or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market.

As regards, in particular, a contract whereby the owner of the copyright in a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State, it is for national courts to make such inquiries as are necessary and in particular to establish whether or not the exercise of the exclusive exhibition right creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry, or the possibility of charging fees which exceed a fair return on investment, or an exclusivity the duration of which is disproportionate to those requirements, and whether or not, from a general point of view, such exercise within a given geographic area is such as to prevent, restrict or distort competition within the common market.

In Case 262/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour de Cassation [Court of Cassation] of the Kingdom of Belgium for a preliminary ruling in the case pending before that court between

1. CODITEL SA, COMPAGNIE GÉNÉRALE POUR LA DIFFUSION DE LA TÉLÉVISION, Brussels,

2. CODITEL BRABANT SA, Brussels,

3. CODITEL LIÈGE SA, COMPAGNIE LIÉGEOISE POUR LA DIFFUSION DE LA TÉLÉVISION, Liège,

4. INTERMIXT, a public utility undertaking, Brussels,

5. UNION PROFESSIONNELLE DE RADIO ET DE TÉLÉDISTRIBUTION, Schaerbeek,

6. INTER-RÉGIES, an intercommunal cooperative association, Saint-Gilles,

appellants in cassation,

and

1. CINÉ-VOG FILMS SA, Schaerbeek,

2. CHAMBRE SYNDICALE BELGE DE LA CINÉMATOGRAPHIE, a non-profit making association, Saint-Josse-ten-Noode,

3. LES FILMS LA BOÉTIE SA, Paris,

4. SERGE PINON, syndic of the court-supervised receivership of Les Films La Boétie SA, Paris,

5. CHAMBRE SYNDICALE DES PRODUCTEURS ET EXPORTATEURS DE FILMS FRANÇAIS, Paris,

respondents in cassation,

on the interpretation of Articles 85 and 86 of the Treaty,

THE COURT

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

Advocate General: G. Reischl
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

By a judgment of 30 March 1979 the Cour d'Appel [Court of Appeal], Brussels, in the context of a dispute between Coditel and Others, companies engaged in the cable diffusion of television, and the Belgian distribution company, Ciné-Vog, and Others, calling into question the Belgian national legislation on cinematographic copyright, stayed the proceedings and referred to the Court of Justice for a preliminary ruling two questions on the interpretation of Article 59 of the EEC Treaty.

By its judgment of 18 March 1980 in Case 62/79 SA *Compagnie Générale pour la Diffusion de la Télévision, Coditel and Others* v *SA Ciné-Vog Films and Others* [1980] ECR 881, the Court of Justice in reply to the questions submitted, ruled as follows:

"The provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing

right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right."

Whilst the reference by the Cour d'Appel, Brussels, was pending before the Court of Justice the appellants in the main proceedings appealed in cassation against the judgment of the Cour d'Appel on the ground that in that judgment it had been held in particular that since the right of performance was part of the specific subject-matter of copyright, Article 85 of the Treaty was not appplicable to the dispute.

The facts which gave rise to this case have already been described in the judgment in Case 62/79 *Coditel* cited above.

Consequently, it is sufficient to recall that by a contract of 8 July 1969 the Belgian film-distribution company, Ciné-Vog, acquired from the producer, the French company, Les Films La Boétie, the exclusive right to show the film entitled "Le Boucher" publicly in Belgium for seven years.

It was stipulated however that the right to broadcast the film on Belgian television could not be exercised until forty months after its first performance in Belgium, which took place on 15 May 1970.

Les Films la Boétie subsequently assigned to German television the right to broadcast the film in question on television in the Federal Republic of Germany. On 5 January 1971 the film was thus broadcast by German television, picked up by three Belgian cable-television companies and distributed by cable to their subscribers in Belgium.

Upon application by Ciné-Vog the Tribunal de Première Instance [Court of First Instance], Brussels, decided by judgment of 19 June 1975 that the Coditel companies had infringed the copyright held by Ciné-Vog.

On appeal Coditel relied upon the incompatibility of the exclusive right granted by Les Films La Boétie to Ciné-Vog with the provisions of the Treaty on competition (Article 85) on the one hand and with those on the freedom to provide services (Article 59) on the other.

By its judgment of 30 March 1979, the Cour d'Appel, Brussels, held first that the Coditel companies required the authority of Ciné-Vog to show the film "Le Boucher" on their networks on 5 January 1971, basing its decision upon the Berne Convention on the Protection of Literary and Artistic Works, in the revised Brussels version of 26 June 1948 adopted by the Belgian Law of 26 June 1951, secondly that a performing right was part of the specific subject-matter of copyright and that consequently Article 85 did not apply and thirdly that the submission based upon Article 59 of the Treaty raised a problem concerning the interpretation of that provision necessitating a reference to the Court of Justice.

The appellants in the main proceedings appealed in cassation against the first two decisions contained in that judgment of the Cour d'Appel, Brussels.

By judgment of 3 September 1981 the Belgian Cour de Cassation on the one

hand rejected the submission relating to an infringement of the Berne Convention and on the other, taking the view that the submission concerning the infringement of Articles 36 and 85 of the EEC Treaty raised a question as to the interpretation of Community law, decided to stay the proceedings and to refer to the Court of Justice pursuant to Article 177 of the Treaty the following question for a preliminary ruling:

"Where a company which is the proprietor of the rights of exploitation of a cinematographic film grants by contract to a company in another Member State an exclusive right to show that film in that State, for a specified period, is that contract liable, by reason of the rights and obligations contained in it and of the economic and legal circumstances surrouding it, to constitute an agreement, decision or concerted practice which is prohibited between undertakings pursuant to Article 85 (1) and (2) of the Treaty or are those provisions inapplicable either because the right to show the film is part of the specific subject-matter of copyright and accordingly Article 36 of the Treaty would be an obstacle to the application of Article 85, or because the right relied on by the assignee of the right to show the film derives from a legal status which confers on the assignee protection *erga omnes* and which does not fall within the class of agreements and concerted practices referred to by the said Article 85?"

