by the free movement of goods and the freedom to provide services, may the SIAE require payments in all cases and circumstances on behalf of authors, relying on recourse to criminal proceedings in order to give effect to that power and enforce its claims?

(3) Is the national case-law and legislation referred to by the SIAE in its application to join the proceedings as a party claiming damages liable to give rise to arbitrary discrimination or a disguised restriction of trade, into and out of Italy, in relation to the commercial exploitation of copyright *vis-à-vis* the other Member States of the European Union?'

5 In its orders in *Italia Testa* and *Modesti* the Court recalled that, according to settled case-law, in order to reach an interpretation of Community law which will be of use to the national court, it is essential that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, in particular, the judgment in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* v *Circostel* [1993] ECR I-393, paragraph 6, and the orders in Case C-157/92 *Pretore di Genova* v *Banchero* [1993] ECR I-1085, paragraph 4, Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 12, Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 8, Case C-307/95 *Max Mara* [1995] ECR I-5083, paragraph 6, and Case C-2/96 *Sunino and Data* [1996] ECR I-1543, paragraph 4).

6 Furthermore, the Court stressed that the information provided and the questions raised in orders for reference must not only be such as to enable the Court usefully to reply but must also give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice (order in *Sunino and Data*, paragraph 5). It is the Court's duty to ensure that the opportunity to submit observations is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties (judgment in Joined Cases 141/81, 142/81 and 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6, and the orders in *Saddik*, paragraph 13; *Grau Gomis*, paragraph 10; *Max Mara*, paragraph 8; and *Sunino and Data*, paragraph 5).

7 The Court observed that the orders for reference in the cases before it did not contain sufficient information regarding the factual and legislative context to meet those requirements. The national court had merely referred to criminal breaches of Italian copyright legislation committed by a person who ran a private radio station and the question, raised in that context, as to whether the monopoly held by a company having the exclusive right to manage such copyright and authorised to require payment of fees, with protection backed by penalties under criminal law, was compatible with Community law. For the rest, it had failed to give sufficient details of the factual context of the dispute, the Italian legislative context or the precise reasons which had prompted it to consider the interpretation of Community law and to deem it necessary to refer questions to the Court of Justice for a preliminary ruling.

8 In these cases, the national court has referred for a preliminary ruling two questions which are identical, respectively, to the first and second questions put to the Court in Cases C-101/96 and C-191/96.

9 In the orders for reference the national court states that criminal proceedings have been brought before the Pretura against Italia Testa and Mario Modesti, first, for having broadcast musical compositions by various Italian and foreign composers, without the appropriate licences or concessions prescribed for that purpose, in breach of Article 171B of Law No 633 of 22 April 1941 (hereinafter 'Law

No 633/41'), which provides for the protection of the rights of composers, producers and the SIAE, which holds the exclusive right to manage copyright in Italy and, second, for having wrongfully reproduced for gain records, magnetic tapes and similar recordings of musical compositions, by duplicating and copying them in breach of Article 1 of Law No 406 of 29 July 1981 (hereinafter 'Law No 406/81'). According to the national court, the defendants appear to have acted in breach of Article 171B of Law No 633/41.

10 The national court raises the question whether those provisions are contrary to Articles 30, 36, 85 and 86 of the Treaty inasmuch as they amount to a statutory monopoly, which may result in a restriction on the economic use of sound recordings already marketed in another Member State. In particular, although Articles 30 and 36 do not preclude national legislation granting a composer the right to make the circulation of his works subject to his permission, the fact none the less remains that, in the present case, it is not the composer who consents or refuses consent to the circulation of the work, but the SIAE, whose decisions cannot be ascertained or monitored by the composer.

11 The national court considers, furthermore, that the protection granted to the SIAE in order to preserve its exclusive right to collect royalties appears to constitute a means of deterring the financial exploitation of the works protected by copyright on the Italian market and consequently a measure having equivalent effect to a customs duty and a practice prohibited by Articles 85 and 86 of the Treaty.

12 It must none the less be pointed out that these orders for reference still do not contain sufficient information to meet the requirements set out above.

13 First, the national court fails to give sufficient details of the Italian legislative context of the questions which it has put to the Court. It does not mention the role played by Article 171B of Law No 633/41 and Article 1 of Law No 406/81 in the context of copyright protection. Next, it does no more than refer to SIAE's exclusive right to manage copyright and to the authorisation given to it to require payment of fees with protection backed by penalties under the criminal law, and does not identify or explain the content of the national provisions which provide for that right and authorisation. Finally, the orders for reference do not provide any information concerning the members and structure of the SIAE, the task assigned to it and the manner in which it carries it out. In particular, they do not indicate whether SIAE's exclusive right to manage copyright also applies to musical works protected by copyright of members of copyright management companies in other Member States.

14 Second, the national court does not state the precise reasons which prompted it to consider the compatibility with Articles 30, 36, 85 and 86 of the Treaty of the monopoly held by SIAE, which has the exclusive right to manage such rights and is authorised to require the payment of fees, with protection backed by criminal penalties under the criminal law. In particular, it does not explain the consequences of SIAE's exclusive right on the possibility for users of registered musical works, established in Italy, to have direct access to the directory of musical works held by copyright management companies in other Member States and on the importation into Italy of sound recordings of those works.

15 Third, the national court does not state the reasons why it considers an answer to those questions to be necessary for the resolution of the dispute.

16 In that respect, it should be recalled that the criminal proceedings in the national court are based on infringement of Article 171B of Law No 633/41 and Article 1 of Law No 406/81. In so far as it appears that, in essence, those provisions merely

prohibit the commercial exploitation, without authorisation, by any person of copyright and related rights held by another person and it is not disputed that Italia Testa and Mario Modesti acted in breach of that prohibition, it is for the national court to explain that the possible incompatibility with Community law of SIAE's exclusive right to manage copyright and its right to require the payment of fees may have repercussions for the criminal proceedings against those defendants.

17 The requested interpretation of Community law is objectively needed for the decision to be taken by the national court only if it has a bearing on the criminal proceedings. If no such need exists, then, in accordance with settled case-law (judgment in Case C-291/96 *Grado and Bashir* [1997] ECR I-5531, paragraphs 16 and 17, and order in Case C-428/93 *Monin Automobiles* [1994] ECR I-1707, paragraphs 15 and 16), the Court has no jurisdiction to rule on the questions referred to it by the Pretura Circondariale di Roma, Sezione Distaccata di Tivoli.

18 In view of the foregoing, it must be held, pursuant to Articles 92 and 103(1) of the Rules of Procedure, that the requests submitted by the national court are manifestly inadmissible.

Costs

19 The costs incurred by the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber)

hereby orders:

The requests for preliminary rulings submitted by the Pretura Circondariale di Roma, Sezione Distaccata di Tivoli by orders of 5 February and 19 February 1997 are inadmissible.

Luxembourg, 30 April 1998.

R. Grass

Registrar

H. Ragnemalm

President of the Sixth Chamber