1. Sound recordings, even if incorporating protected musical works, are products to which the system of free movement of goods provided for by the EEC Treaty applies.

2. The expression "protection of industrial and commercial property", occurring in Article 36 of the EEC Treaty, includes the protection conferred by copyright, especially when exploited commercially in the form of licences capable of affecting distribution in the various Member States of goods incorporating the protected literary or artistic work.

3. The proprietor of an industrial or commercial property right protected by the law of a Member State cannot rely on that law to prevent the importation of a product which has been lawfully marketed in another Member State by the proprietor himself or with his consent. The same applies as respects copyright, commercial exploitation of which raises the same issues as that of any other industrial or commercial property right. Accordingly neither the copyright owner or his licensee, nor a copyright management society acting in the owner's or licensee's name, may rely on the exclusive exploitation right conferred by copyright to prevent or restrict the importation of sound recordings which have been lawfully marketed in another Member State by the owner himself or with his consent.

4. The existence of a disparity between national laws which is capable of distorting competition between Member States cannot justify a Member State's giving legal protection to practices of a private body which are incompatible with the rules concerning the free movement of goods.

Articles 30 and 36 of the EEC Treaty preclude the application of national legislation under which a copyright management society empowered to exercise the copyrights of composers of musical works reproduced on gramophone records or other sound recordings in another Member State is permitted to invoke those rights where those sound recordings are distributed on the national market after having been put into circulation in that other Member State by or with the consent of the owners of those copyrights, in order to claim the payment of a fee equal to the royalties ordinarily paid for marketing on the national market less the lower royalties paid in the Member State of manufacture.

In Joined Cases 55 and 57/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesgerichtshof [Federal Court of Justice] for a preliminary ruling in the actions pending before that court between

MUSIK-VERTRIEB MEMBRAN GMBH, Hamburg (Case 55/80),

K-TEL INTERNATIONAL, Frankfurt (Case 57/80)

and

GEMA — GESELLSCHAFT FÜR MUSIKALISCHE AUFFÜHRUNGS- UND MECHANISCHE VERVIELFÄLTIGUNGSRECHTE (a German copyright management society), Berlin,

on the interpretation of Article 30 *et seq.* of the EEC Treaty,

THE COURT

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

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

gives the following

JUDGMENT

Facts and Issues

The orders making the references, 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 written procedure

(1) *(a) Case 55/80*

The undertaking Musik-Vertrieb membran GmbH imported sound recordings (records and cassettes) from other countries, including Member States of the European Community, in which those products were in free circulation, into the Federal Republic of Germany. The sound recordings were of musical works protected by copyright. Licences were granted in the country of manufacture for the reproduction and distribution of the protected musical works and the appropriate royalties were paid.

GEMA obtained a judgment from the Landgericht [Regional Court] Hamburg ordering Musik-Vertrieb membran to supply detailed information about the sound recordings imported by it into Germany from abroad since 1 April 1973. GEMA had based its application on Article 87 of the Copyright Law (Urheberrechtsgesetz) on the ground that the defendant had infringed the distribution rights of the authors represented by GEMA and was therefore liable to pay damages equivalent to the difference between the licence fee already paid abroad and the royalty in force in Germany. It was in order to be able to put a figure to that difference that GEMA initially confined itself to requiring information.

When ruling on the appeal by the defendant the Hanseatisches Oberlandesgericht upheld the judgment given at first instance.

(b) Case 57/80

In 1974 the undertaking K-tel International imported records from the United Kingdom into the Federal Republic on which protected musical works were recorded. A licence to reproduce and distribute the protected musical works had been granted in the United Kingdom by the management company "Mechanical Copyright Protection Society Ltd. (MCPS)", the copyright owner, to a sister company of K-tel, K-tel International Ltd. The English firm paid a royalty to MCPS. The amount of that royalty is the same as the rate demanded by MCPS for records intended to be marketed in the United Kingdom.

MCPS tried without success to obtain payment in the United Kingdom by K-tel International Ltd., in regard to the records exported to Germany, of the difference between the royalty fee paid in the United Kingdom and that charged in Germany.

GEMA obtained a judgment from the Landgericht Frankfurt ordering K-tel to pay it in regard to the records imported from Germany the difference between the royalty fee paid in the United Kingdom to MCPS by K-tel International Ltd., and that charged in Germany. GEMA had sought that sum as damages payable under Article 97 of the Copyright Law (Urheberrechtsgesetz) on the ground that K-tel had infringed the distribution rights of the authors represented by GEMA.

When ruling on the appeal by the defendant the Oberlandesgericht Frankfurt upheld the judgment given at first instance.