The judgment making the reference was registered at the Court Registry on 30 September 1981.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the appellants in the main proceedings, represented by G. Kirschen, A. Braun, F. Herbert and A. de Caluwe of the Brussels Bar and by J. Dijck of the Antwerp Bar, by the respondents, Ciné-Vog and Chambre Syndicale Belge de la Cinématographie, represented by P. Demoulin of the Brussels Bar, by the Government of the French Republic, represented by Maryse Aulagnon, acting as Agent, by the Netherlands Government, represented by F. Italianer, acting as Agent, by the United Kingdom, represented by J. D. Howes of the Treasury Solicitor's Department, acting as Agent, assisted by R. Jacob, Q.C. Barrister, and by the Commission of the European Communities, represented by N. Koch, Legal Adviser, and E. De March, a Member of its Legal Department, acting as Agents.

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

II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the appellants in the main proceedings

The *appellants in the main proceedings*, after recalling the reasoning which led the Cour d'Appel, Brussels, to decide that Article 85 of the EEC Treaty did not apply to this case, set out the five heads on which they base their appeal in cassation against that decision:

First head: the decision of the Cour d'Appel, Brussels, constitutes a wrong interpretation of Articles 85 and 36 since Article 36 does not restrict the scope of Article 85;

Second head: the Cour d'Appel did not take account of the cumulative effect of parallel agreements concluded in the industry concerned;

Third head: the Cour d'Appel failed to make a proper assessment of the inseparable nature of the exclusive rights in relation to the agreement as a whole;

Fourth head: the Cour d'Appel misinterpreted the effect of the nullity of the exclusive rights;

Fifth head: the Cour d'Appel failed to reply to a submission that the contract contained a discriminatory clause.

Turning next to the question asked by the Belgian Cour de Cassation, the appellants in the main proceedings are of the opinion that a negative reply to the second part of the question raised would be sufficient for the Cour de Cassation to find fault with the judgment of the Cour d'Appel and that the Court of Justice would then not need to reply to the first part of the question. However, they stress that the Court should nevertheless reply to the first part of the question raised in order to avoid a protraction of the proceedings before the national court.

For that reason the appellants in the main proceedings consider first the general question concerning the relationship between Article 36 and Article 85 and, secondly, the question as to the description for the purposes of Article 85 of the right which the assignee seeks to enforce.

(a) The relationship between Articles 36 and 85 of the EEC Treaty

The general consensus of legal opinion seems to be that Article 36 does not preclude the application of Article 85. However, "the extent to which the prohibition contained in Article 85 applies to the rights protected by Article 36 remains the subject of debate", the argument in particular on the effect of the distinction made by the Court of Justice between the existence and the exercise of the right and the Court's reference to the specific subject-matter of the right.

The appellants in the main proceedings next recall the purpose ascribed to Article 36 of the EEC Treaty in the case-law of the Court. That article does not reserve jurisdiction to the Member States; it has always been restrictively interpreted by the Court and, in any event, can constitute an exception only to the principle of free movement, the other rules of the Treaty remaining wholly unaffected; finally, any restrictive measures must be justified.

Those principles are clearly applicable to the sphere of industrial and intellectual property. The appellants in the main proceedings point out in that regard that in practice where the owner of an industrial or intellectual property right has recourse to the protection afforded to him by national legislation, this will give rise to a situation which conflicts with Article 30 and therefore necessitate recourse to Article 36 only "where he seeks to prevent imports from another Member State". In economic terms such action will necessarily lead to a restriction of competition, but Article 85 will apply only if "such recourse constitutes the subject, the means or the consequence of an agreement, decision or concerted practice which, by prohibiting the importation from other Member States of products lawfully placed on the market in those States,

would have the effect of partitioning the market".

Moreover, the competition rules are intended not only to prevent the partitioning af national markets but also to ensure the maintenance of effective competition. It follows, according to the appellants in the main proceedings, that the purpose and scope of the competition rules "are wider than those of the rules on the free movement of goods, inasmuch as the latter are addressed to undertakings".

Nevertheless, it is possible to point out similarities in the interpretation and application of Articles 30 and 85. In particular restrictive action continues to be possible on conditions precisely defined by Article 36 and Article 85 (3) respectively and in both cases the application of the provision laying down exceptions is subject to the principle of proportionality.

It follows, according to the appellants in the main proceedings, that four principles may be deduced with regard to the relationship between Articles 36 and 85:

(1) Article 36, as a provision which lays down exceptions solely to the principle of free movement of goods, does not preclude the application of Article 85;

(2) Where the exercise of the industrial or intellectual property right relied upon is the subject, the means or the consequence of an agreement which restricts competition, any consideration of the lawfulness of such exercise must also take account of the application of Article 85;

(3) An industrial or intellectual property right is not excluded as a matter of general principle from the scope of Article 85;

(4) However, Article 85 (3) guarantees to a certain extent that the interests whose protection is ensured by Article 36 in the context of the free movement of goods may also be protected under Article 85.

Consequently, the appellants in the main proceedings propose that the following reply should be given to this part of the question asked by the Cour de Cassation:

"Article 36 lays down exceptions solely to the application of the provisions of the Treaty on the free movement of goods. The application of the rules on competition remains unaffected. An industrial or intellectual property right remains subject to the prohibition contained in Article 85, where it is the subject, the means or the effect of an agreement which restricts competition."

