# ORDER OF THE PRESIDENT OF THE COURT
# 18 AUGUST 1971[1]

# GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte) v Commission of the European Communities

**Case 45/71 R**

In Case 45/71 R

GEMA (GESSELLSCHAFT FÜR MUSIKALISCHE AUFFÜHRUNGS- UND MECHANISCHE VERVIELFÄLTIGUNGSRECHTE), having its registered office at 37/38 Bayreuther Straße, 1 Berlin 30, represented by its General Manager, Erich Schulze, assisted by Professor Philipp Möhring, Advocate at the Bundesgerichtshof, with an address for service in Luxembourg at the Chambers of Ernest Arendt, avocat-avoué, rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by J. Thiesing, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the Chambers of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

Application for the adoption of an interim measure by way of an order suspending the operation of a Decision of the Commission of 2 June 1971 (Ref. IV/26.760—GEMA) applying Article 86 of the EEC Treaty to GEMA.

## Facts

Following proceedings initiated on its own initative against the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) under Article 86 of the EEC Treaty, the Commission took a decision on 2 June 1971, Article 1 whereof stated that Article 86 had been infringed as a result of various provisions in GEMA's Articles of Association and Article 2 stated that Article 86 had been infringed as a result of certain practices of which GEMA was accused.

Under Article 3 of that decision GEMA was required to put an immediate end to the infringements which had been established and to take the necessary measures to amend the provisions in its Articles of Association and the other provisions referred to in Article 1 within six months of notification of the decision.

1 — Language of the Case: German.

That decision was published in the Official Journal of the European Communities of 20 June 1971.

By application lodged at the Registry on 26 July 1971 and entered on the register under No 45/11, GEMA requested the Court to annul the decision in question.

By a separate document registered on the same day it also made an application for the adoption of an interim measure by way of an order suspending the operation of the Decision of 2 June 1971 on the basis of Article 185 of the EEC Treaty and Article 36 of the Protocol on the Statute of the Court of Justice and in accordance with Article 83 of the Rules of Procedure of the Court of Justice.

In support of this application, GEMA claims that it would be impossible to put an end to the situation complained of without its work being thereby irretrievably paralysed.

It states that because of the legal situation of GEMA and of its present and future members, it would be impossible for GEMA to ensure the continuity of its work, to divide up authors' royalties and to give assistance to those entitled.

It also claims that it is impossible to differentiate between the 'infringements' which must come to an end immediately and the 'provisions of the Articles of Association' which must be amended within six months.

Finally, it is impossible for GEMA to negotiate in the immediate future agreements which would enable the breaches complained of to be avoided.

The Commission opposes the request for an order suspending operation and first points out the contradiction between the request for an order suspending the operation of the decision and the declaration of the applicant that it has put an end to the infringements noted in Article 1 (1) to (6) and Article 2 (3) of the contested decision. It cites an exchange of letters on the consequences of that decision which took place between the parties.

The Commission however offers to suspend the operation of the decision until judgment is given in the main action, in part unconditionally (Article 1 (7), in respect of agreements concluded up to 8 June 1971, and Article 1 (12)) and in part upon certain conditions (Article 1 (7), in respect of agreements concluded after 8 June 1971, and Article 1 (9)).

The Commission endeavours to prove that it is impossible to grant a suspension of operation with regard to the other parts of the decision (Articles 1 (8), (10), (11) and (13) and Article 2 (1) and (2)), since the need or urgency for this has not been justified.

The parties were summoned to appear at the oral proceedings on 18 August 1971 relating to the adoption of interim measures. They put forward their arguments and replied to the questions put to them.

The judge hearing the proceedings for the adoption of interim measures made them specify the points on which they were capable of reconciling their views.

## Law

### As regards the immediate operation of Article 1

1 Article 1 of the decision at issue states that there have been infringements of Article 86 of the Treaty arising from 'the existence' and 'the application' of various provisions of the Articles of Association of GEMA, of the contract of assignment of rights, of the internal regulations and of the rules of its social security fund.

Article 3 provides that the infringements arising from those documents must be brought to an end immediately and the necessary measures to amend them must be taken within six months of the notification.

In its application for the adoption of an interim measure GEMA states that it has brought to an end the infringements set out in Article 1 (1) to (6), so that there is only need to issue an order for a suspension of operation of the other provisions of that Article (paragraphs 7 to 13).

2 By granting a period of six months for the amendment of the documents from which the infringements arise and at the same time providing that they be brought to an end immediately, Article 3 might give rise to difficulties of interpretation which cannot be settled within the framework of the present proceedings.

