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The Impact of EEC Competition Law on the Music Industry

*Frank L. Fine**

I. INTRODUCTION

In the last decade, the horizons of the music industry have broadened considerably with the advent of the music video and the increasing availability of cable and satellite channels. This media explosion has made life more complicated for the music industry lawyer, who must now be increasingly cross-disciplinary in his or her approach to legal issues. Industry lawyers involved in European transactions must also be familiar with the EEC developments affecting the music field.

The purpose of this article is to examine the relevance of EEC competition law (or antitrust law as it is known in the United States) to the music industry. EEC antitrust cases concerning other media, such as satellite broadcasting, are discussed to the extent that they are relevant. It will be shown that EEC antitrust law has a pervasive effect on the music industry and will play an important role as the industry exploits the EEC market.

A. Applicable Treaty Provisions and Other Regulations

The EEC competition rules, particularly Articles 85 and 86 of the Treaty of Rome, apply to the music industry as they do to most business sectors.

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Article 85(1) prohibits agreements and concerted practices which have the object or effect of restricting competition within the Common Market, subject to the possibility of an exemption (individual or block) on public policy grounds pursuant to Article 85(3). In order to qualify for an exemption under Article 85(3), an agreement must satisfy two "positive" and two "negative" criteria. The "positive" criteria are that the agreement must either contribute to improving the production or distribution of goods *or* to promoting technical or economic progress. The "negative" criteria are that the agreement must not impose restrictions which are not "indispensable" *nor* which may eliminate competition with respect to a "substantial part" of the products or services in question.

Article 86 prohibits the abuse of a dominant position in the Common Market or a substantial part of it. In contrast to Article 85, however, Article 86 does not provide any possible exemption from a finding of abuse.

These Treaty provisions are supplemented by the Merger Control Regulation¹ (MCR), adopted by the Council of Ministers in December 1989 and which went into effect on September 21, 1990. As will be discussed in Part IV below, the MCR applies to "concentrations" and "concentrative" joint ventures.

Other relevant Treaty provisions are Articles 30-36 concerning the free movement of goods. As will be shown in Part V, these Treaty provisions operate with great effect to prevent the use of national copyright and analogous laws to partition national markets.

B. Enforcement of EEC Competition Policy

The European Commission is the Community organ primarily responsible for the enforcement of EEC competition policy. Article 3(1) of MCR 17 charges the Commission (in particular, Directorate General IV) with the duty to end infringements of Article 85 or 86 "upon application [i.e., complaint] or upon its own initiative." Article 15 of Regulation 17 empowers the Commission to impose fines of up to 10% of the turnover, on a worldwide basis, of each of the companies participating intentionally or negligently in an infringement.

The Commission is vested with the exclusive responsibility to enforce the MCR.² A Task Force (hereinafter DGIV) has been created specifically for this purpose. DGIV consists of approximately 150 offi-

¹ 33 O.J. EUR. COMM. (No. L257) 14 (1990) [hereinafter MCR].

² *Id.* at art. 21(1); recital 16 of preamble.

cials drawn from both DGIV and the competition authorities of the Member States of the Community.

It should also be stressed that Articles 85 and 86 may be asserted in a civil action either offensively (in an action to rescind a contract) or defensively (in an action to enforce a contract), and moreover, they may be asserted, at least in the U.K., in an action for damages.

C. Extraterritorial Jurisdiction

Companies based outside the EEC may be subject to Community jurisdiction in one of two ways. If the company has a subsidiary or other presence in the Common Market, the Commission may assert the "single economic entity" theory by which the anti-competitive behavior of the EEC-based subsidiary or office is attributed to the third-country parent.³ Alternatively, jurisdiction may be imposed on a company headquartered outside the EEC where the anti-competitive agreement is implemented within the EEC.⁴ This latter assertion of jurisdiction does not require the company in question to have a legal presence in the EEC.

II. APPLICATION OF ARTICLE 85

Article 85(1) applies to agreements which have as their "object or effect" the restriction of competition. It is generally very difficult for the Commission to prove that the "object" of the agreement is to restrict competition. A number of agreements are, however, by their very nature restrictive of competition, and in such cases the Commission does not hesitate to find that infringements *per se* have been committed. Examples of such cases include price-fixing and export bans.

Regardless of whether "object" or "effect" is relied upon by the Commission, it is clear that Article 85(1) cannot be infringed where the agreement in question is incapable of having an "appreciable" or substantial effect on competition. In the Notice on Agreements of Minor Importance,⁵ published in 1986, the Commission established a *de minimis* rule which is applicable to Article 85(1). According to this Notice, agreements do not normally fall within the prohibition of Article 85(1) where:

- i) The goods or services which are the subject of the agreement as well as "equivalent" goods or services do not represent more

³ ICI v. Commission, 1972 E. COMM. CT. J. REP. 619, 1 COMM. MKT. L. R. 557 (1972).

⁴ A. Ahlstrom Oy v. Commission, 1988 E. COMM. CT. J. REP. 5193, 4 COMM. MKT. L. R. 901 (1988).

⁵ 29 O.J. EUR. COMM. (No. C231) 2 (1986).

than 5% of the total market for such goods or services in the area of the Common Market affected by the agreement;

- ii) The aggregate annual turnover of the participating undertakings does not in the aggregate exceed 200 million ECU (\$250 million); and
- iii) Such market share or turnover is not exceeded by more than one-tenth during two successive financial years.

The agreements which are subject to Article 85 and which potentially affect the music industry include the following:

- i) Exclusive artist agreements;
- ii) Copyright licenses;
- iii) Mechanical rights agreements;
- iv) Exclusive distribution agreements;
- v) Market division agreements; and
- vi) Joint venture agreements.

A. Exclusive Artist Agreements

In the Commission decision *RAI/UNITEL*,⁶ the Commission held that exclusive artist agreements are subject to Article 85. In this case, four of La Scala's leading singers had exclusive contracts with UNITEL which, *inter alia*, prevented them from further commercializing their artistic performances in any of the EEC Member States. In this case, Radio Televisione Italiana (RAI) was planning to broadcast live to a worldwide audience the La Scala performance of "Don Carlos." Upon receiving UNITEL's objections to this broadcast, RAI complained to the EC Commission. Although this dispute appears to have been settled, the Commission held that artist contracts like those between the La Scala singers and UNITEL were subject to Article 85. Moreover, the Commission appeared to suggest that a non-competition clause may infringe Article 85(1) if it has appreciable effects on competition.

Taken at face value, *UNITEL* suggests that artists could rely upon Article 85 to circumvent their exclusive commitments to record companies, producers and the like, provided that the agreement in question does not have a *de minimis* effect. An interesting question is therefore whether the notification of draft artist agreements to the Commission should be seriously considered. One may derive some comfort from the fact that the Commission has never held that an artist agreement infringes Article 85(1). On the other hand, it is curious that the Commission in *UNITEL* did not indicate whether and under which

⁶ RAI UNITEL, 21 O.J. EUR. COMM. (No. L157) 39 (1978).

circumstances Article 85(3) may apply to an exclusive artist agreement. Initially, it would appear that Article 85(3) could apply to such agreements because, as in the case of exclusive distribution agreements, they provide incentives to both parties to perform. Thus, they may contribute to improving the production or distribution of goods or services or promoting technical or economic progress. An alternative approach may be to frame such agreements to avoid infringing Article 85(1) by ensuring that the restrictions do not have an appreciable effect on competition.