(2) In both cases the courts held that the right to distribute records in the Federal Republic of Germany was not exhausted by their entry into circulation in the United Kingdom and that the provisions of the EEC Treaty on the free movement of goods did not prevent the difference between the royalty fees from being claimed; more particularly, it was not a matter of a measure having an effect equivalent to a quantitative restriction. Accordingly, in Case 55/80, they first upheld the claim for information.

(3) The two undertakings Musik-Vertrieb membran GmbH and K-tel International (hereinafter called "the appellants") appealed against those judgments on a point of law before the Bundesgerichtshof.

By two orders of 19 December 1979 the Bundesgerichtshof stayed the proceedings and in both cases referred the

following question to the court for a preliminary ruling:

"Is it compatible with the provisions concerning the free movement of goods (Article 30 *et seq.* of the EEC Treaty) for a management company entrusted with the exploitation of copyrights to exercise the exclusive rights held by the composer in Member State A to the transcription of his musical works onto sound recordings, their reproduction and marketing in such a way as to require, in respect of the marketing in Member State A of sound recordings which have been produced and placed on the market in Member State B — the composer's authorization being however restricted to Member State B against payment of a licence fee which is calculated on the quantity and final selling price relevant to that Member State — a payment which is equal to the customary licence fee in respect of production and marketing in Member State A, but which takes into account the (lower) licence fee which has already been paid in respect of production and marketing in Member State B?"

The orders making the reference were received at the Court Registry on 13 February 1980.

By order of 2 July 1980 the Court decided to join Cases 55/80 and 57/80 for the purposes of the oral procedure and the judgment.

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.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the appellants, represented by Deringer, Tessin, Herrmann and Sedemund, of the Cologne Bar, by GEMA, the respondent to the appeal on a point of law, represented by Oliver Brändel, an Advocate at the Bundesgerichtshof, by the Government of the Kingdom of Belgium, by the Government of the Italian Republic and by the Commission of the European Communities, represented by Götz zur Hausen, a member of its Legal Department.

II — Summary of the written observations submitted to the Court

(1) As to the rules applicable to copyright

The *Commission* summarizes the laws and regulations applying to the reproduction and distribution of sound recordings of musical works.

Legislative provisions

Federal Republic of Germany

Copyright in musical works in governed by the Copyright Law or Urheberrechtsgesetz (hereinafter referred to as "the UrhRG") of 9 September 1965 (Bundesgesetzblatt I, p. 1273 — Bundesgesetzblatt III, p. 440-1). That law contains provisions relating to the so-called exploitation rights of an author. Article 15 thereof provides that an author has the exclusive right to exploit his work in a material form. That right includes the right of reproduction referred to in Article 16 of the UrhRG. Reproduction also covers sound recordings of the work such as recordings on record. The right of exploitation further includes the right of distribution referred to in Article 17 of the UrhRG, that is to say, the right to offer for sale or put intro circulation the original work of reproduction copies thereof.

Article 31 of the UrhRG provides that an author may grant a third party the right to exploit his work. According to Article

32 that right of utilization [Nutzungsrecht] may be made subject, *inter alia*, to a territorial restriction. The law does not contain any provisions on the remuneration payable in return for the grant of rights of utilization.

Article 17 (2) of the UrhRG states the principle of the exhaustion of the right of distribution by virtue of which products put into circulation with the authorization of the person who owns that right in the Federal Republic may be redistributed. Finally, Article 97 of the UrhRG indicates the various remedies available to an author should his copyright be infringed. The author may require the removal of the infringement of his copyright, an end to the infringing activity and even damages in the case of deliberate or negligent breach of the law.

A law introduced at the same time as the Copyright Law governs the activity of "management companies". The Law on the Protection of Copyright and Related Rights of 9 September 1965 (Bundesgesetzblatt I, p. 1294 — Bundesgesetzblatt III, p. 440-8) provides that authorization is required for the exercise of one or more rights based on the law on copyright on behalf of one or more authors with a view to common exploitation and management. By virtue of Article 11 of the same law a management company is bound in respect of the rights which it holds to grant rights of utilization on reasonable conditions to any person so requiring. Those rights are granted in return for fees fixed in the scales laid down and published by the management company.

GEMA is the only management company in Germany which grants the right to exploit copyright in the form of the manufacture and distribution of records.

United Kingdom

Copyright is governed by the Copyright Act of 1956 which defines copyright as being *inter alia* the right to reproduce a work in a material form, to distribute it and where appropriate to authorize other persons so to do (Sections 1 and 2).

The provisions contained in Section 8 of the Copyright Act lay down special arrangements for copyright in the recording of musical works for which they make provision for a statutory licence. An author's copyright in a musical work is not infringed by the making of a sound recording if the following conditions are fulfilled: records of the work must previously have been made, with a view to sale, by or with the licence of the author; the manufacturer must give the author notice of his intention to reproduce his work for the purposes of retail sale and pay him a licence fee of 6.25% of the ordinary retail selling price of the record or the minimum royalty also laid down by the Act.

