In Case 22/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour de Cassation of France for a preliminary ruling in the proceedings pending before that court between

GREENWICH FILM PRODUCTION, Paris

and

SOCIÉTÉ DES AUTEURS, COMPOSITEURS ET ÉDITEURS DE MUSIQUE (SACEM), Paris,

and

Société des Éditions Labrador, Paris

on the interpretation of Article 86 of the EEC Treaty,

THE COURT,

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

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

gives the following

JUDGMENT

Facts and Issues

The facts of the case, 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 procedure

1. The Société des Auteurs, Compositeurs et Éditeurs de Musique (hereinafter referred to as "SACEM") is a

private association governed by French law whose principal object is to collect and distribute royalties payable in respect of copyright in the public performance and mechanical reproduction of the works of its members.

The members of SACEM assign to it exclusively the right of public performance of their works. Consequently, in accordance with its documents of association and membership agreements, SACEM alone is entitled to authorize or prohibit the public performance and mechanical reproduction of the works of its members and to collect the royalties payable in respect of the exploitation of such works.

In this connexion SACEM collects royalties payable in respect of the projection, distribution or sale of films having a sound-track in which the works of its members have been incorporated.

The method of collection varies depending on whether the public performance of the film in question takes place in so-called "statutory" countries, in which royalties are collected directly from cinema proprietors, or in so-called "non-statutory" countries, in which the producer of the film is usually required to pay a certain percentage of the receipts from the distribution of the film. With regard to the Community the "non-statutory" countries are all non-member coutries.

However, pursuant to Article 2 (3) of SACEM's documents of association the members are empowered to retain the right to authorize or prohibit the reproduction of their works in films, intended to be shown in cinemas, for which the works were specially written. It is not clear from the file whether that right was exercised in the context of the present dispute.

2. François de Roubaix and Francis Lai are both composers and have been members of SACEM from 1962 and 1958 respectively.

Mr de Roubaix composed the original music for the film "Adieu l'Ami" and Mr Lai that for the film "Le Passager de la Pluie", whose executive producer is the undertaking Greenwich Film Production (hereinafter referred to as "Greenwich"). Those two composers use the same publisher, namely the Société des Éditions Labrador (hereinafter refered to as "Labrador"), which is itself a member of SACEM, with which publisher they concluded contracts conserning the assignment and publication of musical works, namely the music composed for the said films, on 25 June 1968 and November 1969 respectively.

Those two contracts, the terms of which are identical, contain, in addition to the usual clauses appearing in such contracts, a provision formally reserving SACEM's rights: for as long as one or other of the parties to the contracts remains a member of SACEM the effects of the assignment are to be governed by the terms of the agreements concluded by the parties to the contracts and SACEM, as laid down in the latter's documents of association and general rules, together with the agreements whereby the parties became members of that body.

3. Labrador subsequently concluded two contracts with Greenwich, one on 2 July 1968 concerning Mr de Roubaix's music for the film "Adieu l'Ami" and the other on 5 February 1970 concerning Mr Lai's music for the film "Le Passager de la Pluie". Under those contracts the producer is to acquire exclusive title to the rights of reproduction and of performance of the music in question in relation to its exploitation in cinemas, on television and through any other audio-visual medium. A letter drafted by Greenwich was annexed to each of the contracts in which it was provided that, where Greenwich was obliged to pay to SACEM sums in respect of the rights of the composer and of the publisher in respect of territories in which SACEM does not collect royalties (that is to say, in the so-called "non-statury" countries) the sum constituting the share of the publisher would be fully reimbursed to it.

4. SACEM claimed from Greenwich payment of the royalties due in respect of copyright for the public performance of the two films in question in non-statutory countries, that is to say, 3% of the price of the sale or hire of the films. Since Greenwich did not comply with its request SACEM instituted proceedings against it by a writ of 25 October 1971 before the Tribunal de Grande Instance, Paris.