In 1981, the Commission entered into discussions with record company executives to examine the applicability of Article 85 to exclusive recording agreements. Specifically, the record companies sought a model form of recording contract which would comply with Article 85 without jeopardizing the commercial value of the agreement. Although these negotiations did not produce the model agreement desired by the record companies, the Commission had not expressed an interest in applying Article 85 to recording agreements until that time.

B. Copyright Licenses

In *Coditel (No. 2)*,⁷ the European Court demonstrated that the exclusive licensing of performing rights (for example, the right to broadcast or exhibit a work) may be subject to Article 85(1), depending on the restrictiveness of particular clauses which may be deemed to "create artificial, unjustified barriers."⁸ Within the context of the music industry, this legal principle may be applied to soundtracks, music videos and concerts filmed for cinema or television viewing.

In *Coditel (No. 2)*, the French company, Les Films la Boétie, granted Ciné Vog, a Belgian film distribution company, the exclusive right for seven years to exhibit the film, "Le Boucher," in Belgium. Thereafter, Les Films la Boétie assigned the right to broadcast this film on German television to a German television station. When the film was broadcast by the German licensee, the signal was picked up by three Belgian cable operators (collectively Coditel) and was distributed, without the permission of the producer or the Belgian distributor, to Coditel's subscribers in Belgium.

Following proceedings in the Belgian lower and intermediate courts, the Belgian Cour de Cassation sought a preliminary ruling from the European Court as to whether an exclusive right of exploitation, such as

⁷ *Coditel S.A. v. Ciné Vog Filmas, S.A. (No.2)*, 1982 E. COMM. CT. J. REP. 3381, 1 COMM. MKT. L. R. 49 (1983).

⁸ *Id.* at 1982 E. COMM. CT. J. REP. 3402, para. 19, 1 COMM. MKT. L. R. 66, para. 19.

that granted to Ciné Vog, could constitute an agreement which is prohibited by Article 85.

The European Court found, in the first instance, that an agreement granting the exclusive right to exhibit does not in itself infringe Article 85(1). As stated in Paragraph 15 of the judgment:

The *mere fact* that the proprietor of a film copyright has granted to a single licensee the exclusive right to exhibit the film in the territory of a [M]ember State, and therefore to prohibit its diffusion by others, for a specified period, is not sufficient . . . for a finding that such a contract must be considered as the object, means or consequence of an agreement, decision or concerted practice prohibited by the Treaty.⁹

However, the Court left open the possibility that an exclusive license to exhibit a film may create anti-competitive barriers. Examples provided by the Court of clauses which may infringe Article 85(1) include the following: (a) royalties exceeding a fair remuneration; (b) excessive duration; and (c) whether the exercise of such right within a specific geographical area is likely to prevent, restrict or distort competition within the Common Market.¹⁰ Thus, rather than settling the issue of exclusivity in copyright licenses, *Coditel (No. 2)* could be interpreted as inviting challenges to such contracts on the basis of Article 85.

There is also authority for the view that a licensing agreement may violate Article 85(1) when the licensee maintains a monopoly position for the provision of certain broadcasts deemed to be of significant public interest. In *English Football League/London Weekend Television*,¹¹ the English Football League (EFL) and London Weekend Television (LWT), which represented all the independent television network programmers in the United Kingdom, entered into an agreement by which LWT was granted exclusive rights in England to record and transmit EFL matches. This agreement was held to infringe Article 85(1) and was not subject to an exemption for two reasons: (i) the effect of the agreement would have been to exclude the BBC from recording and transmitting these football matches in the United Kingdom; and (ii) the

⁹ *Id.* at 1982 E. COMM. CT. J. REP. 3401, para. 15, 1 COMM. MKT. L. R. 66, para. 15 (emphasis added).

¹⁰ In *Re German TV Films*, 32 O.J. EUR. COMM. (No. L284) 36 (1989), 4 COMM. MKT. L. R. 841, 852 (1990), the relevant agreements provided for the licensing of the exclusive right to broadcast films on television. Specifically, ARD broadcasting organizations of West Germany acquired from MGM/UA television rights in 1,350 feature films plus 14 James Bond films. Citing *Coditel (No. 2)*, *supra* note 7, the Commission found that these agreements infringed Article 85(1) due to the significant quantity and quality of the films licensed and the long duration of the exclusive license. Because of the staggered periods for the selection of films to be licensed, the duration of the exclusivity exceeded the license period of 15 years.

¹¹ COMMISSION, *ENGLISH FOOTBALL LEAGUE/LONDON WEEKEND TELEVISION*, NINTH REPORT ON COMPETITION POLICY, at point 116 (1979).

agreements would have eliminated the possibility of re-transmitting the matches to other Member States, except via LWT.¹²

Although the EFL case precedes *Coditel (No. 2)*, it is arguable that the former case incorporates the reasoning later employed in *Coditel (No. 2)*. The exclusive right to record and transmit league matches was not deemed in itself an infringement of Article 85(1), but rather the Commission considered the agreement's restrictive effects, particularly the availability of sports broadcasts in other parts of the Community.¹³

C. Mechanical Rights Agreements

There appears to be only one case concerning the application of Article 85 to mechanical licenses, that is, agreements whereby the licensee obtains the right to reproduce and commercialize sound recordings owned by another party. In *Re GEMA*,¹⁴ the German copyright protection society (GEMA) sought to impose restrictions on the freedom of manufacturers of sound recordings to take advantage of custom pressing. Early in 1984, GEMA announced its intention, contrary to usual practice among European copyright collection societies, to charge German copyright royalties on all custom pressing performed in West Germany, even where the record company had obtained a mechanical license from the mechanical copyright society of another Member State.

The Commission found that GEMA's practice would have infringed Article 85. In the view of the Commission, a license granted by the copyright collecting society of a Member State is valid throughout the Community and authorizes the manufacture of sound recordings, even by means of custom pressing, in any Member State. According to this principle, where custom pressing is performed in a second Member State, royalties would be due in the first Member State in which the license has been granted. Thus, in the view of the Commission, a second requirement to pay royalties to the society having "jurisdiction" over the place of custom pressing would result in the imposition of barriers by "contractual means" between Member States. GEMA's intended practice would have discriminated against those producers of sound recordings which had obtained mechanical licenses in other Member States and, effectively, would have discouraged custom pressing in West Germany.

¹² *Id.* Even if the positive criteria of Article 85(3) were satisfied, an exemption could not have been granted where competition would have been eliminated as to a "substantial part" of the relevant goods or services.

¹³ *Id.* See also *Screensport/EBU Members*, 34 O.J. EUR. COMM. (No. L63) 32 (1991), in which a joint venture for the establishment of a transnational satellite television sports channel, Eurosport, was approved by the Commission under Article 85(3).

¹⁴ *Re GEMA*, 2 COMM. MKT. L. R. 1 (1985).

As the result of the Commission's intervention, GEMA abandoned its claim for German copyright royalties for all custom pressing work performed in West Germany. The decision has enabled major record companies to conclude licensing agreements with individual collecting societies which provide for "central" licensing and sales accounting throughout the EEC. This reduces the administrative burden of dealing with a separate society in each territory.

D. Exclusive Distribution Agreements

An exclusive distribution agreement may infringe Article 85(1) in a number of ways, and there are many Commission and Court cases on this subject.