(b) The nature, in relation to Article 85, of the right asserted by the assignee

According to the appellants in the main proceedings, the question raises the issue as to whether Article 85 is inapplicable because the action derives from a legal status. Interpreted in that manner, the question asks in effect "where in this particular case the line is to be drawn between the existence of copyright and the exercise thereof". The Court of Justice, in drawing that distinction itself, took the view that the exercise of such a right might fall within the ambit of the prohibitions contained in the Treaty each time it manifested itself as the subject, the means or the consequence of a restrictive practice. Consequently, since in this case the intellectual property right relied upon by Ciné-Vog unquestionably derives from a contract, it is necessary to examine that contract in the light of Article 85.

Before embarking upon such an examination, the appellants in the main proceedings first of all raise the matter of the nature of the contract in question. In

their view, there has always been uncertainty concerning the description to be applied to it. The contract which was called an "exclusive right to distribute" by the parties to the main proceedings was described by the Cour d'Appel as a "temporary and limited assignment" (the description adopted by the Court of Justice in Case 62/79), whereas in the Commission's view it is a contract granting an exclusive licence. The applicants in the main proceedings share the Commission's view on this matter bu stress that in any event the contract, whether it be a licence or an assignment, clearly restricts competition not only because it contains an exclusive-rights clause but also because in the contract there is a first clause in Articles 7 and 8 determining the proportion of the receipts to be attributed to the film "La Boucher" where it is shown jointly with another film and with short supporting films and a second clause to the effect that the television rights may not be exploited by Luxembourg television until thirty-two months after their exploitation by Belgian television. Since the latter clause applies dissimilar conditions to equivalent transactions, it is expressly prohibited by Article 85 (d).

Turning next to the lawfulness of the exclusive right granted to Ciné-Vog, the appellants in the main proceedings maintain that the grant of licences and the exclusive rights attaching thereto do not under any circumstances appertain to the existence of industrial property rights but solely to the exercise thereof. Thus, exclusive rights deriving from an agreement or from a concerted practice fall within the scope of Article 85 of the EEC Treaty. Those principles also apply in matters of copyright, as is demonstrated by the Commission's practice in that area.

That analysis of the position with regard to exclusive rights under Article 85 is essentially the same where there is an exclusive assignment rather than an exclusive licence. The appellants in the main proceedings maintain that their view is confirmed by the judgment of the Court of 27 March 1974 in Case 127/73 *Belgische Radio en Televisie* v *SABAM* [1974] ECR 313 and that the judgment of 25 October 1979 in Case 22/79 *Greenwich Film Production* v *Société des Auteurs, Compositeurs et Éditeurs de Musique* [1979] ECR 3275.

Finally, the appellants consider that, as is clear from the case-law of the Court, any assessment of the restrictive effect of a contract must take account of actual circumstances, and the existence of similar contracts is a circumstance which is capable of being a factor in the economic and legal context within which the contract must be judged (c.f. judgment of 12 December 1967 in Case 23/67 *SA Brasserie de Haecht* v *Wilkin and Wilkin* [1967] ECR 407 and judgment of 25 October 1977 in Case 26/76 *Metro* v *Commission* [1977] ECR 1975). Consequently, in this case it is necessary to take into account the agreement concluded with German television and other contracts assigning rights for cinematographic and televised performance and exploitation, since, according to the appellants in the main proceedings, it is "almost certain that in other Member States similar contracts containing similar restrictions have been concluded". In view of the exclusive rights on the one hand and the clauses apportioning receipts on the other, such a network of contracts has at least the effect of restricting competition. Consideration should also be given to the reputation of the producer and the principal actors and to the popularity to which that may lead on the market.

Finally, the appellants in the main proceedings consider that the judgment given in Case 62/79 *Coditel* cited above does not alter their conclusions as to the unlawfulness of the contract of exclusive assignment by reason of its incompatibility with Article 85 (1). That judgment was concerned only with the freedom to provide services and was given in response to a request for a preliminary ruling. The sole issue which had been raised in that case was the lawfulness of the prohibition of televised re-transmission and consequently the Court gave a ruling on that point and not on the issue raised by the present question submitted by the Belgian Cour de Cassation, namely the lawfulness under Article 85 of wholly exclusive performing rights which are valid not only with regard to the re-transmission of television programmes broadcast in another Member State but also with regard to live televised re-transmission and, in particular, cinematographic exploitation by other distributors.

Consequently, the appellants in the main proceedings consider that if, as the Court has stated, the determinant factor, as far as a performing right in a cinematographic film is concerned, is the right of the owner to demand fees, it is inherent neither in the right to demand fees nor therefore in the existence of the performing right that the latter should be exercised exclusively by one of the contracting parties.

Consequently, the appellants in the main proceedings propose that the following reply should be given to the second part of the question asked by the Cour de Cassation:

"Where the performing right which the assignee seeks to enforce is the subject, the means or the consequence of an agreement which restricts competition, both by reason of its subject-matter, which comprises an exclusive-rights clause, tie-in provisions and discriminatory conditions, and by reason of the economic and legal context surrounding the agreement, it is not possible to dispense with an assessment of the compatibility of that performing right with Article 85 on the ground that the right derives from a legal status."

B — Written observations of the Commission

The Commission recalls first of all that the purpose of the right to exploit cinematographic works is to enable the owner to exploit his work commercially and to derive a fair profit from it. In order to do so he has various means at his disposal, including contracts granting exclusive licences. "Whilst there are no grounds for criticism as regard the protection of the owner in the case of contracts granting non-exclusive licences, there is every reason to consider the question of the applicability of Article 85 of the EEC Treaty in the case of exclusive licences."