Greenwich argued before that court that it had acquired the copyright in the music for the two films under the contracts which it had concluded with Labrador, which had itself acquired that copyright from the composers, and that accordingly it could not be obliged to pay royalties to SACEM for the public performance of the said music.

The Tribunal de Grande Instance, Paris, upheld SACEM's claim in a judgment on 26 April 1974 on the ground that, since the agreements whereby Mr de Roubaix and Mr Lai became members of SACEM were prior to the contracts relied upon by Greenich those contracts were not binding upon SACEM which had not been a party to the contracts. Labrador, which had been joined as a third party in the action, was ordered, in accordance with the undertaking which it had entered into, to reimburse to Greenwich the amount of the publisher's share of the sums which Greenwich was required to pay to SACEM.

Greenwich appealed against the judgment of the court of first instance on the ground that the membership agreements of Mr de Roubaix and Mr Lai were void as a matter of public policy as being contrary both to Article 86 of the EEC Treaty and to Article 59a of the French Order No 45-1483 of 30 June 1945 (which article was incorporated in Decree No 53-704 of 9 August 1953 [1]). The appellant association maintained that, since the membership agreements in question could not be relied upon against third parties and since it had accordingly duly acquired the rights of reproduction and public performance in the music for the two

1 — Article 59a reads as follows:

"Article 59a. Subject to the provisions of Article 59b, the following are prohibited: all concerted measures, express or unwritten agreements or combinations in any form or for any purpose whatever which have as their object or which may have as their effect the restriction of the full scope of competition by hindering reductions in cost prices or selling prices or by promoting an artificial rise in prices.

Any undertaking or agreement relating to a practice hereby prohibited shall be automatically void.

Such nullity may be relied upon by the parties and by third parties but it may not be relied upon by the parties against third parties; a ruling that an agreement is void may be made by the ordinary courts, which shall be notified of any opinion which may be formed by the commission."

films, it was not bound to pay any royalties to SACEM.

By a judgment of 7 May 1976 the Cour d'Appel, Paris, dismissed all Greenwich's claims on the view that the dispute between the French undertakings concerned the pecuniary consequences of contracts for the sale or exploitation of the sound-track of films performed only outside the territory of the European Community, that it was not established that the situation created by the contracts was capable of affecting trade between Member States and that there were accordingly no grounds for examining the validity of the membership agreements, upon which SACEM relied as against Greenwich, in the light of the Community provisions, which were extraneous to the case. The Cour d'Appel consequently upheld the judgment of the Tribunal de Grande Instance.

Greenwich appealed in 9 August 1976 on a point of law to the Cour de Cassation.

In a judgment of 12 December 1978 the Cour de Cassation stayed the proceedings until the Court of Justice of the European Communities has given a preliminary ruling, in accordance with Article 177 of the EEC Treaty, on the interpretation of Article 86 of the Treaty.

The Cour de Cassation requested the Court of Justice to give a 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."

The judgment making the reference was received at the Registry of the Court of Justice on 5 February 1979.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC Greenwich, represented by Robert Saint-Esteben, Advocate of the Cour d'Appel, Paris, SACEM, represented by Georges Kiejman, Advocate of the Cour d'Appel, Paris, the Governement of the Italian Republic, represented by its Ambassador, Adolfo Maresca, acting as Agent, assisted by the Avvocato dello Stato, Franco Favara, and the Commission of the European Communities, represented by Marie-José Jonczy, a member of the Commission's Legal Department, acting as Agent, submitted written observations.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without an inquiry.

II — Summary of the written observations submitted to the Court

Greenwich observes first of all that the basic conditions set out in Article 86 (the concepts of undertaking, dominant position and abuse thereof) do not concern the Court and that the point at issue is the condition for the applicability of Article 86 on the basis of the "effect on trade between Member States".

Accordingly, the Court is called upon to decide whether a practice by an undertaking in the EEC which constitutes an abuse with regard to EEC nationals and affects both the EEC and non-member countries falls outside Article 86 with regard to its operation outside the EEC.

That question has already been answered in the decision which the Commission

adopted with regard to GEMA, the German counterpart of SACEM.