The Act therefore entitles anyone to exploit artistic creations provided certain conditions are fulfilled. In practice that system means that the licence fee for the manufacture and distribution of records is always fixed at 6.25% of the final selling price; it means that no licensee is willing to agree a higher royalty with the author since he has only to wait until the record has been manufactured by someone else in order to be able to reproduce the protected work on payment of the royalty provided for by the Act.

Section 36 governs the assignment of copyright (not to be confused with a grant of a licence). According to

subsection (2) thereof an assignment may be limited to certain countries. There is no provision for a territorial restriction within one country.

As regards the contractual relations of the management companies

Every management company in the Community which exercises rights of mechanical reproduction and of distribution for musical works on behalf of authors is a member of the "Bureau international des sociétés gérant les droits d'enregistrement et de reproduction mécanique". That association was created in 1929 under the name of the "Bureau International de l'Edition Mécanique" (BIEM). An agreement which became known as the "Standard agreement" was negotiated between BIEM and the "International Federation of the Phonographic Industry" (IFPI). Every management company refers to that standard contract when concluding management contracts with record manufacturers.

In regard to the amount of the licence fee paid by a manufacturer, licence contracts concluded with record manufacturers are governed by the *principle of the country of destination.* When the calculation basis for the fees is drawn up a distinction is made between record sales on national territory and record sales abroad. In the case of exports between European countries the basis for calculation is the sale price ruling in the country of destination (Article V (7) of the BIEM standard contract). The fee rate for continental Europe is fixed at 8% of that selling price for each record, while the fee may not be lower than a minimum amount.

The various management companies are bound amongst themselves by contracts covering the mutual protection of the rights which they exercise. The conclusion of those contracts arises from the statute of the BIEM. One of BIEM's tasks is to draw up contracts intended to ensure that a management company may, in its own field of activity, also secure the protection of rights exercised by another management company.

(2) As to the question raised by the Bundesgerichtshof

The *appellants* point out that even if it were accepted that GEMA is entitled under German law to prohibit the importation of sound recordings or to make their importation subject to the payment of an additional fee, such an interpretation of German copyright law as well as the exercise of those rights by GEMA would be contrary to the higher rules of law constituted by Community law, in particular Articles 30 and 36 of the Treaty.

It is no longer disputed that the principle laid down in Case 78/70, *Deutsche Grammophon* v *Metro* (Judgment of 8 June 1971, ECR 487) also applies to copyright; it is expressed as follows:

"It is in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a Member State, in such a way as to prohibit the sale in that State of products placed on the market by him or with his consent in another Member State solely because such distribution did not occur within the territory of the first Member State."

That case-law was confirmed by the judgments of 31 October 1974 in Case 15/74, *Centrafarm* v *Sterling Drug*

([1974] ECR 1147) and in Case 16/74, *Centrafarm* v *Winthrop* ([1974] ECR 1183).

That view is not challenged by GEMA which did not, moreover, expressly assert its right to prohibit the circulation of the sound recordings in question. GEMA believes, however, that the principle elaborated by the Court does not apply to the claim for the difference between the (lesser) licence fee received in England and the higher, corresponding licence fee payable in the Federal Republic of Germany; in its opinion it is necessary to create equivalent conditions of competition for importers of sound recordings and undertakings making those sound recordings on national territory.

On the other hand, the appellants refer to the case-law of the court to argue that it is immaterial in the present case whether or not they are treated in the same way as the manufacturers of sound recordings on the national territory who are bound to pay, in total, the same royalty (Case 8/74, *Dassonville*, judgment of 11 July 1974 [1974] ECR 837; Case 41/76, *Donckerwolcke*, judgment of 15 December 1976 [1976] ECR 1921; Case 13/77, *Inno* v *ATAB*, judgment of 16 November 1977, [1977] ECR 2115; Case 120/78, *REWE*, judgment of 20 February 1979, [1979] ECR 649). Rather, what is decisive is the effect which such a measure has on inter-State trade.

In the present case the act of requiring a supplementary royalty without doubt constitutes an obstacle to the importation of the sound recordings in question. Those sound recordings thus lose the cost advantage based on the market relations existing in another Member State. The offsetting of the differences in price existing on the national markets in question thereby becomes impossible, which tends to lead to the partitioning of those national markets.

The appellants add that if the German legislation is interpreted in conformity with Community law it is not possible to infer from that legislation a right to the payment of the difference. Since GEMA is not entitled to *prohibit* the importation of the sound recordings in question, the distribution of them in the Federal Republic of Germany appears to be lawful. However, a right to damages is recognized under the terms of Article 97 of the German law on copyright only to the extent to which the copyright has been unlawfully infringed, that is to say, in the present case, if the distribution of the sound recordings in Germany had been unlawful.

