basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

REPORT FOR THE HEARING
delivered in Case 395/87 *

I — Facts and procedure

1. *The parties to the main proceedings*

The parties to the main proceedings are the Société des auteurs, compositeurs et éditeurs de musique ('Sacem'), the French copyright-management society, and Jean Verney, who runs the 'Whisky à Gogo' discothèque at Juan-les-Pins. The proceedings relate to the payment of royalties for the playing of musical works by Mr Verney at his discothèque. Mr Verney considers that the sums demanded by Sacem are excessive and contrary to Community law.

Sacem's object is to collect and distribute copyright royalties whenever musical works in its repertoire are used. Sacem's members assign to it exclusive rights over the exploitation of their works as soon as they are created. By virtue of the membership contracts and the statutes of Sacem, Sacem has the exclusive right to authorize or prohibit the use of its members' musical works and to receive the corresponding copyright royalties.

Sacem's repertoire comprises not only the works of its members but also those contained in the repertoires of those foreign copyright societies which have, by means of reciprocal representation contracts, appointed it to represent them in France. Each of the parties to such contracts undertakes to enforce within its own territory the rights of the other party's members in the same way and to the same extent as it does so for its own members. That implies in particular that the scales, methods and means of collection and distribution of royalties are the same. In order to cover the operational costs incurred, each society has the right to deduct a percentage

* Language of the case: French.

of the sums collected by it on behalf of the other society.

2. *The French legislation on literary and artistic property*

Under Article 26 of the French law of 11 March 1957 on literary and artistic property, an author's right of exploitation includes the right of performance and the right of reproduction. Performance is defined as 'communication of the work to the public, in particular by means of . . . dissemination by any method'. Reproduction is understood as 'the material fixing of the work by any method which permits indirect communication to the public, in particular by mechanical recording'.

Under the abovementioned law, the author of a musical work is entitled to authorize its reproduction for a specific purpose and to refuse consent for any other purpose. In practice, the author assigns his rights of reproduction to the manufacturer of gramophone records or other sound recordings with a view to their manufacture and marketing for private use, that is to say within the confines of the family. After receiving from the manufacturer a reproduction fee relating solely to the marketing of his work for purposes of private use, the author is also entitled to claim a royalty — known as a 'droit complémentaire de reproduction mécanique (supplementary mechanical reproduction fee) — from any user who, after acquiring the phonogram, makes public use of it, for example in a radio station, in a discothèque or in a juke-box installed in a public place.

3. *The judgment of the Court in the Basset case*

The compatibility of the supplementary mechanical reproduction fee with Community law was considered in Case 402/85 *Basset* v *Sacem*. In its judgment of 9 April 1987 [1987] ECR 1747, the Court ruled that Articles 30 and 36 of the EEC Treaty, properly construed, do not preclude the application of national legislation allowing a national copyright-management society to charge a royalty called a 'supplementary mechanical reproduction fee'. However, as regards Article 86 of the Treaty, the Court did not rule out the possibility that the amount of the royalty, or aggregate amount of royalties, fixed by the copyright-management company might be such as to render Article 86 of the Treaty applicable. In the *Basset* case the national court had found that Sacem was to be regarded as an undertaking occupying a dominant position in the common market. According to the Court, the conduct of that undertaking would be contrary to Article 86 if it engaged in abusive practices such as, in particular, the imposition of unfair conditions.

4. *The royalties charged by Sacem*

Relations between Sacem and individual discothèques are governed by a standard contract known as a 'contrat général de représentation' (general performance contract). The contract gives the discothèque operator, for the stipulated period, the right to choose, from amongst Sacem's total repertoire, that is to say its own repertoire and the repertories of its foreign counterparts represented by it in France, present or future works which he uses or will use. In return Sacem charges the disco-

thèques a fixed copyright royalty in the form of a percentage of the total receipts achieved by the discothèque operator, including payments for drinks, entry charges, payments for services and VAT. The normal rate is 8.25%, which comprises the public performances right (6.60%) and the mechanical reproduction right (1.65%). However, although 8.25% is the normal rate, in practice a large number of discothèques enjoy reductions for various reasons, for example because they belong to a trade organization with which Sacem has concluded an agreement granting it certain facilities for the collection of royalties, or because they furnish it with accounting statements which enable revenue to be checked.