In that decision, of 2 June 1971 (Journal Officiel 1971 L 134, p. 15), as amended by the decision of the Commission of 6 July 1972 (Journal Officiel 1972 L 166, p. 22), the Commission considered that it

"... does not exceed its competence by including within its decision the assignment of copyright for third countries since the exclusive assignment of such rights to GEMA also prevents the members of that association ... from assigning those rights to another performing right association in the Community" (p. 22).

With regard to the concept of abuse of a dominant position the case-law of the Court of Justice shows that impairment of the structure of effective competition is sufficient to constitute the abuse where such impairment is effected by an undertaking occupying a dominant position, even if the undertaking in question has not in fact "exploited" its position in order to attain its ends (Case 6/72, *Continental Can Company* v *Commission* [1973] ECR 215; Joined Cases 6 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation* v *Commission* [1974] ECR 223, paragraph 32, at p. 252; Case 85/76, *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 91).

Greenwich cites the said GEMA decision in support of its argument that it is this objective concept of abuse which is at issue in this case. The clauses in dispute in the agreements whereby François de Roubaix and Francis Lai became members of SACEM are the same as those of which the Commission disapproved in the GEMA decision, namely the assignment of all categories of copyright for the whole world.

According to Greenwich it was only after the intervention of the Commission against GEMA and the various similar undertakings in the EEC that SACEM had to modify its documents of association at its general meeting on 23 April 1974.

It also refers to the Fourth Report on Competition, Nos 112 and 113, and to the judgment in Case 127/73, *BRT* v *SABAM and Fonior* [1974] ECR 313).

The abuse in question is that which led SACEM to maintain in an abusive fashion or indeed to reinforce its dominant position in the Common Market by means of clauses in membership agreements preventing its members from stimulating effective competition between it and the other performing right associations in the Common Market.

In Greenwich's opinion such an abuse, which consists in a substantial alteration in the structure of competition in the Common Market, necessarily affects "trade between Member States". The Court has upheld this principle, in particular in Joined Cases 6 and 7/73 (cited above) and in Case 27/76, *United Brands* v *Commission* ([1978] ECR 207).

It adds that the same practice cannot be considered to be perfectly valid where it concerns the exploitation of rights

outside the Community and void as a matter of public policy where it concerns the exploitation of copyright within the Community.

In conclusion, Greenwich suggests that the Court should reply to the question submitted with a ruling that Article 86 of the Treaty applies to a contract concluded by an undertaking occupying, in a substantial part of the Common Market, a dominant position in relation to the exploitation of copyright, in so far as that contract has as its object or effect the impairment of the structure of competition in the Common Market, even if the dispute in question concerns the implementation of the said contract outside the Common Market.

SACEM observes first of all that Mr Lai and Mr de Roubaix became members on 28 September 1958 and 9 January 1962 respectively. Ultimately, the argument advanced by Greenwich is intended to call those membership agreements into question on the basis of provisions and case-law which had not come into being at the time when the agreements were concluded. In 1958, as in 1962, since Community law was silent on the point or did not provide specific directives, SACEM considers that it was entitled to obtain the transfer from its members of all the rights which such members owned in their works.

Subsequently, on 11 May 1971 and 13 June 1972, when there were no disputes whatever, SACEM amended the terms of its documents of association to take account of the provisions of Community law. In fact, under Article 34 of those documents, members are entitled to divide the rights and territories transferred to or managed by the association. Moreover, under the same article the nationals of a Member State of the Community may cancel assignments made to SACEM on condition that notice is given three months before the end of each year. Likewise, SACEM in no way discourages its members from active participation in other performing right associations or from becoming members of such associations after leaving SACEM, which frequently occurs.

In view of the amendments made to SACEM's documents of association the procedure initiated on 17 July 1970 by the Commission under Article 3 (1) of Regulation No 17/62 has not been continued.

SACEM considers that, since there are no specific provisions concerning prescription, it is necessary to have regard to the time which has elapsed since the occurrence of the infringements.