The more obvious clauses which are likely to infringe Article 85(1) include the following:

- i) Clauses imposing sales prices on wholesalers or retailers (resale price maintenance);
- ii) Clauses prohibiting wholesalers or retailers from selling to certain customers or types of customers;
- iii) Territorial restrictions which prevent the seller from reselling the product in other Member States; and
- iv) "Tie-in" arrangements which oblige the seller to purchase products other than those which he or she is seeking.

The concept of export bans, as it applies to the music industry, is amply demonstrated in the Commission decision of *WEA-Filipacchi Music S.A.*¹⁵ In this case, WEA-Filipacchi Music S.A. (WEA) sent its main customers a circular which effectively prohibited them from exporting products bearing particular trademarks to certain countries. The Commission found that this circular constituted an agreement (it was returned to WEA signed by the eighteen wholesalers and retailers in question) whose "object" was to restrict competition and therefore infringed Article 85(1). This agreement also did not fall within the *de minimis* thresholds. Moreover, the benefits of Article 85(3) were not available because the Commission was not notified of the export prohibitions.¹⁶

There is a block exemption for exclusive distribution agreements which confers the benefits of Article 85(3) without having to apply for

¹⁵ WEA/Filipacchi, 15 O.J. EUR. COMM. (No. L303) 52 (1972), COMM. MKT. L. R. D43 (1973).

¹⁶ *Id.* at D48. Even if WEA had applied for the exemption, it would undoubtedly have been refused because there is no public policy justification for an export ban.

them. Regulation 1983/83¹⁷ applies only to agreements between two parties whereby one party agrees to exclusively supply the other party with certain goods for resale within the Common Market or a part thereof. The Regulation specifies the permitted obligations which may be imposed on both the supplier and the exclusive distributor in order to obtain the benefits of the block exemption. Although a comprehensive discussion of this block exemption is outside the scope of this paper, it should be pointed out that the block exemption provides a limit on contractual provisions restricting the exclusive distributor from selling outside the contract territory. Article 2(c) provides that the supplier may impose "the obligation to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch, and from maintaining any distribution depot." This provision would not allow a restriction prohibiting the exclusive distributor from concluding "passive" sales to customers outside the contract territory.

E. Market Division Agreements

As in other sectors, the music industry is subject to the Article 85 rule prohibiting agreements to limit or share markets. This point was demonstrated in an older Commission case¹⁸ involving approximately twenty Dutch record manufacturers and importers which controlled roughly 90% of the Dutch market. These parties formed an association, NVGI, which obliged its members to enter into a joint reciprocal exclusive sales and supply arrangement, a collective price notification scheme, and a joint rebate system. In the view of the Commission, these restrictions were intended to impose tight limits on outlets and supplies on the Dutch record market and to consolidate market fragmentation. The Commission's intervention brought these restraints to an end. Consequently, the Commission did not need to render a decision.

F. Joint Venture Agreements

The application of EEC competition law in the area of joint ventures (JVs) begins with a determination of whether the JV is considered "cooperative" or "concentrative." In a cooperative JV, the partners remain

¹⁷ 26 O.J. EUR. COMM. (No. L173) 24 (1983).

¹⁸ COMMISSION, DUTCH AGREEMENT IN THE RECORD INDUSTRY, FOURTH REPORT ON COMPETITION POLICY, at point 76 (1974). *See also* COMMISSION, EUROPEAN BROADCASTING UNION, SIXTEENTH REPORT ON COMPETITION POLICY, at point 62 (1986) (EBU members had planned to fix joint rates and conditions for the use of television news items taken from the network by third parties).

actual or potential competitors in the relevant product and geographic markets. With a concentrative JV, the parties cease competing with respect to the JV product by divesting themselves of the relevant operations.

Cooperative JVs are theoretically subject to both Articles 85 and 86 of the EEC Treaty. However, in practice, Article 86 is rarely at issue.

Commission decisions have shown that cooperative JVs often infringe Article 85(1). Unless the *de minimis* rule applies, a JV tends more often than not to satisfy the criteria of Article 85(1). These criteria are: (a) the JV parties are actual or potential competitors; (b) the JV has the object or effect of restricting competition; and (c) the JV affects trade between Member States.¹⁹

Where two record companies or two video producers conclude a co-production agreement, it is highly likely that they will be "actual" competitors. A distinction may be drawn, however, where a record company enters into a co-production agreement with a film studio or television production company. Arguably, neither the record company nor the film/television producer may acquire each other's technology internally and, therefore, a JV (or outright acquisition) would be required in order to access the desired technology. Therefore, Commission decisions indicate that where the JV parties are not in downstream, upstream or neighboring markets, and neither party has attempted to enter the market of the other, they are not potential competitors.²⁰

The last two elements to be proved under Article 85(1) (i.e., restriction of competition and impact on trade between Member States) are far simpler to establish. In one case, the Commission stated that the JV as a whole was restrictive simply because the parties were actual or potential competitors.²¹ Restrictive effects are also shown in the various terms of the JV agreement, which usually provides that the parties will allocate production, distribution, supply or purchases, in addition to agreeing not to compete with each other or with the JV. The last element under Article 85(1) (i.e., the effect on trade between Member States) is usually a non-issue due to the fact that almost every JV which fails to be *de minimis* would have such an effect.

If a JV infringes Article 85(1), the parties may not obtain the bene-

¹⁹ COMMISSION, SIXTH REPORT ON COMPETITION POLICY points 54-55 (1976). See generally F. FINE, MERGERS AND JOINT VENTURES IN EUROPE: THE LAW AND POLICY OF THE EEC 57-85 (1989).

²⁰ See, e.g., Optical Fibres, 29 O.J. EUR. COMM. (No. L236) 30 (1986); Mitchell Cotts/Sofiltr, O.J. EUR. COMM. (No. L41) 31 (1987).

²¹ GEC/Weir, 20 O.J. EUR. COMM. (No. L327) 26, 32 (note 2(e)) (1977), 1 COMM. MKT. L. R. D42, D53 (note 25(c)) (1978).

fits of Article 85(3) unless they obtain an individual exemption (or "comfort" letter) or are subject to a block exemption. In most cases involving the music industry (as opposed to the consumer electronics industry), it would not appear that the block exemptions for R&D and specialization agreements would apply. These are the only two block exemptions which even theoretically could apply to JVs.²² As a result, the parties to a music industry JV which is subject to Article 85(1) would be advised to either obtain an individual exemption or a comfort letter.

An example of how a JV in the entertainment field would be evaluated under Article 85 is provided by *United International Pictures*.²³ In this case, Paramount Pictures, MCA and MGM formed United International Pictures BV (UIP) under the laws of the Netherlands, to distribute and license on an exclusive basis, principally for exhibition in cinemas, feature films, short subjects and trailers produced and/or distributed by the parents, their subsidiaries and related companies. With respect to the term of exclusivity, each parent company wishing to distribute a film outside the United States and Canada was required to grant a right of first refusal to UIP. If UIP elected not to exercise its right to distribute a film, UIP nevertheless was obliged to distribute the film if the individual party holding the distribution rights in any territory, at its sole discretion, so directed.

In assessing the application of Article 85(1) to these agreements, the Commission had no difficulty concluding that the JV satisfied each of the elements. The parties were clearly competitors (major film makers), the agreements restricted competition (Paramount, MCA and MGM all distributed their own films within the EEC) and the agreements had an appreciable effect upon trade between Member States.