5. *The background to the main proceedings*

In March 1984 Mr Verney lodged a complaint with the senior juge d'instruction (examining magistrate), Grasse, together with a claim for damages as civil party, in respect of refusal to sell, sale under duress and tied sale, discriminatory practices and unlawful price-fixing, within the meaning of two Orders of 30 June 1945 and Article 419 of the Code pénal (Criminal Code). Mr Verney accused Sacem of requiring from him payments which were excessive, inequitable or undue for the performance of protected musical works in his discothèque. The examining magistrate, considering that Mr Verney's allegations provided no grounds for criminal proceedings, dismissed the complaint on 18 December 1985. On appeal by Mr Verney, the chambre d'accusation (preliminary criminal procedure chamber) of the cour d'appel (Court of Appeal), Aix-en-Provence, by judgment of 22 October 1986, quashed that order and directed that further information should be furnished with a view to the commencement of criminal proceedings against the director of Sacem, response to the civil claim and completion of the file on the case. Before the chambre d'accusation Mr Verney reiterated his complaints against Sacem, in particular regarding the fact that it required a single royalty for its entire world repertoire and refused to disclose the scales for the component groups of the repertoire, and that it applied discriminatory and abusive rates. He also requested that certain questions should be submitted to the Court of Justice for a preliminary ruling. The chambre d'accusation acceded to that request in December 1987. Finally, on 19 February 1988, Jean-Louis Tournier, the Director of Sacem was charged, in particular with a view to enabling him to present argument before the Court of Justice.

6. *The questions referred to the Court*

By judgment of 2 December 1987 the cour d'appel, Aix-en-Provence, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the amount of the royalty or of the combined royalties fixed by Sacem, which occupies a dominant position in a substantial part of the common market and enjoys a *de facto* monopoly in France in copyright management and the charging of royalties connected therewith, compatible with Article 86 of the Treaty of Rome, or does it, on the contrary, amount to an abusive and restrictive practice through the imposition of conditions which are not negotiable and are inequitable?

(2) Does the organization, by means of a group of agreements known as reciprocal representation agreements, of a *de facto* monopoly in most countries of the European Community, enabling a copyright-management undertaking pursuing its activities in one Member State to fix arbitrarily and in a discriminatory fashion the level of royalties in such a way as to prevent users from selecting works from foreign authors without being obliged to pay royalties on the repertoires managed by the copyright-management society in that Member State, constitute a concerted practice in breach of Article 85(1) of the Treaty of Rome, thus facilitating the abuse of a dominant position within the meaning of Article 86 of that Treaty?

(3) Is Article 86 of the Treaty of Rome to be interpreted as meaning that it is an "unfair trading condition" for a copyright-management society occupying a dominant position in a substantial part of the common market and bound by reciprocal representation contracts to similar organizations in other EEC countries to fix a scale and rate of royalty which is several times greater than that applied by all copyright-management societies in the member countries of the EEC without any objectively justifiable ground and is unrelated to the sums redistributed to the authors, so that the royalty is disproportionate to the economic value of the service provided?

(4) Is the refusal by a society of authors and publishers enjoying a *de facto* monopoly in a Member State to permit users to have access solely to the foreign repertoire which it manages, thereby partitioning the market, to be regarded as having as its object or at least as its effect the prevention, restriction or distortion of competition within the meaning of Article 85(1)?

(5) In view of the fact that the Court has already held that the placing at the public's disposal of a record or a book is inseparable from the circulation of the material form of the work, which results in exhaustion of the right to royalties, and despite the payment by the purchaser of the price of the record, which incorporates the royalty payable for the authorization to use the work, is the application of national legislation assimilating reproduction by means of sound-reproduction equipment to unlawful reproduction if the royalties for public performances fixed by the national [copyright-] management undertaking with a *de facto* monopoly are not paid compatible with Articles 30 and 59 of the Treaty if those royalties are excessive and discriminatory and if their amount is not determined by the authors themselves and/or would not be that which the foreign copyright-management undertakings representing them would be liable to agree on directly?'