They point out that GEMA has relied on the Commission's decision of 2 June 1971 (Journal Officiel 1971, No L 134, p. 15) by which the Commission decided with regard to GEMA that that decision did not prevent it from demanding, where appropriate, from importers the difference between the lesser licence fee due in the country of origin and the higher licence fee usually in force in the Federal Republic of Germany. However, that decision was made in the context of a procedure brought under Regulation No 17 and therefore based on Articles 85 and 86 of the EEC Treaty.

In the view of the appellants the claiming of a supplementary licence fee cannot be justified in regard to Article 36 of the Treaty. Such a claim certainly does not belong to the specific subject-matter of the right to protection, but forms part of the exercise of that right. That follows from the judgment of the Court of 18 March 1980 in Case 62/79, *Coditel* v *Ciné Vog* ([1980] ECR 881).

Consequently, it is likewise immaterial to examine whether the higher royalty

chargeable in a Member State (in this case the Federal Republic of Germany) is tied to a higher royalty rate or to the fact that the retail selling prices used as a basis for calculation are higher than in England, for example. To the extent to which the royalty rates are different, the charging of a back-payment at the time of importation is in any event contrary to Article 30 of the EEC Treaty. Inasmuch as the difference in royalty as an absolute value is based on the differences found to exist in the bases of calculation — the retail selling prices — the agreement made between GEMA and MCPS of England, by which the licence fees chargeable in each case cover only the placing of the recordings in circulation in that area covered by the management companies concerned, involves the continued partitioning of the national markets.

GEMA, the respondent to the appeal on a point of law, emphasizes that it is not seeking to prevent importation of the sound recordings in question. Its objective is rather that, where the exploitation of a musical work in the Federal Republic of Germany is concerned, in the case of sound recordings made abroad the same royalties should be paid to the author as must be paid by any person who manufactures the same sound recordings with the author's consent in the Federal Republic of Germany and then puts them into circulation.

The claiming of a back-payment equivalent to the difference between the royalties is compatible with the principles stated in Article 30 *et seq.* of the Treaty. GEMA states that satisfaction of such a claim and, *a fortiori*, of the claim for information, as a preparatory measure, cannot prevent the free movement of goods.

In support of that argument GEMA first sets out the terms governing the exploitation of musical works protected by copyright. In spite of the uniform percentage of royalties the amounts received are very different from one Member State to another owing to appreciable differences in the price of records. In the United Kingdom, because of legislation on prices, the selling prices for sound recordings are lower than in the Federal Republic of Germany; that factor has an effect, therefore, on royalties in the two countries. The royalty is calculated on the basis of the licence rates applicable in the country of manufacture. However, if the applicant is planning to make exports abroad, the management company is bound to grant a marketing licence in accordance with the scales in force in the country of destination. That rule is being circumvented by the appellants.

GEMA argues that it is not appropriate to deprive the author of a share in the higher return attainable by those means because a fair remuneration for the intellectual content of a protected work must depend on the price which the consumer is willing to pay for the purchase of a copy. If, therefore, the amount obtainable as a result of sale within the Federal Republic is *higher* than had been assumed at the time of the payment of the royalty — which was calculated on the basis of marketing in Great Britain — the *principle of equivalence* itself requires that the royalty should be adapted to the profits which are actually obtainable.

The principle of the free movement of goods may not have the effect of diminishing the right of an author to receive fair remuneration for his intellectual effort for the benefit of those who when exploiting protected works take advantage of the differences existing between national price structures in order to make additional profits. It is

part of the very nature of copyright that the author should be entitled to have and retain the benefit of his intellectual effort.

If authors were to be denied the right to payment of the difference in royalties an obstacle to the distribution of works protected by copyright would thereby be created. In the future authors would be forced to grant performing and distribution right only in the Member State with the highest royalties.

The extra payment claimed by GEMA and the compatibility of such a claim with Article 30 *et seq.* of the Treaty stems after all from reliance on a factual situation approved by the EEC Commission. The practical arrangements for collecting the extra royalties are based on the Commission's decision of 2 June 1971 (cited above). GEMA should have been able to rely on the content of that decision.

GEMA then goes on to examine the question whether in the case of a limited territorial licence the granting of a licence in a Member State automatically involves the exhaustion of copyright in the other Member States. It believes that even if that question were answered in the affirmative that would not mean that the author, by analogy with the exhaustion of his right to protection in the whole of the Common Market, also loses the right to claim a royalty equivalent to that paid in the country of distribution. it argues, however, that such a far-reaching effect of the exhaustion principle would not be justified in relation to copyright since an author's ability to grant a right of exploitation limited in time, in space or in content is part of the essential nature of copyright.