With reference to Case 127/73 *BRT* v *SABAM and Fonior* (cited above) and the *GEMA* decision (cited above) SACEM observes that in those instances the provisions of Article 86 were relied upon to defend the interests of the authors in question. On the other hand in the present case Greenwich is relying upon these provisions in order to refuse to make over to the composers, through SACEM, the royalties which are payable to them in respect of the exploitation of their works.

In broaching the question of interpretation submitted by the Cour de Cassation SACEM emphasizes that that question essentially concerns admissibility. The matter at issue relates exclusively to the implementation in non-member countries of agreements concluded on the territory of Member

States by persons under the control of such States.

The condition of "affecting trade between Member States" may be understood, on the one hand as a criterion whereby it is possible to define the respective scope of Community and national law on competition. On the other hand, the word "affect" may imply a value judgment to the effect produced by the activities in question. The case-law of the Court establishes that the conduct in question must be capable of affecting the pattern of trade between Member States "in such a way that it might hinder the attainment of the objectives of a single market between States" (Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295 and Case 1/71 *Cadillon* v *Höss* [1971] ECR 351).

In the GEMA decision the Commission in fact considered that the measures imputed to GEMA were of such a kind as to affect trade between Member States, in particular because the conditions which it imposed on its members rendered it "more difficult to obtain the status of a member in performing right associations established in other Member States" and "hampered the establishment of a single market for the provision of the services of music-publishers in the Community"(cf. the said decision published in Journal Officiel 1971 L 134, p. 26 at letter D).

In the context of the relationship between performing right associations and their members trade between Member States within the meaning of Article 86 of the Treaty is thus affected only in so far as such associations prohibit their members from belonging to a similar foreign association. This is the meaning which must be attached to the "market" or "the competitive structure" in question which is to be protected against measures which might jeopardize them.

If it is necessary to establish whether Article 86 of the Treaty applies to the implementation *on the territory of the Community* of the contracts concerned in the present dispute it must therefore be observed that trade between Member States cannot be affected by SACEM's actions since it does not bind its members by terms which prohibit them from joining another performing right society (Article 34 of its documents of association).

In the present case the real point at issue concerns *only the case of the implementation in non-member countries of the said contracts concluded on the territory of Member States.*

Article 86 may apply in such a situtation (cf. the above-mentioned Joined Cases 6 & 7/73) but it is a further requirement that the implementation in question should be of such a nature as to affect trade between Member States.

The claim for payment of royalties addressed to Greenwich in respect of the exploitation in so-called "non-statutory" countries of the works of the two composers in question has not and could not affect the "market" in question. Furthermore, it is impossible to establish a relationship between that claim and the restrictions on their rights which must not be imposed upon composers by their performing right association.

In conclusion, SACEM requests the Court of Justice to reply in the following terms to the question submitted:

"Article 86 of the Treaty of Rome is not applicable to the performance in non-member countries of contracts concluded on the territory of a Member State by parties within the jurisdiction of that State if trade between Member States is

not affected by such performance or if it is not established that such performance might have that effect."

The *Italian Government* observes that the important point in the present dispute is the territorial aspect of the performance of the contract between the two composers and SACEM.

The Italian Government considers that the question submitted by the Cour de Cassation should be amended as follows: Does the conclusion of a contract which, *inter alia*, prohibits composers from assigning to third parties rights in the exploitation of their works not only within the territory of the European Community but also outside such territory constitute evidence of a "dominant position" within the European Common Market?

In Case 127/73 *(BRT* v *SABAM and Fonior*, cited above) the Court properly ruled that the "decisive market" in deciding whether contracts of this nature are compatible with Article 86 of the Treaty is the particular market in services relating to the management of copyrights. In relation to that particular market the author or composer constitutes a consumer of the "service" even if he is the "assignor" of title to exploit such rights. In the said judgment the Court also took a positive view of the role and activity of "performing right associations".

In the present case the fact that the rights are exploited exclusively on markets outside the Community may be of importance, not in establishing the territorial scope of the rule on competition in question, but solely as evidence of an abuse on the domestic market, at the expense of composers working within the Community, in the management of copyright.