Nevertheless, the Commission found that the agreements were entitled to an exemption under Article 85(3). With regard to the positive criteria of Article 85(3), the Commission found that the creation of UIP made possible "a more effective and rationalized distribution of the product of the parent companies and thereby ensured the maintenance of an economically viable distribution network in a deteriorating market where high financial risks are present."²⁴ Consumers would benefit from the JV because it would improve both the quality and availability of the films.²⁵ Moreover, the formation of the JV was deemed indispensable to the con-

²² See Regulation 417/85, 28 O.J. EUR. COMM. (No. L53) 1 (1985) and Regulation 418/85, O.J. EUR. COMM. (No. L53) 1 (1985).

²³ UIP, 32 O.J. EUR. COMM. (No. L226) 25 (1989), 4 COMM. MKT. L. R. 749 (1990). See also Screensport, *supra* note 13.

²⁴ *Id.* at 760, para. 46.

²⁵ *Id.* at 760, para. 49.

tinuation of the international distribution of the parent companies' films: "Alternatives less restrictive of competition, such as relying on independent distributors throughout the Community for their international distribution, would not provide the benefits expected of UIP."²⁶ Finally, the agreements did not pose the possibility of eliminating competition with respect to a substantial part of the products in question since UIP had an average market share of 22% in the Community.²⁷

III. COLLECTING SOCIETIES AND ARTICLE 86

This section will consider collecting society conduct held to infringe Article 86. The cases tend to follow distinct patterns. Cases decided by the European Court mostly arise out of disputes between individuals or organizations (often discotheque owners) trying to avoid payment of royalties to the particular collecting society on the ground that the collecting society has abused its dominant position contrary to Article 86. Commission decisions all relate to investigations under Regulation 17 into the statutes and assignment contracts of the collecting societies.²⁸

A. Dominant Undertaking

A number of points which recur in all the cases can be dealt with at the outset.

First, the Commission considers whether the collecting society in question is a "dominant undertaking within the Common Market or a substantial part of it." This is illuminated by *BRT v SABAM*.²⁹ SABAM (the Belgian Association of Authors, Composers and Publishers) is a co-operative association whose object is to exploit, administer and manage all copyrights and kindred rights, for its members and associates and for its clients and affiliated undertakings. It was pointed out in this case that the personal collection of royalties is very difficult. Almost all authors resident in Belgium seek the help of SABAM in collecting their royalties. This is also true in each Member State where a collecting society operates to protect the interests of its own nationals. Copyright collecting societies are, therefore, undertakings within the meaning of Article 86: By acting as agencies which safeguard the rights of musical composers, they perform the function of an undertaking engaged in the provision of services. Furthermore, because the collecting societies have a quasi-monop-

²⁶ *Id.* at 760, para. 51.

²⁷ *Id.* at 763, paras. 56 and 57.

²⁸ The Commission has recently announced that it will conduct a probe of collecting societies as part of its copyright plan. See COM(90) 584, para. 1.6 and annex.

²⁹ *BRT v. SABAM*, 1974 E. COMM. CT. J. REP. 51, 2 COMM. MKT. L. R. 238 (1974).

oly in the field of authors' rights in their respective countries, they are deemed to have a dominant position in a substantial part of the Common Market.

In the decision of *GVL*,³⁰ the Commission held that the lack of profit motive is irrelevant to the concept of undertaking within the meaning of Article 86. Thus, non-profit undertakings are subject to Article 86.³¹

B. Inapplicability of Article 90

In *BRT v. SABAM*,³² SABAM asserted that Article 90(2) prevented the application of Article 86 on the ground that SABAM constituted a public undertaking. Article 90(2) provides as follows:

Undertakings entrusted with the operation of services of general economic interest . . . shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance . . . of the particular tasks assigned to them.

The issue for the Court was whether a collecting society such as SABAM could be considered an "undertaking entrusted with the operation of services of general economic interest" within the meaning of Article 90(2). In the Court's view, where the undertaking concerned is private, an additional element must be considered (i.e., whether the mandate of the private undertaking is provided by an act of the public authorities).³³

The Court held that SABAM was not entitled to the protection of Article 90(2) because it was unable to satisfy any of its requirements. As the Court observed, Article 90(2) could not apply "in the case of an undertaking to which the State has not assigned any task and which manages private interests, including intellectual property rights protected by law."³⁴

C. Abuse

Article 86 does not define "abuse," but rather lists several examples of how it may arise (e.g., by imposing unfair purchase or selling prices or unfair trading conditions). What constitutes an abuse has to be determined in each case. In the collecting society cases, abuse has been shown in a number of instances.

³⁰ 24 O.J. EUR. COMM. (No. L370) 49 (1981), 1 COMM. MKT. L. R. 221 (1982), *on appeal* GVL v. Commission, 1983 E. COMM. CT. J. REP. 483, 3 COMM. MKT. L. R. 645 (1983).

³¹ *Id.* at 24 O.J. EUR. COMM. (No. L370), para. 44.

³² *BRT v. SABAM*, 1974 E. COMM. CT. J. REP. 51.

³³ *Id.* at [1974] 2 COMM. MKT. L. R. 238, para. 20.

³⁴ *Id.* at para. 23.

1. *Collecting Societies May Not Refuse to Accept
EEC Nationals As Members*

The *GVL* case³⁵ involved the conduct of GVL, the West German collecting society responsible for the exploitation in Germany of “performer’s rights” (i.e., rights which arise out of the reproduction of an artist’s performances). GVL had refused to conclude management agreements with foreign artists lacking domiciles in Germany. The Commission considered that an “abuse” for the purposes of Article 86 must be viewed in the light of the general principles of the Treaty.³⁶ Article 7 of the Treaty constitutes such a general principle; it provides that any discrimination on grounds of nationality shall be prohibited. On this basis, the Commission concluded that the exclusion of foreign artists not resident in West Germany must be regarded as an infringement of Article 86.

GVL’s conduct also fell under the special prohibition of discrimination contained in Article 86(c), since GVL discriminated against certain trading partners on grounds unrelated to the transaction involved. The transactions within the meaning of Article 86(c) were between artists and GVL, and consisted of the exchange of GVL’s service (namely the management of rights) for valuable consideration (i.e., a proportion of the royalties to cover GVL’s administrative expenses). These transactions were identical to those concluded with West Germans, but foreign artists were placed at a competitive disadvantage because of GVL’s discriminatory conduct. Due to this conduct, foreign artists received no royalties with respect to the secondary exploitation of their performances in Germany.

2. *A Collecting Society May Not Impose Discriminatory Terms on
EEC Nationals Concerning Their Membership Rights*

In *Re GEMA*³⁷ (*Re GEMA I*), the Commission ordered GEMA, the West German collecting society, to amend or remove certain provisions of its constitution and standard assignment contract. The constitution of GEMA, in its June 1970 version, provided that “foreign nationals may become ordinary or extraordinary members only if they have their fiscal domicile in Germany.” On the other hand, a German composer or author, regardless of the location of residence, was able to become a voting member of GEMA. Foreign nationals were therefore placed at a considerable disadvantage, since only ordinary and extraordinary members

³⁵ *GVL v. Commission*, 1983 E. COMM. CT. REP. 483.

³⁶ *Id.* at 24 O.J. EUR. COMM. (No. L370), para. 46.