In the case of exclusive licences only the licences may exercise the rights which copyright encompasses, whereas the owner of the right is prevented from granting other licences, and, as the case may be, from exploiting his work himself in the territory concerned.

These are typical restrictions on freedom of economic action which generally fall within the scope of Article 85 (1) of the Treaty.

Moreover, the aim of such an exclusive-rights clause is to prevent potential competition on the part of distributors who are not parties to the licensing agreement.

In such circumstances and according to the Commission's practice with regard to exclusive licences in respect of patents,

exclusive licences in respect of rights to exploit cinematographic works may entail a restriction of competition within the meaning of Article 85 (1) of the Treaty.

It is certainly true, observes the Commission, that the guarantee provided by Article 36 of the Treaty with regard to the existence of industrial and commercial property rights must also apply in matters of competition. However, that general principle can exclude the exercise of copyright or trade-mark or patent rights from the scope of Article 85 only in so far as the application of that provision encroaches upon the specific subject-matter of those rights. It may easily be demonstrated that the essential function of rights to exploit cinematographic works is not exploitation by a single person but exploitation from which unauthorized third parties are excluded and that since the grant of exclusive licences does not affect the right of the owner to exclude third parties but his freedom to exercise his right as he pleases, the restrictions resulting therefrom cannot be part of the owner's "monopoly of action".

Thus, according to the Commission, the renunciation by contract of the freedom to exploit the copyright in a film does not constitute an exercise but the relinquishment of that right by its owner. It follows that "far from encroaching upon the specific subject-matter of the right, the view that exclusive licences restrict competition protects the owner's freedom of exploitation against contractual restrictions".

The Commission, rejecting the commercial and financial argument in favour of exclusive rights in cinematographic films, maintains that in so far as the argument concerning the financing of the film industry justifies contracts granting exclusive rights, this proves that an exclusive licence is intended to ensure that the licensee is protected from competition from any further licensees. On the other hand, such a circumstance may, where appropriate, justify exemption under Article 85 (3).

Finally, in so far as exclusivity constitutes a restriction of the freedom of the owner of the right, the fact that there is a difference between literary and artistic works, the placing of which at the disposal of the public is inseparable from the circulation of the material form of the work, and works which are made available to the public by performances and therefore not in a material form, has no relevance to this case.

However, if the exclusive-rights clause of an agreement granting a licence in respect of the right to show a film constitutes a restriction of competition within the meaning of Article 85 of the Treaty, in order for such a clause to fall within the scope of Article 85 (1) the other conditions laid down by that provision must also be fulfilled and in particular "the restriction of competition must be appreciable, it must be capable of affecting trade between Member States and the effect on trade between Member States must in turn be appreciable." Thus, the question as to whether an agreement falls within the scope of Article 85 (1) depends less on its legal nature than on its effects on competition and on trade between the Member States. The. assessment of the latter condition is a matter for the national courts.

Accordingly, the Commission considers that the following answer may be given to the question asked by the Belgian Cour de Cassation:

"A commitment to grant an exclusive right, entered into by a company owning the right to exploit a cinematographic film, in favour of a company in another Member State under a contract granting to the latter company the right to show the film in that State is an agreement between undertakings which has as its object the restriction of competition within the meaning of Article 85 (1) of the Treaty. That agreement may constitute an agreement, decision or concerted practice which is prohibited and therefore void under paragraphs (1) and (2) of that article, if the other conditions laid down by Article 85 of the Treaty are fulfilled."

C — Written observations of the respondents in the main proceedings

According to the *respondents in the main proceedings,* the question asked by the Belgian Cour de Cassation seeks to ascertain whether the contract in question is automatically void pursuant to Article 85 (1) and (2) of the Treaty because it grants the exclusive right to show the films, limits that exclusive right to the territory of one Member State and provides for the parallel grant of exclusive rights to other distributors in respect of other territories of the common market. Those characteristics do not give rise to the application of Article 85, since they are inherent in the nature of the right to show the film, which is a copyright, by its nature exclusive and capable of being exercised as many times as the film is shown. Moreover, it must also be possible, so far as subsequent holders of the right, be they assignees or licensees, are concerned, for the right to remain exclusive, and to remain so in respect of geographical regions which may coincide with the territories of the Member States, if harmonious exploitation safeguarding the legitimate interests of the European film industry is to be achieved.

The defendants in the main proceedings recall in that regard the rules concerning the financing of the European film industry. European film-production is possible only with the financial participation of the distributors. The latter will agree to make advances only if each distributor established in a given country "is certain that he will be the only person able to show the proposed film in the territory in which he carries on business. Thus, the exclusiveness attaching to the exercise of a performing right, "which is inherent in that right", must be capable of being transferred from the producer to the distributor since it is a necessary condition of the risk which the distributor agrees to run.

The respondents in the main proceedings consider therefore that if the distributor is unable to acquire exclusive rights, the European producer will obtain no further finance from that distributor and this will lead to the ruin of the European film industry to the benefit of the American film industry whose films are shown in cinemas throughout the world by distribution companies which have wholly-owned subsidiaries in each Member State and thus escape the application of Article 85 of the Treaty. Consequently, in so far as it may legitimately be thought that the aim of the Community rules is not be bring about the ruin of a European commercial and artistic activity, "the circumstances dictate that Article 85 of the Treaty should not apply in this case".

However, the law is in confirmity with the circumstances, as is clear merely from a re-reading of the grounds of the

judgment given in Case 62/79. Indeed, it follows from paragraph 11 that the objection based on a possible partitioning of the market cannot be upheld in the case of performing rights.