Although this double period may correspond to the distinction made in Article 1 between 'the existence' and 'the application' of the documents in question, it is possible that, subject to the judgment in due course on the substance of the case, since the wording of Article 3 is not more explicit, immediate operation applies solely to the contracts of assignment of rights made after notification of the decision, whilst contracts made beforehand may benefit from the six months' period.

The Commission seemed to accept the latter distinction during the oral proceedings when it declared that it would refrain from the operation of Article 1 (7) in so far as it refers to contracts of assignment made before notification of the decision.

With regard to new contracts of assignment made subsequent to that notification, they seem unlikely to benefit from an order suspending operation since they can contain any appropriate reservation clauses relating to any consequences of the judgment to come.

Whilst GEMA cites the material difficulties which it might encounter in that respect, these do not seem to be insuperable since the Commission has accepted during the oral proceedings that the division by categories provided for in Article 1 (7) could be provisionally suspended.

Therefore any such difficulties cannot come into conflict with the provisions of Article 185 of the Treaty whereby actions 'shall not have suspensory effect'.

3 It seems that the operation of Article 1 (8) to (13) cannot be affected by the distinction between old and new contracts of assignment: consequently in

these circumstances the interpretation whereby the six months' period laid down in Article 3 may be applicable to them cannot be completely ruled out.

In any case, it might be feared that because the number and nature of the documents concerned—GEMA's Articles of Association and internal regulations and the rules of the social security fund—and because of the variety and the complexity of the measures ordered and their repercussions on the relationship between GEMA and its members, the immediate operation of those measures might seriously disturb GEMA's work and the interests which it administers, before the expiry of the normal period which should enable the Court to deliver judgment.

Excluding any delays, that period corresponds approximately to that laid down in Article 3 of the decision.

By itself refraining, conditionally or unconditionally, from putting into immediate operation Article 1 (9) and (12) the Commission in any case admits the difficulties thereof.

Without prejudice to the judgment to be delivered in due course and its consequences, it therefore appears that exceptional circumstances justify *prima facie* the grant, under Article 83 (2) of the Rules of Procedure, of an order suspending the operation of Article 1 (8) to (11) and (13) for a period of six months as from the notification of the decision of the Commission.

As regards the immediate operation of Article 2

4 Article 2 of the decision states that there have been infringements of Article 86 resulting first, from practices relating to the extension by contract of the copyright in certain musical works, secondly, from the imposition of a licence fee on sound recordings which are imported or reimported into Germany, and lastly from the imposition of a higher royalty on tape recorders and video tape recorders imported into that State.

Article 3 obliges GEMA to put an immediate end to those practices.

The latter do not arise from the Articles of Association of GEMA or from any of the documents which it is under a duty to amend in accordance with Article 1, but result merely from GEMA's actions.

It does not appear from the written observations or from the oral proceedings that the interruption of those practices is likely to compromise the essential bases of GEMA's work as it appears from its Articles of Association.

Although interrupting those practices may constitute an inconvenience to GEMA, which the judge giving the interim ruling must take into account in the light solely of the requirements of Article 185 of the Treaty, that inconvenience does not seem to be capable of paralysing the work of GEMA irretrievably.

Moreover, the applicant has stated that it put an end to one of the forms of conduct referred to (Article 2 (3)) of its own accord.

There is therefore no need to order a suspension of the operation of Article 2 (1) and (2) of the contested decision.

## Costs

[5] The costs should, in the circumstances, be reserved.

On these grounds,

Upon reading the pleadings;
Upon hearing the parties;
Having regard to the Treaty establishing the European Economic Community, especially Articles 86 and 185;
Having regard to the Protocol of the Statute of the Court of Justice of the European Economic Community, especially Article 36;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 83 *et seq.*,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

hereby finds:

1. that GEMA has declared that it has 'already put an end' to the infringements referred to in Article 1 (1) to (6) and Article 2 (3) of the Decision of the Commission of 2 June 1971.

2. that the Commission has declared that it unconditionally refrains from putting into immediate operation Article 1 (7)—as regards contracts made up to 8 June 1971—and paragraph 12 of the said Article;

and by way of interim ruling

hereby orders:

1. **The operation of Article 1 (8), (9), (10), (11) and (13) of the Decision of the Commission of 2 June 1971 (ref. IV/26760-GEMA) applying to GEMA Article 86 of the EEC Treaty shall be suspended for six months from notification of that decision.**

2. **Subject to the application of the declarations of the Commission relating to Article 1 (7) and (12), the application for an order suspending the operation of that decision is dismissed in all further respects.**

3. **The costs are reserved.**

So done and ordered at Luxembourg on 18 August 1971.

A. Van Houtte
Registrar

R. Lecourt
President