That view is borne out by the judgment of 18 March 1980 in Case 62/79, *Coditel* v *Ciné Vog* ([1980] ECR 881) which states, *inter alia*: "... 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 *Government of the Italian Republic* observes that GEMA has brought an action against two legal entities which are third parties in relation to the licence contracts.

It gives a summary of the Italian legislation on copyright from which it emerges that an author has the exclusive right to introduce reproductions made abroad into the territory of the State for the purpose of putting them into circulation.

The present dispute is not concerned with the prohibition on the importation of goods but only with a debt consisting of supplementary royalties. Therefore it is doubtful whether Article 30 *et seq.* of the Treaty and the case-law of the Court relevant thereto may have application to this case.

The breaking-up of the Common Market into several national markets as the result of territorial restrictions on intellectual property rights cannot be regarded as a "means of arbitrary discrimination" or as "a disguised restriction on trade between Member States" (Article 36 of the EEC Treaty). That situation is only the reflection of the particular manner in which the bodies of copyright laws are currently arranged.

In conclusion, the Italian Government proposes that the question referred to the Court should be answered in the affirmative.

The *Government of the Kingdom of Belgium* states that an author's remuneration is tied to the selling price of the sound recordings. Consequently an author's remuneration varies with the prices of the sound recordings in the various Member States. If, in the case of imports into a country in which prices are higher, an author is barred from claiming a payment in addition to the lower one previously received in the country of origin, copyright is infringed.

The Belgian Government adds that the sound recordings in suit in Case 57/80 were imported from the United Kingdom, where the author's payment is calculated on a statutory scale (Copyright Act, Section 8). If the author could not therefore claim an additional payment in the other countries of the Community on the basis of the rates freely agreed as is the practice in those countries, that would mean that the statutory rates of the United Kingdom would be extended throughout the Community, which would be contrary to Article 13 (2) of the Berne Convention for the Protection of Literary and Artistic Works (1948 Brussels version), of which all the Member States are signatories.

It concludes that the question should be answered in the affirmative.

The *Commission* submits that the recognition of a right to the payment of the difference between the licence fee normally paid in Germany and that previously paid in the country of manufacture constitutes a measure having an effect equivalent to a quantitative restriction.

The right relied on by GEMA in fact flows directly from the right to prevent the distribution of reproduction copies of a work, which is claimed on the basis of copyright. In actual fact it amounts to a claim for damages. It is certainly not a right to remuneration founded upon the licence contract concluded with the manufacturer of the sound recordings which is claimed in the present case.

An obligation on the importer to make good the damage suffered would affect the free movement of goods just as seriously as a prohibition on marketing. The importer would lose the possibility of importing into a Member State, freely and unhindered, goods bought in another Member State where they were in free circulation.

Furthermore, the derogation contained in the first sentence of Article 36 of the Treaty cannot have application in the present case.

Although copyright may not be regarded as strictly comparable to industrial or commercial property, nevertheless there is justification for including it by analogy within the scope of application of Article 36, at least when the copyright work is produced in a material form which is dealt in commercially and is consequently caught by the provisions on the free movement of goods.

On the other hand, the Court's case-law establishes the principle that the proprietor of an industrial and commercial property right which is protected by the legislation of a Member State may not rely on that legislation to resist the importation of a product which has been lawfully placed on the market in another Member State by or with the consent of the proprietor himself.

The Commission believes that the same principle must likewise apply in regard to copyright inasmuch as an author exercises his right when he exploits his work by manufacturing and distributing reproduction copies thereof. In such cases an author should not be treated any differently from an inventor exploiting his patent in the same fashion.

The Commission further submits that actions for a declaration that rights have been infringed are not covered in the present case by Article 36. The bringing of such an action against reproduction copies *lawfully put into circulation* is no more part of the "subject-matter" of copyright than the prohibition on the further marketing of those products.

The Commission points out that a judgment of the Court of Appeal in Brussels came to the conclusion which it considers to be correct in the present case (judgment of 26 October 1976, *SABAM* v *TIME*, Journal des Tribunaux 1979, p. 407).

In addition to giving reasons based on copyright, the judgment of the Oberlandesgericht expresses the consideration that the offsetting of the difference between licence fees is in any event justified by the fact that it helps to eliminate disparities in conditions of competition which exist between the different national markets. By taking that line of argument, so the Commission believes, that decision misconstrues the basic principle of the Common Market. Without doubt goods are produced and marketed within the Community under different conditions, but the Community has given itself the specific task of abolishing those differences by ensuring, mainly by virtue of the establishment of the free movement of goods, that the production and sale thereof is governed by economic factors alone and is not artificially controlled by Government measures such as those referred to in Article 30 or by the action of private traders in the nature of restrictions on competition. The existence of different market conditions is the last argument which may be used to justify measures which have a restrictive effect on trade.