In paragraph 12 the Court of Justice, by distinguishing a work from its material form and by treating differently the performance of a work, which alone is at issue here, from the circulation of the material form of the work, affirmed the legitimacy of the exclusiveness attaching to performing rights.

In paragraph 13, the Court of Justice stated that it was legitimate for the exercise of a performing right to be remunerated by fees due in respect of the authorization to exhibit a film calculated on the basis of the actual or probable number of performances. In the absence of exclusive rights it would not be possible to fix those since the probable number of performances would be unknown.

Paragraph 15 could be "restated by replacing Article 59 by Article 85 of the Treaty".

It is clear from paragraph 16 that Article 85 can no more constitute an obstacle to the geographical limits specified in the contracts than Article 59.

Finally, it follows from paragraph 17 that a performing right may take the form of an exclusive right limited to one Member State, without there being an infringement of Community law. Since Article 85 is a provision of Community law, it cannot preclude the grant and exercise of an exclusive right limited to the territory of one Member State, where the right granted is the right to show a film.

Consequently, "it seems that the reply which may be given to the Belgian Cour de Cassation is that Article 85 does not apply to this case because in particular the exclusiveness attaching to a performing right is one of the specific aspects of that copyright."

The respondents in the main proceedings add, moreover, that this must be the case because, since the right to authorize the showing of a film necessarily entails the right to prohibit such a showing, it would be impossible to exercise that right without granting exclusivity to the distributor of the film in respect of a given territory, since in the absence of exclusivity each distributor would be able to prohibit all the showings agreed to by his competitors with the result that the exploitation of the film would be nullified.

D — Written observations of the French Government

The *French Government* also takes the view that the right of performance is inherent in copyright and does not constitute an element severed from it. Indeed it is clear from the Berne Convention that the copyright in the work in question comprises both a non-pecuniary right, perpetual and unalienable, relating to the authorship and preservation of the work and an economic right which may be the subject of transactions between authors and assignees and relates to the publishing or reproduction and performance of the work. Thus, the rights of reproduction

and performance are elements inherent in copyright.

In the film industry the producer is the exclusive assignee of the copyright and that exclusive right of exploitation may be transferred by him to the distributor, who in turn grants performing rights to the cinema operator. At the same time the producer gives a guarantee to the distributor, who in turn gives a guarantee to the cinema operators that, in particular, the work will not be broadcast on television. The French Government emphasizes in that regard that the widening of the areas of reception of television broadcasts due to cable distribution increases the necessity for "an unequivocal statement of the exclusive nature of copyright in the hands both of the authors themselves and of their assignees".

Turning to a discussion of the relevant law, the French Government considers that it follows from paragraph 12 of the judgment given in Case 62/79 *Coditel* cited above that the Court agreed to grant special treatment to copyright in cinematographic films on the ground that "there are two aspects to the financial right attaching to the films, namely the right of reproduction and the right of performance". It follows, moreover, from paragraph 14 of that judgment that the Court recognized "the supremacy by virtue of Article 36 of the Treaty of the copyright in a cinematographic film over the Community rules on free movement".

However, in the view of the French Government, it is still necessary to determine whether a contract assigning the financial right attaching to copyright is not contrary to the rules governing competition. It takes the view that it is clear from the case-law of the Court (judgment of 29 February 1968 in Case 24/67 *Park Davis* v *Centrafarm* [1968] ECR 55 and judgment of 20 January 1981 in Joined Cases 55 and 57/80 *Musik-Vertrieb membran* v *Gema* [1981] ECR 147) that "in itself copyright (and the exclusive performing right which it comprises) cannot be regarded as an agreement, decision or concerted practice prohibited by Article 85 (1)". Thus, it is accepted that the sale of copyright and the non-exclusive licence granted in respect of that right is compatible with the rules on competition. Nor, however, is the intermediate solution, which an exclusive licence represents, prohibited by Article 85 (1), since such an agreement embodies the exercise of a right by its owner, in so far as the grant of that right represents a transfer of the exclusive performing right for a specified period and not a relinquishment of that right. Consequently, an exclusive-rights contract of this kind does not interfere with free movement, whereas if exclusivity were not granted the effect would be to disrupt distribution and to distort competition by forcing distributors to engage in commercial warfare "whose only effect would be a lowering of the quality of distribution".

Finally, the French Government considers that if, contrary to all expectations, it were decided that the contract in question restricts competition, the contract not only should gain exemption under Article 85 (3) but also would be covered by the derogation provided for by Article 36, since the specific subject-matter of the copyright derives from a legal status and consists of the exclusive right to show the film.

Consequently, the French Government takes the view "that Article 85 (1) of the EEC Treaty does not apply to an exclusive licence to show a film, in so far as the right attaching to that licence constitutes the specific subject-matter of a copyright which derives from a legal status".

E — Written observations of the Netherlands Government

The *Netherlands Government* does not propose to consider whether the contract in question is contrary to Article 85 but considers that the present case raises the question as to whether a copyright whose exercise is compatible with Article 59 may be incompatible with Article 85, where it is the subject of a contract.

In order to reply to that question, the Netherlands Government draws a parallel between Article 85 on the one hand and Articles 30 and 36 on the other. With regard to the case where the licensee of an exclusive right seeks to enforce that right, the following principles may be inferred from the case-law of the Court concerning Article 85 of the EEC Treaty:

Article 36 also applies in the field of competition in so far as the existence of industrial and intellectual property rights are concerned. The exercise of those rights may, however, fall within the scope of the prohibitions laid down by Article 85;

An industrial and intellectual property right, as a legal instrument, does not in itself exhibit the characteristics referred to in Article 85 (1);

However, the exercise of such a right may fall within the scope of Article 85 each time it is the subject, the means or the consequence of an agreement, decision or concerted practice.