³⁷ 14 J.O. COMM. EUR. (No. L134) 15 (1971), 10 COMM. MKT. L. R. D35 (Supp. 1971).

were given voting rights and were therefore able to influence policy. The Commission found that these discriminatory terms infringed Article 86.

The German constitution also resulted in economic disadvantages for non-Germans. In order to receive supplementary payments under the "classification procedure" (a scheme for distributing royalties), the GEMA constitution required a composer or author to have been an ordinary member of GEMA for at least three years.³⁸

Further abuses of dominant position were identified by the Commission. For example, Clause 13(1)(ii) required that the members of the supervisory council be of German nationality, thereby excluding nationals of other Member States. Clause 7(i) of the assignment contract, under which the copyright holder must communicate any change of nationality, reinforced the discrimination described above.

3. A Collecting Society May Not Require Assignment of Unduly Broad Categories of Rights

In *Re GEMA I*, the original assignment contract (the June 1968 version) provided that:

[T]he copyright holder assigns to GEMA his copyrights in musical works, i.e.

- all the rights which he holds at the time, and
- all the rights which may belong to him in the future, which may be assigned to him, which may be reassigned to him or which he may acquire in any manner whatsoever during the term of the contract,
- even if such rights are created or arise out of or arise from future technical developments or changes in the law,
- for the whole world,
- in exclusivity.³⁹

The Commission decided that GEMA bound its members by "unnecessary and unjustified obligations" which constituted an abuse of dominant position. The Commission required that members be given the power to resign after one year with division of author's rights in seven categories:

- (i) the general performing right;
- (ii) the broadcasting right, including the transmission right;
- (iii) the right to film performance;
- (iv) the right of mechanical reproduction and diffusion, including the transmission right;
- (v) the right of film production;
- (vi) the right to produce, reproduce, diffuse and transmit on optical sound bases; and

³⁸ *Id.* at 10 COMM. MKT. L. R. D39, D47.

³⁹ *Id.* at D40-41.

- (vii) the exploitation rights resulting from technical developments or from a future change in the law.⁴⁰

After one year, a member was to be allowed to withdraw and GEMA would restore all or part of that author's rights.

In *GEMA (No. 2)*,⁴¹ GEMA sought a minimum membership of three years, arguing that such a period was necessary because important users of music (e.g., broadcasting companies and record manufacturers) would bring pressure on its members to bypass GEMA and transfer the author's rights directly to them. The Commission amended its earlier decision by allowing GEMA to increase the minimum length of membership to three years. However, in order to ensure that the balance between the duration and the breadth of the commitment was maintained, the decision provided that GEMA grant its members, as regards the freedom to dispose of the various forms of utilization of author's rights in all countries of the world, a greater freedom than that provided for in the assignment contract.

In the case of *BRT v. SABAM*,⁴² the European Court was asked whether an undertaking enjoying a de facto monopoly in a Member State would abuse its dominant position in the management of copyrights by requiring the global assignment of all copyrights without drawing any distinction between specific categories. The Court was also asked whether an abuse of a dominant position can result from an undertaking's requirement that an author assign all present and future rights, and that the rights assigned continue to be exercised by such undertaking for five years following the member's withdrawal. In the judgment, the important point was made that there must be a "balance between the requirement of maximum freedom for authors to dispose of their works and that of the effective management of their rights by an undertaking which in practice they cannot avoid joining."⁴³

The Court went on to outline what can be called the "indispensability test:" In an examination of a collecting society's statutes in light of the EEC competition rules, the decisive factor is whether they exceed the limits absolutely necessary for effective protection or whether they unnecessarily limit the individual copyright holder's freedom to dispose of his or her work.⁴⁴

Turning to the two questions presented, the Court held as follows:

⁴⁰ *Id.* at D49.

⁴¹ 15 J.O. COMM. EUR. (No. L166) 22 (1971), 11 COMM. MKT. L. R. D115 (Supp. 1972).

⁴² *BRT v. SABAM*, 1974 E. COMM. CT. J. REP. 51.

⁴³ *Id.* at [1974] 2 COMM. MKT. L. R. para. 8.

⁴⁴ *Id.* at para. 11.

"[A] compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear [to be an abuse], especially if such assignment is required for an extended period after the member's withdrawal."⁴⁵

4. *A Collecting Society May Not Discriminate Among Its Members As Regards Distribution of Income*

In *Re GEMA I*,⁴⁶ the Commission held that GEMA abused its dominant position by only paying supplementary fees under its "classification procedure" to certain members, although the payments derived from contributions of all GEMA members, including those who did not yet fulfill the conditions for participation in the "classification procedure" or could not because they were foreign nationals not domiciled in West Germany. These supplementary payments were held to constitute loyalty bonuses.

Furthermore, the constitution of the GEMA social fund, in its original form, was held to be abusive.⁴⁷ The constitution required a long waiting period of twenty years and contained a provision that distribution of benefits ceased upon the termination of membership. This failed to take account of the fact that the social fund was funded from contributions of all the members of GEMA. The Commission considered that the social fund in its original form was a means of binding the members of GEMA too rigidly.

5. *A Collecting Society May Not Exclude Recourse to Judicial Appeals for Its Members*

In *Re GEMA I*, the "classification procedure" in question included the following provision: "Appeal may be made against the decisions of the classification committee to the supervisory council whose decision is final and against which no judicial proceedings are permitted."⁴⁸ The Commission considered this to be yet another abuse on the part of GEMA in that it excluded all recourse to the courts, even though the funds to be distributed came from the contributions of the members. It was insufficient that GEMA regulated itself internally since such control could not guarantee that each member's royalties would be properly computed.

⁴⁵ *Id.* at para. 12.

⁴⁶ 14 J.O. COMM. EUR. (No. L134) 15 (1971).

⁴⁷ *Id.* at [Supp. 1971] 10 COMM. MKT. L. R. D52.

⁴⁸ *Id.* at D40.

6. *A Collecting Society May Not Extend Copyrights to Non-Copyrighted Materials*

The abuses identified above were committed on the part of collecting societies in dealing with their members. This subsection concerns relations between collecting societies and the users of musical works.

In *Re GEMA I*, the Commission examined the principal contract between GEMA and the German record producers. In order to calculate its fees, GEMA used a side of a record as a unit of calculation: For sides on which GEMA works accounted for only part of the recording, GEMA still required full fees (regardless of whether the non-GEMA works reproduced were in the public domain or had not been placed under GEMA control by their authors). There was one exception: If the GEMA portion lasted for less than one-third of the total running time of the recording, GEMA claimed one-third of the fee.

The Commission decided that the above provisions infringed Article 86 as they constituted a contractual extension of copyright to non-copyright works. If, for example, only one-tenth of a side of a record contained GEMA material, GEMA claimed one-third of the fee; if 34%, GEMA demanded the full fee, as if the whole side of the record comprised works on its lists. The Commission observed that such levying of royalties for unprotected works would not be accepted by record producers had GEMA not enjoyed a dominant position.

D. Royalty Rates

The imposition of an excessive royalty rate by a collecting society may constitute an abuse within the meaning of Article 86 as an example of an unfair trading condition. The difficulty is in deciding what is an excessively high rate. There are two cases, both involving the French collecting society SACEM, which are relevant here.