In its judgment making the reference, the national court observes that, according to Mr Verney, the rate of 8.25% of the operator's turnover required by Sacem may be regarded as abusive by comparison with

the much lower rates applied abroad and by comparison with the economic value of what is received in return. The national court also states that Sacem occupies a dominant position, that its activity covers the entire French territory, which constitutes a substantial part of the common market, and that the conduct complained of is liable to affect trade between the Member States. In those circumstances, it concludes, it is appropriate to accede to Mr Verney's request and bring the matter before the Court of Justice.

7. *Procedure*

The judgment making the reference was received at the Court Registry on 23 December 1987.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Mr Verney, the plaintiff in the main proceedings, represented by Jean Claude Fourgoux, of the Paris Bar, and by Alma Paffenholz-Bompart, of the Grasse Bar; by Mr Tournier, the defendant in the main proceedings, represented by Olivier Carmet, of the Paris Bar; by the Government of the French Republic, represented by Marc Giacomini and Régis de Gouttes, acting as Agents; by the Government of the Hellenic Republic, represented by Spyros Zissimpoulos, Georgios Crippa, Yannos Kranidiotis and Elli-Markella Mamouna, acting as Agents; by the Government of the Italian Republic, represented by Ivo M. Braguglia, avvocato dello Stato; and by the Commission of the European Communities, represented by its Legal Advisers Giuliano Marenco and Ida Langermann, 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. However, it asked the Commission to produce certain documents, and the Commission did so within the period set for that purpose.

II — Summary of the written observations submitted to the Court

1. *General observations*

By way of preliminary, the French Government and Mr Tournier observe that the questions appear clumsily constructed, in so far as they contain forms of words and descriptions of factual situations which have not yet been established by evidence before the national court. In a large measure they actually constitute the subject-matter of the dispute.

The Commission, however, states that in any event Sacem's dominant position, deriving from the concentration in the same hands of all individual copyrights, appears in effect to be incontestable.

Finally, according to Mr Tournier, the reference to the Court is inadmissible because the questions submitted can serve no purpose in the proceedings before the national court; they are wholly irrelevant. In that connection, he refers in particular to the judgment of the Court of 16 June 1981 in Case 126/80 *Salonia* [1981] ECR 1563.

2. *Abuse of a dominant position*

The observations concerning abuse of a dominant position may be divided into two groups. Some concentrate on the parameters which will enable the national court to determine whether the scales imposed by Sacem constitute an abuse. Others are more concerned with the question whether Sacem engages in forms of abuse other than the imposition of excessive rates.

(a) *The parameters*

According to Mr Verney, the arbitrary and unfair character of the royalties demanded by Sacem is apparent from the following factors:

The amount of the royalties charged in the other Member States is considerably lower than in France. In national proceedings and in the course of an investigation undertaken by the Commission of the European Communities, Sacem tried to confuse matters by submitting incorrect figures lower than the real ones and by claiming that the 'French' royalty was well within the European average. However, discothèque operators are in possession of figures that show that the rate applied in France results in royalties several times higher than those charged in the other Member States;

The scales applied to discothèques bear no relation to those negotiated with other, more powerful users of music, such as television and radio stations. Moreover, there is a considerable difference between the amounts actually paid by one discothèque and the next, and that difference cannot be accounted for by benefits provided to Sacem by the privileged discothèques;

The royalties charged bear no relation to the sums distributed to the authors. In the distribution of royalties, Sacem allocates large sums to the publishers; moreover, it retains large sums itself which are not distributed either to the authors or to the publishers. The sums due to the authors are thus very modest. Moreover, the distribution does not in any way reflect the frequency of the use of the protected works in discothèques, since the checks carried out by Sacem by means of 'surveys' are wholly inadequate.