Where such a right is exercised by means of contractual assignments, it is necessary to determine in each individual case whether such exercise gives rise to a situation falling within the scope of the prohibition contained in Article 85;

Such a situation may arise in particular from restrictive agreements between proprietors or their assignees or licensees which enable them to prevent imports from other Member States.

With regard to the relationship between Article 30 and industrial and intellectual property rights falling within the ambit of Article 36, the Court has followed a consistent line of reasoning:

Legislation whose application leads to a disruption of trade between Member States must be regarded as a measure having equivalent effect within the meaning of Article 30 of the Treaty;

However, Article 36 permits derogations from that rule in so far as restrictions on imports are justified on the ground of the protection of industrial and intellectual property;

The proprietor of such a right may not however prevent the importation of a product which has been lawfully marketed in another Member State by the proprietor himself or with his consent.

The Netherlands Government draws the conclusion from all these decisions that "a licensee of an industrial and intellectual property right cannot prevent the parallel importation of goods lawfully marketed" in other Member States, any more than a proprietor is able to do so. On the other hand, the exercise *ex contractu* of such a right is not prohibited by Article 85, in so far as such exercise remains within the limits of what is permitted in the case of owners themselves under Articles 30 to 36. According to the Netherlands Government, since the contract in question remains within those limits, it does not constitute an agreement, decision or concerted practice prohibited under Article 85.

That reasoning applies by analogy to the question as to whether a copyright the exercise of which is compatible with Article 59 may be incompatible with Article 85 where it becomes the subject of a contract. In its judgment in Case 62/79 *Coditel* cited above, the Court followed a line of reasoning comparable with the interpretation placed on Articles 30 to 36 and that judgment clearly provides "guidance as to the reply to be given to the question asked by the Belgian Cour de Cassation".

The Netherlands Government adds finally that, as was held by the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] in its judgment of 30 October 1981 in Case 11739, "it follows from Article 11 of the Berne Convention, in the form revised in Brussels on 26 June 1948, that the transmission through a cable distribution network operated by a third party of a programme which is broadcast by a television broadcasting station and is subject to copyright must be regarded as a separate communication to the public within the meaning of that Convention" and that a separate communication to the public of a work covered by copyright is always subject to the authorization of the original owner or his assignees or licensees.

In conclusion, the Netherlands Government considers that "a contract between the original owner and his assignees or licensees does not fall within the scope of the prohibition contained in Article 85 of the EEC Treaty, if it does not involve for the person exploiting the cable network restrictions which are more severe than those to which the latter would have been subject within the limits laid down by Article 59 of the EEC Treaty, in the absence of the said contract".

F — Written observations of the United Kingdom

According to *the United Kingdom*, the essence of the question asked by the Belgian Cour de Cassation lies in the first part of the question. In the second part of its question, the Belgian court suggests two alternative reasons why the contract might not fall within Article 85. The United Kingdom submits that the agreement does not fall within Article 85, not only for the two reasons suggested by the Belgian court in the second part of its question but also "for the simple further reason that there is nothing in the contract — whether by object or effect — which either affects trade between Member States or which prevents, restricts or distorts competition within the common market".

Before embarking upon a legal analysis, the United Kingdom, like the French Government and the respondents in the main proceedings, emphasizes the fact that a declaration that exclusive licences were contrary to Article 85 would render unworkable the present system of making and distributing cinematographic works, since the characteristics of film production and of the system for distributing films are such that, in order for the system to work, it is necessary in many cases that the transfer of the various rights should be exclusive, particularly in the case of distributors, since they will promote the film only if in return they obtain the exclusive right to show the film.

Turning to consider the relevant law, the United Kingdom first refers briefly to the difference between assignments and licences, emphasizing that an assignment is a transfer of property whereas a licence forms part of the law of contract. It states that this distinction does not

eflect a genuine distinction in commercial reality, since what is important in this context is exclusivity and for that reason it considers that the distinction which it has pointed out between an assignment and a licence has no bearing on the decision in this case.

The United Kingdom next considers the compatibility of such an assignment or exclusive licence with Article 85 of the Treaty. In its view such assignments or exclusive licences may constitute an infringement of Article 85 but that is by no means necessarily so. It states that in any event this is a question of fact which is to be determined by the national court. Moreover, in the present case neither the assignment nor the exclusive licence satisfies the requirements of Article 85, since the effect of the assignment or licence was simply to transfer the exclusive right from one party to another who was in a better position to manage it. That transfer neither increased nor decreased actual or potential competition, nor did it affect trade between Member States. Moreover, the United Kingdom contends that the Court has already effectively so held in paragraph 16 of its judgment in Case 62/79 *Coditel*, cited above.

The United Kingdom adds that in this case no artificial barriers were created and that the Court, using in paragraphs 13 and 14 the expression "a copyright owner and his assigns", considered that copyright could be assigned.

Consequently, "a decision in the present case holding otherwise would be tantamount to rendering the first *Coditel* case a pointless exercise".

Turning next to what it refers to as the two reasons suggested by the Belgian Cour de Cassation for the non-applicability of Article 85, the United Kingdom maintains, first, with regard to Article 36, that it follows from the judgment of 18 February 1971 in Case 40/70 *Sirena* v *Eda* [1971] ECR 69 that the article is also applicable by analogy to matters governed by Article 85. On that basis the protection of Article 36 is also available for the protection of the assignee or exclusive licensee on the ground that his right to require fees forms part of the specific subject-matter of the copyright.