The first such case is *Basset v. SACEM*.⁴⁹ Mr. Basset operated a French discotheque called "La Playa." When Basset refused to pay the royalties that had been agreed, SACEM instituted proceedings in a French court. Mr. Bassett argued that by virtue of its de facto monopoly on the French market, SACEM occupied a dominant position which it abused by charging prices which were excessive in relation to the service provided. SACEM claimed a royalty of 8.25% of his gross turnover: 6.6% in performing fees and 1.65% in supplementary mechanical reproduction fees. While these latter fees are provided for under French legis-

⁴⁹ *Basset v. SACEM*, 1987 E. COMM. CT. J. REP. 1747, 3 COMM. MKT. L. R. 173 (1987). See also *Cholay v. SACEM*, Judgment of Dec. 12, 1990 (unreported).

lation, they are not mentioned in the laws of other Member States, except Belgium.⁵⁰

This case was referred to the European Court which held that the imposition of a supplementary mechanical reproduction fee did not in itself abuse the dominant position held by SACEM. The question was whether the royalty rates as a whole were unreasonable, and this was an issue for the French court to resolve. The Court also distinguished this case from *Musik-Vertrieb*⁵¹ (discussed in Part V *infra*). According to the Court, SACEM's supplementary royalty was similar to a performing right fee which was calculated on the basis of the discotheque's turnover, rather than the number of discs purchased or performed. Thus, the SACEM royalty was within the subject matter of the copyright pursuant to Article 36.

The other case that dealt with the amount of royalties charged by a collecting society was *Ministère Public v. Tournier*.⁵² Criminal proceedings were instituted against Jean-Louis Tournier, a director of SACEM, on a complaint by the owner/operator of a French discotheque, Jean Verney. Verney alleged that SACEM had required him to pay excessive royalties for the playing of protected musical works at his discotheque and had thus committed offenses under the French criminal code. In a parallel civil action, Verney's complaint raised questions concerning SACEM's general behavior towards discotheques in France. He claimed that the rate of royalties demanded by SACEM was appreciably higher than that applied in the other Member States and, moreover, the rates charged to discotheques bore no relation to those charged to other large-scale users of recorded music, such as radio and television stations.

When the case was referred to the European Court, two questions were asked in connection with Article 86:

1. Is the amount of the royalty . . . fixed by SACEM . . . 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?⁵³
2. Is Article 86 to be interpreted as meaning that it is an "unfair trading condition" for a copyright management society . . . 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

⁵⁰ *Basset v. SACEM*, 1987 E. COMM. CT. J. REP. at 1754.

⁵¹ *Musik-Vertrieb Membran GmbH v. GEMA*, 1981 E. COMM. CT. J. REP. 147, 2 COMM. MKT. L. R. 44 (1981).

⁵² *Ministère Public v. Tournier*, 4 COMM. MKT. L. R. 248 (1991).

⁵³ *Id.* at para. 7.

authors, so that the royalty is disproportionate to the economic value of the service provided?⁵⁴

The Court therefore had to consider what criteria must be applied to determine whether a collecting society is imposing unfair trading conditions. The second question asked more specifically whether the relationship between the rate charged in France and that charged in other Member States is a relevant factor in answering the first question.

The Court concluded that a collecting society:

[I]mposes unfair trading conditions where the royalties which it charges to discotheques are appreciably higher than those charged in other Member States. However, this would not be the case if the collecting society were able to justify such a difference by reference to objective and relevant dissimilarities between copyright-management in the member-states concerned and copyright-management in the other member-states.⁵⁵

Another form of abuse for which SACEM was criticized in this case was the application of a single scale for its entire repertoire. Discotheque operators have to pay for access to the entire SACEM repertoire even though 90% of the music they use is from the English speaking world. SACEM refuses to give special authorization for a sub-group, or several sub-groups, corresponding to the repertoire most used by discotheques. However, the Court held that the refusal by a collecting society to grant the users of recorded music access only to its foreign repertoire does not have the object or effect of restricting competition in the Common Market.

E. Application of Article 86 Outside the EEC

*Greenwich Film Production v. SACEM*⁵⁶ concerned the copyright of music used in film soundtracks. It also showed how Article 86 can be applied to contracts entered into in a Member State but which have effects outside the EEC. The method by which SACEM collected royalties payable with respect to the projection, distribution or sale of films having a soundtrack in which the works of SACEM's members had been incorporated depended on where the public performance of the film took place. In so-called "statutory" countries, where royalties are collected directly from the cinema proprietors, SACEM collected the royalties in this manner. However, in "non-statutory" countries (these are all non-EEC countries), where the producer of the film is normally required to

⁵⁴ *Id.*

⁵⁵ *Id.* at para. 46.

⁵⁶ *Greenwich Film Production v. SACEM*, 1979 E. COMM. CT. J. REP. 3275, 1 COMM MKT. L. R. 629 (1979).

pay a percentage based on the receipts from the distribution of the film, SACEM collected royalties in this fashion.

Greenwich Film Production (Greenwich), a French company, had produced two films using soundtracks which incorporated the work of two French composers, each of whom were members of SACEM. Greenwich refused to pay the royalties claimed by SACEM on the ground that it had acquired the copyrights directly from the publisher of the music, also a member of SACEM. The French lower court upheld SACEM's claim on the ground that the composers' contracts with SACEM preceeded the contracts between Greenwich and the publishers, and in any case SACEM was not a party to these later contracts and could not be bound by them.⁵⁷

Greenwich appealed the judgment of the French lower court arguing, *inter alia*, that the composers' contracts with SACEM were contrary to Article 86. The Cour d'Appel of Paris dismissed Greenwich's claim on the ground that the dispute concerned the exhibition of films outside the EEC and it was not established that the situation created by the contracts was capable of affecting trade between Member States.⁵⁸

Following an appeal by Greenwich to the Cour de Cassation, the European Court was asked to give a preliminary ruling "on the application of Article 86 of the Treaty of Rome in relation to the performance in non-member countries of contracts entered into in the territory of a Member State by parties within the jurisdiction of that state."⁵⁹ The Court considered that the activities of collecting societies may have the effect of partitioning the Common Market in that authors and composers who join a particular collecting society may be obliged to assign the entire copyright, worldwide, and for an extended period of time (as was the case with SACEM). This obligation clearly hinders the freedom of authors and composers to "shop around" for the services of performing rights societies in other Member States with respect to some categories of their rights or with respect to the exploitation of their rights in some countries. In this way, such an abuse might affect trade between Member States. This holds true regardless of whether the management of copyrights relates only to the performance of musical works in non-member countries.

Accordingly the Court concluded that:

[W]here an association exploiting composers' copyrights is to be regarded as an undertaking abusing a dominant position within the Common Market

⁵⁷ *Id.* at 1 COMM. MKT. L. R. 632.

⁵⁸ *Id.* at 633.

⁵⁹ *Id.*

or in a substantial part of it, the fact that such abuse, in certain cases, relates only to the performance in non-member countries of contracts entered into in the territory of a Member State by parties within the jurisdiction of that state does not preclude the application of Article 86.⁶⁰

It should be noted that the *Greenwich* judgment was given in the form of a preliminary ruling under Article 177 of the EEC Treaty. Thus, the case was sent back to the Cour de Cassation for the purpose of determining, in view of the European Court's ruling, whether SACEM's practice did, in fact, infringe Article 86. In this connection, it would appear that the French court was bound to apply the "indispensability" criteria of *BRT v. SABAM*,⁶¹ discussed earlier in this article.⁶²

IV. MERGERS AND ACQUISITIONS

Broadly speaking, the MCR now covers large-scale mergers and acquisitions throughout the Community. However, there is still some room for the argument that Article 86 continues to apply to smaller concentrations.