The Commission's decision of 2 June 1971 concerning GEMA (cited earlier) was adopted pursuant to Article 86 of the Treaty. The question whether copyright is exhausted in another Member State was left open expressly. For the rest that decision may not, for legal reasons, in any way affect the validity of Article 30 *et seq.* of the Treaty.

In conclusion, the Commission proposes that the Court should answer the question referred to it as follows:

"That a copyright management association empowered to enforce such rights should have the right in a Member State to take action in respect of infringement of copyright against anyone who markets products in that State which were put into circulation in another Member State by or with the consent of the author is contrary to the provisions on the free movement of goods within the Common Market".

III — Oral procedure

At the hearing on 8 October 1980, the appellants represented by Arved Deringer, GEMA, represented by Oliver Brändel, the Government of the French

Republic, represented by Henri Marty-Gauquie, and the Commission of the European Communities, represented by Mr Götz zur Hausen, submitted oral argument.

The *French Government* pointed out that it is necessary to distinguish the copyright of an author of an artistic work from that of a manufacturer of sound recordings. As the rights of a manufacturer are restricted to marketing, his rights are therefore comparable to industrial and commercial property rights. An author, on the other hand, has a moral right which, irrespective of any economic purpose, may lead him to refuse to allow his work to be exported to a given geographical area or, possibly, to impose a number of conditions on such exportation according to his own chosen criteria.

The French Government then went on to observe that whereas the majority of the parties to the Berne Convention are governed by the system of contractual royalties, Article 13 (1) of the Convention provides that contracting parties may, by way of derogation from the Convention, institute in their legal systems a scheme for statutory licences with a maximum rate of remuneration.

The United Kingdom, for example, has instituted a scheme of statutory royalties. However, Article 13 of the Berne Convention also provides that... "such ... conditions shall apply only in the countries which have imposed them".

The Advocate General delivered his opinion at the sitting on 11 November 1980.

Decision

1 By two orders dated 19 December 1979, which were received at the Court on 13 February 1980, the Bundesgerichtshof [Federal Court of Justice] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 30 *et seq.* of the Treaty.

2 That question has been raised in the context of two disputes between GEMA, a German copyright management society, and two undertakings which imported into the Federal Republic of Germany sound recordings of protected musical works. In Case 55/80 the imports consisted of gramophone records and musical tape cassettes from various countries, including other Member States of the Community and in Case 57/80 the importation consisted of a consignment of 100 000 gramophone records from the United Kingdom. It is common ground that the sound recordings from other Member States had been manufactured and marketed in those Member

States with the consent of the owner of the copyright in the musical works concerned, and that the requisite licences had been granted by those owners and the appropriate royalties had been calculated only on the basis of distribution in the country of manufacture.

3 GEMA contends that the importation of those sound recordings into German territory constitutes an infringement of the copyrights which it is responsible for protecting in the name of the owners of those rights. As a result it considers that it is entitled to claim payment of the royalties payable on sound recordings put into circulation on German territory less the amount of the lower royalties already paid in respect of distribution in the Member State of manufacture.

4 The Bundesgerichtshof has stated that under German law the fact that the composers involved consented to their musical works' being reproduced in another Member State of the Community and put into circulation on the territory of that Member State in return for a royalty calculated according to the number of copies sold and the retail selling price in that Member State does not prevent them from claiming, pursuant to the exclusive exploitation right which they hold on the German market when sound recordings are distributed on that market, the royalties ordinarily paid on that market, which are calculated according to the number of copies sold and the retail selling price prevailing on the domestic market, less the royalties already paid in respect of distribution in the Member State of manufacture.

5 However, the national court questions whether such an exercise of copyright is compatible with the provisions of the Treaty relating to the free movement of goods. It has brought the matter before the Court in order to clarify this point.

6 From the papers placed before the Court it seems that in the two disputes before the German courts GEMA based its case on Article 97 of the German Law on Copyright (Urheberrechtsgesetz), a provision setting forth the various remedies which are available to an author should his copyright be infringed and which include actions requiring the person infringing the copyright to put an end to the infringement, to desist therefrom and to pay damages.

7 In those circumstances the question submitted by the national court is in effect whether Articles 30 and 36 of the Treaty must be interpreted as precluding the application of national legislation under which a copyright management society empowered to exercise the copyrights of composers of

musical works reproduced on gramophone records or other sound recording in another Member State is permitted to invoke those rights where such sound recordings are distributed on the national market after having been put into circulation in the Member State of manufacturer by or with the consent of the owners of those copyrights in order to claim payment of a fee equal to the royalties ordinarily paid for marketing on the national market less the lower royalties paid in the Member State of manufacture for marketing in that Member State alone.