With regard to the legal status of the licensee, the United Kingdom understands that under Belgian law the exclusive licensee has been given the right to bring infringement proceedings or their equivalent against third parties. The United Kingdom considers that in this case the mere transfer of an industrial property right and the contract relating to the transfer cannot as such fall within Article 85, since they do not involve the creation of artificial barriers to trade between Member States.

Finally, the United Kingdom considers the consequences of a decision declaring that the agreement in question is contrary to Article 85. Article 85(2) provides that the agreement is to be void, but that nullity is not necessarily total. Indeed, it may be that only the terms which have anti-competitive effect are void. However, "it does not appear that in the present case the exclusivity clause can be excised from the agreement and the remainder of the agreement enforced against the infringer".

The United Kingdom considers that another possibility would be to follow the solution adopted by the national court responsible for applying the decision of the Court in Case 40/70 *Sirena.* The result none the less, would be that even if the agreement were technically contrary to Article 85, the copyright could still be enforced against the infringer. If, however, the the agreement were to be declared totally null and void, it must follow that no transfer of the copyright could have occurred, in which case there would be no reason why the original owner of the rights could not enforce them against infringers. Such a decision would therefore mean that the licensee or assignee would not have the security of being able to enforce the copyright himself or to compel an unwilling licensor to do so and ultimately would permit "one party to renege on a deal which it is in the interests of an efficient Community film-distribution system to preserve".

Finally, if the agreement were held to be void simply because it involved the grant of an exclusive right, Community law would, in the view of the United Kingdom, favour unduly the large film-producing organizations, which exploit their film directly throughout the whole of the Community, at the expense of the small independent producer who does not have his own Community-wide organization.

Consequently, the United Kingdom considers that the Court should answer the question asked in the negative and that it need do no more than re-affirm in the specific context of Article 85 what it stated in paragraph 17 of its judgment in the first *Coditel* case, namely:

> "17. The exclusive assignee of the performing right in a film for the whole of a Member State may therefore rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another Member State, without thereby infringing Community law."

III — Oral procedure

At the sitting on 16 June 1962, the appellants in the main proceedings, namely the Coditel companies and Intermixt, represented by G. Kirschen, A. Braun and F. Herbert of the Brussels Bar, the Union Professionnelle de Radio et de Télédistribution, represented by A. de Caluwé of the Brussels Bar, and Inter-Régies, represented by J. Dyck of the Antwerp Bar, the respondents in the main proceedings, Ciné-Vog Films and the Chambre Syndicale Belge de la Cinématographie, represented by P. Demoulin of the Brussels Bar, the Government of the French Republic, represented by A. Carnelutti, acting as Agent, the Government of the Federal Republic of Germany, represented by R. Lukes, acting as Agent, the United Kingdom, represented by J. D. Howes, acting as Agent, assisted by H. I. L. Laddie, Barrister of the Middle Temple, and the Commission of the European Communities, represented by N. Koch and E. de March, acting as Agents, presented oral argument and answered questions put to them by the Court.

The Advocate General delivered his opinion at the sitting on 14 September 1982.

Decision

1 By order of 3 September 1981, which was received at the Court on 30 September 1981, the Belgian Cour de Cassation [Court of Cassation] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Article 85 read in conjunction with Article 36 of that Treaty.

2 The question arose in the course of proceedings between three Belgian cable television diffusion companies, which are hereinafter referred to jointly as the Coditel companies, appellants in cassation, on the one hand, and a Belgian film distribution company, Ciné-Vog Films SA, a French film producing company, Les Films La Boétie, and other representatives of the cinematographic industry, the respondents in cassation, on the other hand.

3 The action which gave rise to those proceedings was for compensation for the damage which Ciné-Vog alleged it had suffered as the result of the retransmission of the broadcast on German television of the film "Le Boucher", in respect of which Ciné-Vog had acquired exclusive distribution rights in Belgium from Les Films La Boétie.

4 It is apparent from the file that the Coditel companies provide, with the authority of the Belgian administration, a cable television diffusion service covering part of Belgium. Television sets belonging to subscribers to the service are linked by cable to a central aerial having special technical features which enable Belgian broadcasts to be picked up as well as certain foreign broadcasts which the subscriber cannot always receive with a private aerial, and which furthermore improve the quality of the picture and sound received by the subscribers.

5 The court before which the claim was originally made, the Tribunal de Première Instance [Court of First Instance], Brussels, ordered the Coditel companies to pay damages to Ciné-Vog. The Coditel companies appealed against that judgment, and the Cour d'Appel [Court of Appeal], after holding that Article 85 was not applicable to the dispute, submitted to the Court of Justice two questions which, essentially, raised the problem of

whether Articles 59 and 60 of the Treaty prohibit the assignment, limited to the territory of a Member State, of the copyright in a film, in view of the fact that a series of such assignments might result in the partitioning of the common market as regards the undertaking of economic activity in the film industry.

6 By judgment dated 18 March ([1980] ECR 881), the Court ruled as follows:

"The provisions of the EEC Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right".

7 However, within the period prescribed by statute for lodging an appeal in cassation, the Coditel companies had appealed to the Cour de Cassation against the judgment of the Cour d'Appel, claiming *inter alia* that the latter had erred in holding that Article 85 of the Treaty was not applicable to the case in point. They maintained, on the one hand, that Article 36 could not restrict the scope of application of Article 85 and, on the other hand, that if copyright as a legal status did not fall within the class of agreements and concerted practices as envisaged by Article 85, its exercise might be the purpose, the means or the result of an agreement, decision or concerted practice and that a contract involving an exclusive licence or an assignment of copyright might amount to an agreement, decision or concerted practice for the purposes of Article 85, not only because of the rights and obligations arising from its clauses but also because of the economic and legal circumstances surrounding it and, in particular, because of the existence of any similar agreements concluded between the same parties or even between third parties, and of the cumulative effect of such parallel agreements.