The aim of the MCR is to require notification to the Commission of concentrations involving parties above a certain size. The size of the transaction has no relevance in determining whether notification is necessary, nor in evaluating the anti-competitive effects of the transaction. Under the "one-stop" shop operation of the MCR, concentrations within the ambit of the MCR are no longer subject to national antitrust regulations (subject to referrals to the Member States under Article 9 of the MCR).⁶³

The MCR requires the pre-notification to the Commission of concentrations having a "Community dimension,"⁶⁴ which is determined by calculating the worldwide and EEC turnover of the various companies involved. Briefly, the worldwide aggregate turnover of the "undertakings concerned" (i.e., the parties to the deal as well as those companies which they control and those which control the parties) must exceed 5 billion ECU (\$6.25 billion), and the aggregate EEC-wide turnover of each of at least two of the undertakings concerned must be more than 250 million ECU (\$312 million), unless each of the undertakings concerned achieves more than two-thirds of its aggregate EEC-wide turnover within the same Member State.⁶⁵ In calculating turnover where the concentration

⁶⁰ *Id.* at para. 13.

⁶¹ See *supra* note 29.

⁶² See *supra* note 44.

⁶³ See *supra* note 2.

⁶⁴ MCR, *supra* note 1, at art. 4(1).

⁶⁵ *Id.* at art. 1(2).

consists of the acquisition of "parts" (i.e., a subsidiary or division), only the turnover of such parts is taken into account as that of the seller.⁶⁶

Once it is determined that a notified concentration has a Community dimension, the next question is whether it is "compatible with the Common Market." The global test of "compatibility" is whether the concentration creates or strengthens a dominant position in which "effective competition would be significantly impeded in the Common Market or in a substantial part of it."⁶⁷ The first part of this global test is based essentially on Article 86 but is obviously broader because an "abuse" is not necessary. The second half of the test of "significant impediment" of "effective" competition is a new formulation which remains to be defined by the Commission. What is clear, however, is that mere dominance or its reinforcement would not necessarily be prohibited under the MCR.

The criteria taken into account by the Commission are:

- i) The structure of all the markets concerned and the actual or potential competition from companies located inside or outside the EEC;
- ii) The market position of the undertakings concerned;
- iii) The alternatives available to suppliers and users;
- iv) Legal and other barriers to entry;
- v) Supply and demand trends for the relevant goods and services;
- vi) The interests of the intermediate and ultimate consumers;
- vii) The development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition.⁶⁸

As explained above, one of the central differences between the MCR and practice under Articles 85 and 86 is that the former requires notification, whereas notification under the latter is always optional. A second important difference between the two is that the MCR provides time frames for the examination of notifications and for the termination of investigations. As a general rule, the Commission has four weeks to decide whether to open an investigation under the MCR⁶⁹ and, in the event an investigation is initiated, it has four months to decide whether the concentration is prohibited.⁷⁰ No such time limits exist under Articles 85 and 86. It may take several years for a formal notification under Article 85 or 86 to be acted upon.

The MCR has already been applied by the Commission in several cases involving the entertainment industry, but neither merger was prohibited.

⁶⁶ *Id.* at art. 5(2).

⁶⁷ *Id.* at art. 2(3).

⁶⁸ *Id.* at art. 2(1)(a)-(b).

⁶⁹ *Id.* at art. 10(1).

⁷⁰ *Id.* at art. 10(3).

In *MCA/Matsushita*,⁷¹ Matsushita, one of the major producers of consumer audio and video equipment, concluded an agreement to acquire MCA, one of the world's seven largest producers of films for cinema, television, cable and home video. The Commission noted that this matching of Matsushita hardware and MCA software "may lead to a dominant position," particularly when new electronic products such as High Definition Television (HDTV) are introduced, although it could not be concluded at the time of the Commission decision that a dominant position would be created.

At about the same time, the Commission approved the merger between British Satellite Broadcasting (BSB) and Sky Television. Unlike the *MCA/Matsushita* deal, *BSB/Sky*⁷² never reached the antitrust test because the concentration did not have a Community dimension. A preliminary Commission examination revealed that none of the main companies involved in BSB (including Pearson, Chargeurs, Granada and Reed) had control of the holding company which operates BSB. Thus, the considerable turnover of the shareholders in the holding company could not be included in the calculation of worldwide or EEC-wide turnover. As a result, the parties did not have to notify the merger to the Commission.

V. FREE MOVEMENT OF GOODS (ARTICLES 30-36)

The free movement provisions of the Treaty have been applied, much like Article 85, to prevent the partitioning of national markets. In fact, a fair body of Court jurisprudence has developed in this area with respect to copyright. This section of the paper surveys some of the major cases.

A. The Exhaustion of Rights Principle

*Deutsche Grammophon v. Metro*⁷³ is the classic case explaining the "exhaustion of rights" principle. Deutsche Grammophon (DG) distributed its records in West Germany under the Polydor label. Metro, a Hamburg seller, obtained Polydor records manufactured by DG in Germany from a Hamburg wholesaler, who had previously purchased these records from DG's Paris subsidiary. As the result of the parallel importation of these products into West Germany, Metro was able to sell these records to retail customers at a price below that fixed by DG for the

⁷¹ Comm'n Press Release IP/91/21.

⁷² EUROPEAN REPORT, Part III (Jan. 12, 1991).

⁷³ *Deutsche Grammophon v. Metro*, 1971 E. COMM. CT. J. REP. 487, 1971 COMM. MKT. L. R. 631.

West German market. DG subsequently sought to enjoin Metro from selling these parallel imports on the ground that West German law gave DG the exclusive right to distribute its sound recordings in West Germany. The Hamburg court referred a number of questions to the European Court under Article 177.

The European Court noted that Article 36 of the Treaty permits restrictions on the free movement of goods in the interest of protecting industrial and commercial property. However, Article 36 adds as a limitation that such restrictions may not amount "either to a means of arbitrary discrimination or to a disguised restriction on trade between the Member States."⁷⁴ Put another way, although Article 36 permits restrictions on the free movement of goods for the protection of industrial and commercial property, it only allows such restrictions on the freedom of trade "to the extent that they are justified for the protection of the rights that form the specific object of this property."⁷⁵

In the view of the Court, if the application of the national copyright law in question effectively partitions national markets, this would conflict with the essential aim of the EEC Treaty, which is the integration of the national markets into one uniform market.⁷⁶ It followed therefore that:

[I]t would conflict with the provisions regarding the free movement of goods in the Common Market if a manufacturer of recordings exercised the exclusive right granted to him by the legislation of a Member State to market the protected articles in order to prohibit the marketing in that Member State of products that have been sold by himself or with his consent in another Member State solely because this marketing had not occurred in the territory of the first Member State.⁷⁷

B. Royalty Rate Differences Between Member States

Like *Deutsche Grammophon*, the case of *Musik-Vertrieb Membran GmbH v. GEMA*⁷⁸ involved the exhaustion of rights doctrine but under a different set of facts. Here, Musik-Vertrieb Membran (MVM) had parallel imported sound recordings from the United Kingdom into West Germany. MVM had acquired the records from K-Tel International

⁷⁴ *Id.* at 1971 COMM. MKT. L. R. 631, para. 9.