In general, the fact that an assignment of title to exploit a right extends to the whole world does not in itself constitute sufficient evidence of an abuse. The essentially unitary nature of the world market and the rapidity of trade in cultural material may thus render useful, if not indispensable, management by a single "undertaking" of the various possible uses of such cultural "material".

The Italian Government suggests that the Court should rule that the insertion in a contract relating to copyright management services of a provision which prevents a composer from assigning directly to third parties rights to exploit works in all countries of the world does not in itself constitute evidence of abuse of a dominant position, even though the association in question does occupy such a position.

The *Commission* first of all provides a short account of the procedure which it instituted against SACEM.

In the course of that procedure SACEM very quickly agreed to remove from its documents of association all discrimination by reason of nationality, all contractual ties of excessive duration and all measures which might prevent withdrawal by a member, either wholly or in part.

The Commission explains that it has altered its point of view somewhat with regard to the extent to which an association such as SACEM might bind its members without giving rise to an

abuse within the meaning of Article 86 of the Treaty. In fact it considered that membership of a performing right association constitutes protection for composers against the economic pressures of certain consumers of music.[1] The Commission thus considered that the links between such associations and composers were reasonable where, under the rules of such associations, composers are empowered to restrict the assignment of their copyrights in all their works to certain categories or forms of exploitation and for a certain duration.

This point of view was set out in the procedure against GEMA which culminated in the two decisions of 2 June 1971 (Journal Officiel 1971, L 134, p. 15) and of 6 July 1972 (Journal Officiel 1972, L 166, p. 22) which laid down the basic principles in accordance with which SACEM amended its documents of association on June 1973 and June 1974.

Those principles are the following:

— The total abolition of all discrimination on the basis of nationality;

— Freedom for members:

(a) to assign to SACEM or to another performing right association all or part of their copyrights for countries in which SACEM does not operate directly;

(b) to assign to SACEM their rights for countries in which SACEM operates directly or to divide such rights by categories amongst several performing right associations;

(c) to withdraw from SACEM the exploitation of certain categories of rights following due notice at the end of each year (decision of 2 June 1971) or on the expiry of a period of three years (decision of 6 July 1972).

The Commission considers that the fact that SACEM remits to composers the royalties payable in respect of the performance of their musical works does not constitute and has never constituted abuse of a dominant position within the meaning of Article 86 of the Treaty.

In the event of the disputed conduct of SACEM being considered to constitute an abuse within the meaning of Article 86 of the Treaty, the Commission states that, having regard to the number and variety of the situations conceivable in relation to that provision, it is difficult to imagine that the authors of the Treaty could have laid down, in a provision similar to Article 85 (2), the civil consequences of breaches of the prohibition laid down in Article 86. Community law entrusts to the national court the task of settling the civil consequences of such breaches on the basis of the letter and spirit of Article 86 and of the relevant provisions of national law or of private international law. It considers that this is the solution put forward by the Court of Justice in the above-mentioned Case 127/73 when it ruled that "if abusive practices are exposed, it is for the national court to decide whether and to what extent they affect the interests of authors or third parties concerned, with a view to

1 — This point of view was upheld by the Court in its judgment in the above-mentioned Case 127/73.

deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions".

The Commission, in considering the question submitted by the Cour de Cassation, considers that the principles flowing from its above-mentioned decisions of 2 June 1971 and of 6 July 1972 are applicable. That view is reinforced by the judgment of the Court in Joined Cases 6 & 7/73, *Instituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation* v *Commission* ([1974] ECR 223).

In conclusion the Commission considers that the reply to be given to the Cour de Cassation might be worded as follows:

"The fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 requires of its members the exclusive assignment of all their rights for the whole world may constitute an abuse in so far as such obligations are not absolutely necessary for the attainment of its object and thus encroach unfairly upon a member's freedom to exercise his copyright.