8 The Cour de Cassation considered that the above submission raised a question of interpretation of Community law and referred the following question to the Court:

"Where a company which is the proprietor of the rights of exploitation of a cinematographic film grants a contract to a company in another Member

State an exclusive right to show that film in that State, for a specified period, is that contract liable, by reason of the rights and obligations contained in it and of the economic and legal circumstances surrounding it, to constitute an agreement, decision or concerted practice which is prohibited between undertakings pursuant to the first and second paragraphs of Article 85 of the Treaty or are those provisions inapplicable either because the right to show the film is part of the specific subject-matter of copyright and accordingly Article 36 of the Treaty would be an obstacle to the application of Article 85, or because of the right relied upon by the assignee of the right to show the film derives from a legal status which confers on the assignee protection *erga omnes* and which does not fall within the class of agreements and concerted practices referred to by the said Article 85?"

9 The question essentially seeks to ascertain the position, in relation to prohibitions contained in Article 85 of the Treaty, of a contract whereby the owner of the copyright in a film grants the exclusive right to exhibit that film within the territory of a Member State and for a specified period. More particularly, the question asks whether such a grant may possibly fall outside the scope of Article 85 by virtue of the special character attributed to that right by Article 36 of the Treaty or by its protected status under national law.

10 It should be noted, by way of a preliminary observation, that Article 36 permits prohibitions or restrictions on trade between Member States provided that they are justified on grounds *inter alia* of the protection of industrial and commercial property, a term which covers literary and artistic property, including copyright, whereas the main proceedings are concerned with the question of prohibitions or restrictions placed upon the free movement of services.

11 In this regard, as the Court held in its judgment of 18 March 1980 *(Coditel* v *Ciné-Vog Films* [1980] ECR 881), the problems involved in the observance of a film producer's rights in relation to the requirements of the Treaty are not the same as those which arise in connection with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records, whereas the film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely

repeated and the commercial exploitation of which comes under the movement of services, no matter whether the means whereby it is shown to the public be the cinema or television.

12 In the same judgment the Court further held that the right of the owner of the copyright in a film and his assigns to require fees for any showing of that film is part of the essential function of copyright.

13 The distinction, implicit in Article 36, between the existence of a right conferred by the legislation of a Member State in regard to the protection of artistic and intellectual property, which cannot be affected by the provisions of the Treaty, and the exercise of such right, which might constitute a disguised restriction on trade between Member States, also applies where that right is exercised in the context of the movement of services.

14 Just as it is conceivable that certain aspects of the manner in which the right is exercised may prove to be incompatible with Articles 59 and 60 it is equally conceivable that some aspects may prove to be incompatible with Article 85 where they serve to give effect to an agreement, decision or concerted practice which may have as its object or effect the prevention, restriction or distortion of competition within the common market.

15 However, the mere fact that the owner of the copyright in a film has granted to a sole licensee the exclusive right to exhibit that film in the territory of a Member State and, consequently, to prohibit, during a specified period, its showing by others, is not sufficient to justify the finding that such a contract must be regarded as the purpose, the means or the result of an agreement, decision or concerted practice prohibited by the Treaty.

16 The characteristics of the cinematographic industry and of its markets in the Community, especially those relating to dubbing and subtitling for the benefit of different language groups, to the possibilities of television broadcasts, and to the system of financing cinematographic production in Europe serve to show that an exclusive exhibition licence is not, in itself, such as to prevent, restrict or distort competition.

17 Although copyright in a film and the right deriving from it, namely that of exhibiting the film, are not, therefore, as such subject to the prohibitions contained in Article 85, the exercise of those rights may, none the less, come within the said prohibitions where there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market.

18 Since neither the question referred to the Court nor the file on the case provides any information in this respect, it is for the national court to make such inquiries as may be necessary.

19 It must therefore be stated that it is for national courts, where appropriate, to make such inquiries and in particular to establish whether or not the exercise of the exclusive right to exhibit a cinematographic film creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry, or the possibility of charging fees which exceed a fair return on investment, or an exclusivity the duration of which is disproportionate to those requirements, and whether or not, from a general point of view, such exercise within a given geographic area is such as to prevent, restrict or distort competition within the common market.

20 Accordingly, the answer to be given to the question referred to the Court must be that a contract whereby the owner of the copyright in a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State is not, as such, subject to the prohibitions contained in Article 85 of the Treaty. It is, however, where appropriate, for the national court to ascertain whether, in a given case, the manner in which the exclusive right conferred by that contract is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to prevent or restrict the distribution of films or to distort competition within the cinematographic market, regard being had to the specific characteristics of that market.

Costs

21 The costs incurred by the United Kingdom, the Government of the French Republic, the Government of the Kingdom of the Netherlands and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Belgian Cour de Cassation, by order of 3 September 1981, hereby rules:

A contract whereby the owner of the copyright for a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State is not, as such, subject to the prohibitions contained in Article 85 of the Treaty. It is, however, where appropriate, for the national court to ascertain whether, in a given case, the manner in which the exclusive right conferred by that contract is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to prevent or restrict the distribution of films or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market.

Mertens de Wilmars Bosco Touffait Due

Pescatore Mackenzie Stuart O'Keeffe Koopmans Everling

Delivered in open court in Luxembourg on 6 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President