8 It should first be emphasized that sound recordings, even if incorporating protected musical works, are products to which the system of free movement of goods provided for by the Treaty applies. It follows that national legislation whose application results in obstructing trade in sound recordings between Member States must be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty. That is the case where such legislation permits a copyright management society to object to the distribution of sound recordings originating in another Member State on the basis of the exclusive exploitation right which it exercises in the name of the copyright owner.

9 However, Article 36 of the Treaty provides that the provisions of Article 30 to 34 shall not preclude prohibitions or restrictions on imports justified on grounds of the protection of industrial and commercial property. The latter expression includes the protection conferred by copyright, especially when exploited commercially in the form of licences capable of affecting distribution in the various Member States of goods incorporating the protected literary or artistic work.

10 It is apparent from the well-established case-law of the Court and most recently from the judgment of 22 June 1976 in Case 119/75 *Terrapin Overseas Ltd.* [1976] ECR 1039 that the proprietor of an industrial or commercial property right protected by the law of a Member State cannot rely on that law to prevent the importation of a product which has been lawfully marketed in another Member State by the proprietor himself or with his consent.

11 In the proceedings before the Court the French Government has argued that that case-law cannot be applied to copyright, which comprises *inter alia* the right of an author to claim authorship of the work and to object to any distortion, mutilation or other alteration thereof, or any other action in relation to the said work which would be prejudicial to his honour or reputation. It is contended that, in thus conferring extended protection, copyright is not comparable to other industrial and commercial property rights such as patents or trade-marks.

12 It is true that copyright comprises moral rights of the kind indicated by the French Government. However, it also comprises other rights, notably the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties. It is this economic aspect of copyright which is the subject of the question submitted by the national court and, in this regard, in the application of Article 36 of the Treaty there is no reason to make a distinction between copyright and other industrial and commercial property rights.

13 While the commercial exploitation of copyright is a source of remuneration for the owner it also constitutes a form of control on marketing exercisable by the owner, the copyright management societies acting in his name and the grantees of licences. From this point of view commercial exploitation of copyright raises the same issues as that of any other industrial or commercial property right.

14 The argument put to the Court by the Belgian and Italian Governments that in the absence of harmonization in this sector the principle of the territoriality of copyright laws always prevails over the principle of freedom of movement of goods within the Common Market cannot be accepted. Indeed, the essential purpose of the Treaty, which is to unite national markets into a single market, could not be attained if, under the various legal systems of the Member States, nationals of those Member States were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between Member States.

15 It follows from the foregoing considerations that neither the copyright owner or his licensee, nor a copyright management society acting in the owner's or licensee's name, may rely on the exclusive exploitation right conferred by copyright to prevent or restrict the importation of sound recordings which have been lawfully marketed in another Member State by the owner himself or with his consent.

16 GEMA has argued that such an interpretation of Articles 30 and 36 of the Treaty is not sufficient to resolve the problem facing the national court since GEMA's application to the German courts is not for the prohibition or restriction of the marketing of the gramophone records and tape cassettes in question on German territory but for equality in the royalities paid for any distribution of those sound recordings on the German market. The owner of a copyright in a recorded musical work has a legitimate interest in receiving and retaining the benefit of his intellectual or artistic effort regardless of the degree to which his work is distributed and consequently it is maintained that he should not lose the right to claim royalties equal to those paid in the country in which the recorded work is marketed.

17 It should first be observed that the question put by the national court is concerned with the legal consequences of infringement of copyright. GEMA seeks damages for that infringement pursuant to the applicable national legislation and it is immaterial whether the quantum of damages which it seeks is calculated according to the difference between the rate of royalty payable on distribution in the national market and the rate of royalty paid in the country of manufacture or in any other manner. On any view its claims are in fact founded on the copyright owner's exclusive right of exploitation, which enables him to prohibit or restrict the free movement of the products incorporating the protected musical work.

18 It should be observed next that no provision of national legislation may permit an undertaking which is responsible for the management of copyrights and has a monopoly on the territory of a Member State by virtue of that management to charge a levy on products imported from another Member State where they were put into circulation by or with the consent of the

copyright owner and thereby cause the Common Market to be partitioned. Such a practice would amount to allowing a private undertaking to impose a charge on the importation of sound recordings which are already in free circulation in the Common Market on account of their crossing a frontier; it would therefore have the effect of entrenching the isolation of national markets which the Treaty seeks to abolish.

19 It follows from those considerations that this argument must be rejected as being incompatible with the operation of the Common Market and with the aims of the Treaty.