According to Mr Verney, the scale is determined in a wholly arbitrary manner since the basis of assessment, namely the total receipts of the discothèque including VAT, bears no relation to the protected musical works used by the establishment in question.

Mr Tournier observes, first of all, that the application of Article 86 of the Treaty is not without difficulty. Although the Court of Justice has laid down certain criteria for the identification of an unfair price, Mr Tournier finds it difficult to see how those criteria, namely the size of the profit margin and the cost price, together with the prices charged for competing products, can be applied to the case of musical works.

He then discusses the discothèque operators' main complaint, the disparity between royalties in the Member States. The disparity is wholly relative. Although the rates in the EEC are different, the payment required by Sacem is comparable to that charged in Italy and Belgium. Even if it is conceded that there is a disparity, it is attributable to objective considerations peculiar to each Member State, for example:

the general level of protection granted to authors in the State concerned: France traditionally affords a high level of protection to authors;

the legal approaches applied: only France and Belgium require an additional payment for the mechanical reproduction right;

the level of the prices charged by discothèque operators: if customers are prepared to pay more, it is clear that the royalty paid to Sacem may be higher than those paid in cheaper countries;

the manner in which royalties are habitually charged: a copyright society may, for example, place the emphasis on collecting royalties from only certain categories of users.

Mr Tournier considers that to have regard to the disparity in the amounts of royalties would lead to unacceptable consequences. If it were considered that the highest payment was abusive and that the lowest was unlawful, the result would be 'downward harmonization' of which the victims would be the authors.

As regards the criteria relevant to this case, account should be taken of the importance of the music for the operator in question; the significance of the payment due in respect of the music by comparison with the other charges incurred by the operator; the amount of the payment required by the copyright society from other users of its repertoire in relation to the importance for them of the use of the music; the amount of the payments received in the State concerned by creators of works other than the authors of musical works; and the traditions, in particular the legal traditions, obtaining in the State in question. Relying on those criteria, Mr Tournier goes on to show that the royalty required from discothèques in France is perfectly proportional to the economic value of the benefit provided by Sacem.

As regards distribution of the sums received by Sacem, Mr Tournier contends that Sacem pays over the totality of sums received, after deduction of its management expenses, which, in the case of discothèques, amount to 33.31% of receipts. However, in order to effect distribution, Sacem must have at its disposal documents enabling it to determine the persons entitled to royalties in respect of the broadcast works. Distribution may thus be subject to delay, sometimes considerable delay. After 10 years, any royalties which it has not been possible to allocate are used to defray management expenses. That results in a corresponding diminution of the deductions made under that heading against receipts and an increase in the sums distributed to authors.

In their observations, the Italian, Greek and French Governments put forward arguments identical to those of Mr Tournier. They refer to the impossibility of determining the cost price and the profit margin in the case of a work of the imagination such as a musical work, a situation which renders the most useful criterion inoperative. Similarly, they emphasize that what is provided by Sacem to discothèque operators is of considerable value since music is the *raison d'être* of such establishments. The French Government infers that the level of the royalties must only be regarded as excessive if the expenditure in respect thereof shown in the operating accounts of discothèques exceeds what is usually regarded as a normal percentage, and it does not in this instance.

As regards the comparison between the scales applied in the various countries, the three governments consider that such a comparison cannot provide a valid criterion. The rates depend on the situation in the Member State in question, and in particular on the collection methods used, the prevailing customs and tastes, and the various traditions. In that connection, the French Government claims that there is no reason for asserting that the amount of the royalty in France, which reflects a long tradition of protection of intellectual property has impeded the growth of the discothèque business. It states that the rate of royalty applied is in fact 'in proportion' to the sums distributed to authors. The 33.38% deducted from the total sums collected reflects the size of the repertoires in question and the work involved in collecting the amounts due from a multitude of users spread over a large area.

Finally, the Italian Government expresses certain doubts concerning the applicability to this case of Article 86 of the Treaty. In its view, copyright-management undertakings do not carry on a commercial activity.