The prohibition of abuse of a dominant position within the meaning of Article 86 of the EEC Treaty may also apply where the abuse is capable of affecting trade between Member States relating to products or services intended for export outside the Community.

If abusive practices are exposed, it is for the national court to decide whether and to what extent they affect the interests of the authors or third parties concerned, with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions."

III — Oral procedure

At the hearing on 11 September 1979 Greenwich, represented by R. Saint-Esteben and B. Jouanneau, Advocates of the Cour d'Appel, Paris, SACEM, represented by G. Kiejman and O. Carmet, Advocates of the Cour d'Appel, Paris, and the Commission of the European Communities, represented by Marie-José Jonczy, a member of the Legal Department of the Commission, acting as Agent, presented oral argument.

The Advocate General delivered his opinion at the sitting on 4 October 1979.

Decision

1 By a judgment of 12 December 1978, which was received at the Court on 5 February 1979, the Cour de Cassation of France referred to the Court, pursuant to Article 177 of the EEC Treaty, a question on the interpretation of Article 86 of that Treaty.

2 That question was raised in the course of proceedings between the Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM), on the one hand, and the Société Anonyme Greenwich Film Production and the Société des Éditions Labrador, on the other.

3 The file shows that SACEM instituted proceedings against Greenwich before the Tribunal de Grande Instance, Paris, for payment of royalties in respect of the public performance of the music for two films and that Greenwich, in the course of the proceedings, caused Labrador to be joined as a third party in order to obtain from it the reimbursement of any sums which it might be required to pay to SACEM. The Tribunal found that the composers of the music for the two films in question were members of SACEM and had assigned to the latter the exclusive right throughout the entire world to authorize or prohibit the public performance of their works. It also found that Greenwich, in order to obtain the services of the two composers in relation to the two films which it was producing, had concluded contracts with Labrador, which was itself a member of SACEM and the publisher of the music of the two composers. The Tribunal also established that Greenwich claimed to own the copyrights in the music for the two films, having acquired those rights from Labrador which had obtained them directly from the composers; and finally that the two composers had joined SACEM before the contracts between Greenwich and Labrador were concluded.

4 It is further clear from the findings made by the Tribunal that, with regard to royalties payable in respect of the public performance of film music, a distinction must be drawn between territories where SACEM collects fees directly and territories where it does not. In accordance with the wording employed by SACEM the latter territories are termed "non-statutory countries". SACEM's claim relates exclusively to royalties payable in respect of public performance in "non-statutory countries". An agreement was concluded between Greenwich and Labrador to the effect that if Greenwich were obliged to pay to SACEM sums in respect of the composer's and publisher's rights for such territories the sum constituting the publisher's share would be fully reimbursed by Labrador.

5 On the basis of those findings of fact the Tribunal ordered Greenwich to pay the sums due to SACEM in respect of the public performance of the music for the two films in question in the "non-statutory countries". It appointed an expert to ascertain the exact amount of such sums. The Tribunal

considered with regard to the third-party claim that Labrador must reimburse to Greenwich the "publisher's" share of the sums which Greenwich was bound to pay to SACEM.

6 Greenwich appealed against that judgment on the ground that SACEM's conduct, in paricular its requirement that the two composers, in accordance with its documents of association in force at the time, should execute a general assignment of all categories of rights throughout the entire world, constitutes an abuse of a dominant position on the market. Such conduct must accordingly be considered to be prohibited under Article 86 of the EEC Treaty and also under Article 59a of the French Order of 30 June 1945.

7 The Cour d'Appel dismissed the complaint based on infringement of Article 59a of the Order of 30 June 1945 on the grounds that no proof or evidence had been provided that SACEM's activities have (or had) as their object or could have (or could have had) as their effect to impede the operation of the market and that "decisions and judgments issued in European matters but not concerning SACEM are clearly of no assistance" in the application of French domestic law.