20 GEMA and the Belgian Government have represented to the Court that, in any event, a system of free movement of sound recordings may not be permitted as regards sound recordings manufactured in the United Kingdom because the provisions of section 8 of the United Kingdom Copyright Act 1956 have the effect of instituting a statutory licence in return for payment of a royalty at a reduced rate and the extension of such a statutory licence to other countries is contrary to the provisions of the Berne Convention for the Protection of Literary and Artistic Works.

21 Section 8 of the Copyright Act provides in effect that the copyright of a composer of a musical work is not infringed by the manufacture of a sound recording of that work if the work has already been reproduced in the United Kingdom on a sound recording for the purpose of retail sale by the author himself or with his consent and if, in addition, the manufacturer notifies the copyright owner of his intention to make a recording of the work for the purpose of sale and pays him a royalty of 6·25% of the retail selling price of the sound recording.

22 It appears from the papers before the Court that the practical result of that system is that the royalty for any manufacture of a sound recording is established at 6·25% of the retail selling price since no prospective licensee is willing to agree to a higher rate. As the rate of 6·25% is thus the rate which is in fact agreed for contractual licences, the United Kingdom legislation has the effect of putting a ceiling on the remuneration of the copyright holder.

23 Where, therefore, a copyright management society exercising an exclusive right of exploitation in the name of an owner claims the difference between the rate of 6·25% already paid and that charged on its domestic market, it is in fact seeking to neutralize the price differences arising from the conditions existing in the United Kingdom and thereby eliminate the economic advantage accruing to the importers of the sound recordings from the establishment of the Common Market.

24 As the Court held in another context in its judgment of 31 October 1974 in Case 15/74 *Centrafarm BV and Adriaan De Peijper* v *Sterling Drug Inc.* [1974] ECR 1147, the existence of a disparity between national laws which is capable of distorting competition between Member States cannot justify a Member State's giving legal protection to practices of a private body which are incompatible with the rules concerning free movement of goods.

25 It should further be observed that in a common market distinguished by free movement of goods and freedom to provide services an author, acting directly or through his publisher, is free to choose the place, in any of the Member States, in which to put his work into circulation. He may make that choice according to his best interests, which involve not only the level of remuneration provided in the Member State in question but other factors such as, for example, the opportunities for distributing his work and the marketing facilities which are further enhanced by virtue of the free movement of goods within the Community. In those circumstances, a copyright management society may not be permitted to claim, on the importation of sound recordings into another Member State, payment of additional fees based on the difference in the rates of remuneration existing in the various Member States.

26 It follows from the foregoing considerations that the disparities which continue to exist in the absence of any harmonization of national rules on the commercial exploitation of copyrights may not be used to impede the free movement of goods in the Common Market.

27 The answer to the question put by the Bundesgerichtshof should therefore be that Articles 30 and 36 of the Treaty must be interpreted as precluding the application of national legislation under which a copyright management society empowered to exercise the copyrights of composers of musical work reproduced on gramophone records or other sound recordings in another Member State is permitted to invoke those rights where those sound recordings are distributed on the national market after having been put into circulation in that other Member State by or with the consent of the owners of those copyrights, in order to claim payment of a fee equal to the royalties ordinarly paid for marketing on the national market less the lower royalties paid in the Member State of manufacture.

Costs

The costs incurred by the Belgian Government, the Government of the Italian Republic, the Government of the French Republic 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 actions are concerned, in the nature of a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question submitted to it by the Bundesgerichtshof by two orders of 19 December 1979, hereby rules:

Articles 30 and 36 of the Treaty must be interpreted as precluding the application of national legislation under which a copyright management society empowered to exercise the copyrights of composers of musical works reproduced on gramophone records or other sound recordings in another Member State is permitted to invoke those rights where those sound recordings are distributed on the national market after having

been put into circulation in that other Member State by or with the consent of the owners of those copyrights, in order to claim the payment of a fee equal to the royalties ordinarily paid for marketing on the national market less the lower royalties paid in the Member State of manufacture.

Mertens de Wilmars Pescatore Mackenzie Stuart

Koopmans O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 20 January 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 11 NOVEMBER 1980

My Lords,

These two cases come before the Court by way of references for preliminary rulings by the Bundesgerichtshof. In each of them the respondent in the proceedings before that court is the GEMA or, to give it its full name, the Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte. In Case 55/80 the appellant is the Firma Musik-Vertrieb membran GmbH, which carries on business in Hamburg as an importer and distributor of sound recordings. In Case 57/80 the appellant is the Firma K-tel International GmbH, which carries on a similar business in Frankfurt-am-Main. Essentially the question at issue between the GEMA and the appellants is whether the latter are liable to make payments to the GEMA in respect of the copyright in musical works reproduced on recordings