The Commission recognizes, in principle, the difficulties referred to by Mr Tournier and the governments concerning the possible parameters for establishing any abuse by Sacem of its dominant position. However, it does not consider that those difficulties render the criteria wholly inoperative. The Commission agrees that the royalties charged by a copyright society cannot be judged unfair on the basis of a comparison between the cost price and the royalty. A comparison with the rates applied in the other Member State can, however, be wholly relevant. To make a valid comparison it is necessary to use standard national discothèques as a basis and to simulate their operating results, trying to keep as close as possible to reality. That approach eliminates those factors which seem, at first sight, to render a comparison difficult, such as, for example, disparities between legislation and the differences between methods of collection. The Commission has carried out such a comparison in connection with an investigation made by it into the royalties charged to French discothèques by Sacem. If, following a comparison made on a uniform basis, a royalty proves to be several times higher in France than in the other Member States, that royalty may be considered to be unfair. Moreover, the Commission considers that in order to determine whether royalties are excessive, a comparison with the rates applied to other forms of exploitation of music may be relevant. However, in such a

case account would have to be taken of the importance of music in the type of operation concerned; it would be important, for example, to assess what proportion of the operator's receipts was attributable to music.

As regards the question of distribution, the Commission observes that the problems of relations between Sacem and the authors and of the relationship between Sacem's costs and the net remuneration of authors are distinct from the problem of possible abuse by Sacem in its dealings with discothèques. However, the fact cannot be ignored that inflated administrative expenses may be an indication of prodigality and mismanagement which might support the view that the royalty was excessive.

(b) *Other forms of abuse*

Mr Verney also criticizes Sacem for applying a single scale for its entire repertoire. Discothèque operators thus have to pay for the whole repertoire even though 90% of the music they use is from the English-speaking world. But Sacem refuses to give them special authorization for a sub-group, or several sub-groups, corresponding to the repertoire most used by discothèques. Mr Verney also observes that direct relations between discothèques and foreign copyright-management societies, with a view to obtaining from them more advantageous financial conditions, have proved impossible: those societies have simply referred the discothèque operators concerned to Sacem.

The French Government states that the imposition of a single royalty for the use of works of authors in Sacem's own repertoire and authors in foreign repertoires is justified by the complications and considerable extra cost of verification which would arise if the scales were diversified as a result of compartmentalization of the repertoire into various 'sub-groups'. It also observes that it is only for reasons of cost and efficiency that foreign societies do not issue licences direct to users in other countries. They certainly do not act in that way as a result of prior instructions from Sacem.

According to the Commission, the fact that the other societies refuse to give direct licences in respect of their repertoires would be attributable solely to abuse by Sacem of its dominant position in the case of a concerted practice between it and the other management societies. However, in this case it would appear that the refusal merely reflects the interests of the latter and is not the result of a concerted practice. As regards the question of authorizations for 'sub-groups', the Commission observes that such authorizations would not necessarily entail a lower royalty being paid to Sacem. The agreements between management societies require that the members of the foreign society be treated in the same manner as those of the local society.

3. *The reciprocal representation agreements*

Mr Verney criticizes Sacem and the other copyright societies for having partitioned the market, which makes it impossible for discothèque proprietors to approach a society whose rates are more reasonable for

the worldwide repertoire or a part thereof. The network of reciprocal representation contracts leads to a *de facto* monopoly for Sacem over copyright management in French territory.

Mr Tournier contends that it is the discothèque operators themselves who benefit from the system of reciprocal representation agreements. Their contracts with Sacem give them an opportunity of choosing from a very extensive repertoire the works they need in order to satisfy their customers at any time. If a foreign copyright-management society did not conclude a reciprocal representation agreement with Sacem, it would itself have to manage its repertoire in France, a task which would be practically impossible and extremely costly. Management on that basis would lead to discothèques' paying royalties higher than those paid to Sacem. According to Mr Tournier, operators in a Member State do have the possibility of direct access to foreign repertoires, but a direct link between the operators and the foreign societies gives rise to such difficulties of verification and collection and such inconvenience for the operators themselves and for the foreign societies that the latter generally prefer indirect management by Sacem. In those circumstances the conduct of the management societies can in no way be considered to constitute agreements or concerted practices within the meaning of Article 85 of the Treaty.