⁷⁵ *Id.* at para. 11.

⁷⁶ *Id.* at para. 12.

⁷⁷ *Id.* at para. 13. It should be noted, however, that the principle of exhaustion does not apply to products imported from non-EEC countries, even if there is a free trade agreement between the EEC and such third countries. *See, e.g.,* Polydor v. Harlequin Record Shops, 1982 E. COMM. CT. J. REP. 329, 1 COMM. MKT. L. R. 677 (1982); *Deutsche Grammophon GmbH v. Firma Pop*, 1 COMM. MKT. L. R. 137 (1982).

⁷⁸ *Musik-Vertrieb Membran GmbH v. GEMA*, 1981 E. COMM. CT. J. REP. 147, 2 COMM. MKT. L. R. 44 (1981).

Limited, which had itself obtained a license from the Mechanical Copyright Protection Society Ltd. to reproduce and distribute the records in Great Britain. The statutory British royalty of 6.25% on the retail price had been paid in Britain but GEMA, the copyright management society in West Germany, claimed that royalties were due to it for the differential between 6.25% and the 8% claimed by GEMA under West German law for the infringement of the exclusive right of the German copyright owner to distribute copies of the work in West Germany (i.e., the same statutory provision relied upon in *Deutsche Grammophon*). The question referred to the European Court was whether the levy of this supplementary royalty was consistent with the Treaty provisions on the free movement of goods.

Employing the reasoning of *Deutsche Grammophon*, the Court concluded that the imposition of the supplementary royalty was inconsistent with Article 30 and could not be justified under Article 36. In the words of the Court:

[N]o 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 [therefore having] the effect of enhancing the isolation of national markets which the Treaty seeks to abolish.⁷⁹

C. What Constitutes "Consent"?

The case of *EMI Electrola GmbH v. Patricia*⁸⁰ tests the principle of exhaustion of rights as established in *Deutsche Grammophon*, again in the area of sound recordings. In this case, EMI Electrola GmbH, to whom EMI Records Ltd. had assigned the German rights of reproduction and distribution of certain sound recordings, sought an injunction against Patricia and Lüne-ton, two Danish companies, from selling records imported into West Germany from Denmark incorporating such sound recordings. However, the two defendants contended that the disputed records had been marketed lawfully in Denmark, since the Danish copyrights had expired, and that consequently, the exhaustion of rights doctrine prevented EMI Electrola from asserting its German copyright.

⁷⁹ *Id.* at 2 COMM. MKT. L. R. 44, para. 18.

⁸⁰ *EMI Electrola GmbH v. Patricia*, 1989 E. COMM. CT. J. REP. 92, 2 COMM. MKT. L. R. 413 (1989).

These acts apparently took place with respect to musical works which were no longer protected by Danish copyrights.

Distinguishing the instant case from *Musik-Vertrieb Membran GmbH v. GEMA*, the Court held that Article 36 in this case justified EMI's exercise of its copyright. As the Court observed, the argument that the sound recordings were marketed lawfully in Denmark had nothing to do with EMI's consent, which was never given, but rather the expiration of the Danish copyright. Thus, the issue in the case arose from the disparity in protection periods provided by the copyright laws of West Germany and Denmark. In the absence of a harmonized EEC law of copyright, the Court held that it was for national legislatures "to specify the conditions and rules for such protection."⁸¹ In conclusion, the Court held:

To the extent that the disparity between national laws is likely to create restrictions on sound recordings in the Community, such restrictions are justified by Article 36 of the Treaty if they arise from the difference in arrangements relating to the duration of protection and if the protection period is inseparably linked with the existence of the exclusive rights themselves. There would be no justification if the restrictions on trade imposed or allowed by the national legislation on which the owner of exclusive rights or his licensee rely were such as to constitute a means of arbitrary discrimination or a disguised measure for restricting trade. However, there is nothing in the file which would permit the presumption that this situation could arise in a case such as the present.⁸²

D. Limitation to the Exhaustion of Rights Principle

The case of *Warner Brothers Inc. v. Christiansen*⁸³ further develops the principles discussed in the foregoing judgments, albeit with respect to the rental of video cassettes. In this action, Warner, the owner of the U.K. copyright in a James Bond film, "Never Say Never Again," assigned its video rights in Denmark to Metronome. The video cassette of the film was on sale in the United Kingdom with Warner's consent. Christiansen, who managed a video shop in Copenhagen, purchased a copy in London with the purpose of renting it out in Denmark and imported it into Denmark. Both Warner and Metronome sought an injunction in Denmark prohibiting the video rentals on the basis of Danish legislation which enabled the author of a musical or cinematographic work to take legal action prohibiting the rental of videograms of such work until the copyright owner gives consent. By contrast, U.K. copy-

⁸¹ *Id.* at 2 COMM. MKT. L. R. 413, para. 11.

⁸² *Id.* at 2 COMM. MKT. L. R. 413, paras. 12 and 13.

⁸³ *Warner Brother Inc. v. Christiansen*, 1988 E. COMM. CT. J. REP. 2625, 3 COMM. MKT. L. R. 684 (1990).

right law allowed the author to control its initial sale but did not convey the right to prohibit the hiring out of protected products.

The Court began its analysis with the finding that the Danish law prohibiting the unauthorized rental of video cassettes was likely to influence trade between Member States and consequently had an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty. However, when the Court considered the applicability of Article 36, the Court found that the free circulation in the United Kingdom of the video cassettes in question did not exhaust plaintiffs' underlying copyright. The Court distinguished the rental market of videos as offering "great potential as a source of revenue for makers of films."⁸⁴ Thus, if a national copyright law authorized the collection of royalties on sales of video cassettes but not rentals, the copyright owner in the recording would be deprived of an important source of royalty income. The Court therefore concluded that, far from partitioning national markets, the Danish copyright law on video rentals was justified by Article 36 as being within the subject matter of copyright.⁸⁵

VI. CONCLUSION

This article has demonstrated the breadth and complexity of applying EEC competition law to the music industry. An international legal advisor must first be acquainted with the various relationships and arrangements which may fall prey to the principal competition provisions, Articles 85 and 86. The advisor must also have a grasp of the particular "niche" areas in which EEC competition law plays a role in the music industry, as shown in the copyright collecting society cases. Moreover, it is also necessary to adapt principles established in related fields, such as the cable broadcasting or video market, to the music industry. Finally, to complete this daunting task, the industry lawyer should be sensitive to national legislation which may have anti-competitive effects by infringing the Treaty provisions concerning the free movement of goods. This is a dynamic and stimulating area of law, and it is hoped that this article has, to some extent, clarified some of the issues and principles involved.

⁸⁴ *Id.* at 3 COMM. MKT. L. R. para. 14.

⁸⁵ The Commission has proposed legislation which would require the Member States to provide a right to authorize or prohibit the rental or lending of originals and copies of copyright works. These rights would extend to the performing artist in respect of fixations of his performance, the phonogram producer in respect of his phonograms and to the producer of cinematographic works and moving images in respect of his visual recordings, and visual and sound recordings. *See Proposal for a Council Directive on Rental Rights, Lending Rights, and on Certain Rights Related to Copyright*, O.J. EUR. COMM. (No. C53) 35 (1991).