8 With regard to the complaint based on infringement of Article 86 of the Treaty the Cour d'Appel considered first of all that, if it had to adjudicate on the merits of that point, it would have to dismiss it on the same grounds as those set out in connexion with Article 59a of the Order of 30 June 1945. However, since the "admissibility" of that complaint was disputed by SACEM, the Cour d'Appel considered that that point must be settled first. In that connexion the Cour d'Appel considered that the dispute, which involves French undertakings, concerns the pecuniary consequences of contracts for the assignment or exploitation of the sound-track of films which are implemented exclusively outside the territory of the Community (it is common ground that the "non-statutory countries" are all non-Community States). The Cour d'Appel concluded from this that it has been neither established nor argued that the situation arising from such contracts is capable of affecting trade between Member States and that the Community provisions are accordingly irrelevant to the dispute between the parties.

9 Greenwich, in its appeal on a point of law to the Cour de Cassation, has contested that last decision on the basis of a single argument by which it

maintains that Articles 86 and 177 of the Treaty have been infringed. The Cour de Cassation has stayed the proceedings and requested the Court of Justice to deliver a preliminary ruling on the application of Article 86 of the Treaty 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.

10 It is clear from the foregoing that at the present stage of the procedure the courts seised of the substance of the matter have not considered the question whether, for the purposes of Article 86 of the Treaty, SACEM may be considered to be an indertaking abusing a dominant position within the Common Market or in a substantial part of it. However, the question submitted by the Cour de Cassation cannot be answered unless it is assumed that that condition is fulfilled. It will be for the French courts subsequently to establish whether in the present action this is in fact the case. If abusive practices are exposed, it is also for such courts to decide whether and to what extent they affect the interests of authors or third parties concerned, with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or of certain of their provisions.

11 The reply to the question thus defined may be discerned in the previous decisions of the Court of Justice. The Court of Justice, in deciding whether trade between Member States may be affected by the abuse of a dominant position in the market in question, has taken the view that it must take into consideration the consequences for the effective competitive structure in the Common Market, adding that there is no reason to distinguish between production intended for sale within the Common Market and that intended for export (judgment of 6 March 1974 in Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents Corporation* v *Commission* [1974] ECR 223). There is no reason to restrict that interpretation to trade in goods and not to apply it to the provision of services such as the management of copyrights.

12 In fact, it is well known that in certain Member States the management of composers' copyrights is usually entrusted by composers to associations whose object is to supervise the exercise of such rights and to collect the corresponding royalties of behalf of any composer working within the territory of the Member State in question. It is possible in those circum-

stances that the activities of such associations may be conducted in such a way that their effect is to partition the Common Market and thereby restrict the freedom to provide services which constitutes one of the objectives of the Treaty. Such activities are thus capable of affecting trade between Member States within the meaning of Article 86 of the Treaty, even if the management of copyrights, in certain cases, relates only to the performance of musical works in non-member countries. In considering whether Article 86 is applicable the performance of certain contracts cannot be assessed in isolation but must be viewed in the light of the activities of the undertaking in question as a whole.

13 It is clear from the foregoing that where an association exploiting composers' copyrights is to be regarded as an undertaking abusing a dominant position within the Common Market 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 of the Treaty.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Cour de Cassation of France by a judgment of 12 December 1978, hereby rules:

Where an association exploiting composers' copyrights is to be regarded as an undertaking abusing a dominant position within the Common Market 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 of the Treaty.

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans

Delivered in open court in Luxembourg on 25 October 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 4 OCTOBER 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Cour de Cassation of France.

The appellant before that Court is a company called Greenwich Film Production, which, despite its name, is a French company, having its head office in Paris. Its business is, as its name indicates, that of producing films. I shall call it "Greenwich".

There are two respondents.

The first is the Société des Auteurs, Compositeurs et Éditeurs de Musique, or "SACEM", which is the French equivalent of the Belgian "SABAM", of the German "GEMA" and of the British Performing Right Society. It too has its head office in Paris.

The second respondent is the Société des Éditions Labrador, which is a music publisher, also carrying on business in Paris. I shall call it "Labrador". Labrador is closely associated with a firm called "Les Éditions Francis Dreyfus", which is