The Italian and French Governments and the Commission support Mr Tournier's arguments. In their opinion the reciprocal representation contracts contribute to rational and effective control of the use of musical works and to more rapid and less costly recovery of royalties. It is clear that foreign copyright societies do not issue authorizations direct to users because the arrangements for the issue thereof and for verification would make them unprofitable in practice. Territorial organization of the collection of copyright is in the interests of all the societies, and of all users.

The Commission adds that at its request, at the beginning of the 1970s, copyright societies eliminated the exclusivity clause traditionally included in reciprocal representation contracts. However, the situation has not changed. The management societies continue to entrust the protection of their members' rights in foreign territories only to the national management society. That practice is attributable, however, to the societies' concern to ensure efficient management and not to a concerted practice.

4. *Articles 30 and 59 of the Treaty*

According to Mr Verney, in so far as copyright has become a marketable commodity, national legislation designed to give it a protected status, and its application by the national courts, come within Article 30 of the Treaty as regards copyright itself and Article 59 as regards the services provided by management societies.

Mr Tournier contends that the French rules are not caught by Articles 30 and 59 of the Treaty. The royalty at issue is not levied in respect of the movement of phonograms or

of their transfer from one country to another but constitutes a basis of exploitation for public broadcasting. The collection of the royalty does not influence directly or indirectly the pattern of trade between Member States. The Court itself stated in its judgment of 9 April 1987 *(Basset), supra)* that a royalty forming part of the copyright fee for public performance of a recorded musical work does not fall within the measures having equivalent effect prohibited by Article 30 of the Treaty.

The Greek, Italian and French Governments and the Commission also state that Articles 39 and 59 are not applicable. The Commission and the French Government add that in its question the national court incorrectly invokes the principle of exhaustion of rights. The object of that principle is to prevent the proprietor of the right from being able, as a result of the territoriality of national legislation, to benefit several times from the profit resulting from the same sale of the article in which his creative effort is embodied. In the present case there is no question of a sale — what is involved is a repeated event, public performance. The right in respect thereof does not become exhausted, as is apparent from the judgment of 18 March 1980 in Case 62/79 *Coditel I* [1980] ECR 881 and from the judgment in *Basset*, cited above.

5. *The answers proposed by the Commission*

In the light of the foregoing considerations, the Commission suggests that the Court should give the following answers to the questions submitted by the national court:

(1) Article 86 of the Treaty must be interpreted as meaning that the charging by a copyright-management society occupying a dominant position in a substantial part of the common market of royalties several times higher than those charged by other societies in other Member States without any objectively justifiable reason may constitute an unfair trading condition.

(2) Article 85 must be interpreted as not prohibiting as such agreements between two copyright-management societies for the reciprocal protection of their respective repertoires in each other's territory but as prohibiting an exclusivity clause or a concerted practice preventing a society, as principal, from granting licences in respect of its repertoire in the territory of the other either directly or through another society. Such a concerted practice cannot, however, be inferred from a mere refusal by foreign societies to grant direct licences for their repertoires in French territory.

(3) Article 86 must be interpreted as meaning that the refusal by other societies to grant direct licences for their repertoires in the territory of another copyright management society does not constitute an abuse of a dominant position by the latter.

(4) Article 86 must be interpreted as meaning that the fact that a copyright-management society grants a general licence for the repertoire managed by it does not constitute an abuse of a dominant position.

(5) Articles 30 and 59 must be interpreted as not prohibiting national rules which treat as an infringement of copyright the performance in public without payment of royalties of musical works by means of sound-recording media for which royalties have already been paid to the author in respect of the mechanical reproduction right. Any abusive or discriminatory character of the royalties or other bases for the exercise of copyright, attributable not to the rules but to the authors or to the society to which they entrust the management of their rights, must be assessed in the light of the competition rules applicable to undertakings, namely Articles 85 and 86 of the Treaty.

T. Koopmans
Judge-Rapporteur