OPINION OF ADVOCATE GENERAL TESAURO

delivered on 22 January 1998 *

1. By order of 18 April 1996 the Landgericht Köln (Regional Court, Cologne) sought a preliminary ruling from the Court on the validity of certain provisions of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (hereinafter 'the Directive').

More specifically, the national court asks whether the grant of an exclusive right to authorise or prohibit the rental of protected works, as provided for in Articles 1 and 2 of the Directive, is compatible with the fundamental rights guaranteed by Community law, in particular the right of free enterprise.

Legislative background

2. The Directive, and likewise the other relevant directives [1] concerned with the approximation of laws, was adopted by the Council following publication of the Commission Communication ('Green Paper') entitled 'Copyright and the challenge of technology — Copyright issues requiring immediate actions'. [2] The purpose of the Directive is to contribute to harmonisation of national laws concerning copyright and related rights, at the same time ensuring protection of rights which is appropriate to the new technological context. The legal basis of the Directive is Articles 57, 66 and 100a of the EC Treaty.

3. For the purposes of these proceedings, the important provisions are contained in Chapter I of the Directive, which governs the rental right and the lending

* Original language: Italian.

1 — Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42); Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15); Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9); and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

2 — COM(88) 172 final of 10 November 1988.

right. [3] The rule of a general nature contained in Article 1(1) pursues harmonisation. It provides that the Member States are to recognise 'the right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject-matter as set out in Article 2(1).' The latter provision identifies the persons to whom the exclusive rental right is to be granted: the author in respect of the original and copies of his work; the performer in respect of fixations of his performance; the phonogram producer in respect of his phonograms; and the producer of the first fixation of a film in respect of the original and copies of his film. Article 2(4) goes on to make it clear that the rights in question may be transferred, assigned or subject to the granting of contractual licences.

Article 1(2) and (3) define the rights conferred by Chapter I of the Directive. According to those paragraphs: '"rental" means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage' whilst '"lending" means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.' The proceedings before the national court are concerned only with the rules governing rental. Article 1(4) expressly states that exercise of the right of sale or distribution, in any form, of the protected works is not to entail exhaustion of the rights of rental and lending. [4] The Directive thus makes the rental right entirely autonomous, as a form of exploitation distinct from distribution of the original or copies of the protected work.

4. Chapter II of the Directive is concerned with harmonisation of national provisions relating to certain rights related to copyright, in particular the fixation right (Article 6), the reproduction right (Article 7), the right of broadcasting and communication to the public (Article 8) and the distribution right (Article 9). The producers of phonograms enjoy an exclusive right to authorise or

3 — Rules conferring the exclusive right to authorise or prohibit rental are also found in other directives concerning the protection of copyright. Article 4(c) of the abovementioned Directive 91/250/EEC conferred on the authors of computer programs an exclusive right in respect of 'any form of distribution to the public, including the rental, of the original computer program or of copies thereof'. That right is now covered by the general rule in Article 1 of Directive 92/100/EC. Also of importance is Article 7(2)(b) of the abovementioned Directive 96/9/EC, which also confers the exclusive right to authorise or prohibit rental on authors ('makers' in the terminology used in the Directive) of databases who, not fulfilling the requirement of originality, are not afforded protection by copyright. That right concerns operations of re-use of the database (or a substantial part thereof) which the maker may prohibit.

4 — The right of distribution as a right related to copyright is defined by Article 9(1) of the Directive as '— for performers, in respect of fixations of their performances, — for phonogram producers, in respect of their phonograms, — for producers of the first fixations of films, in respect of the original and copies of their films, — for broadcasting organisations, in respect of fixations of their broadcast as set out in Article 6 (2), the exclusive right to make available these objects, including copies thereof, to the public by sale or otherwise'. Article 9(2) provides: 'The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.' Finally, Article 9(3) provides that the distribution right is to be without prejudice to the specific provisions concerning the rental right.

prohibit the reproduction and distribution of their works and the right to fair remuneration in the event of broadcasting or any communication to the public of the phonogram or a copy thereof.

Article 13, in Chapter IV, entitled 'Common provisions', is concerned with the effect in time of the protective provisions of the Directive as a whole. For the purposes of this case, Article 13(3) is of importance: it contains a transitional provision intended to facilitate application of the legislation to regimes in those States in which the exclusive rental right had not yet been granted to authors and the holders of related rights. [5] Finally, it should be noted at this point that, under Article 15, Member States were required to adopt measures to implement the Directive by 1 July 1994.

5. The Directive was transposed into German law by a Law of 23 June 1995, which amended the general law on copyright and related rights (the Urheberrechtsgesetz (Copyright Law) of 9 September 1965, hereinafter 'the UrhG').

Prior to the entry into force of the implementing law, the rental of copyright works was authorised in German law provided that the physical medium containing the protected works was put into circulation with the consent of the holders of the broadcasting rights (Paragraph 17(2) of the UrhG, old version); those included, by virtue of Paragraph 85 of the UrhG, the producer as regards his own phonograms. Paragraph 27 of the Law required the renters to pay fair remuneration to the holders of distribution rights, and therefore, *inter alia*, to the producer.

6. Following the entry into force of the Law of 23 June 1995 Paragraph 17(2) of the UrhG was amended. In the new version, that provision expressly states that rental is not to be regarded as a fresh, authorised dissemination of the original or a copy of a protected work legitimately put into circulation in the territory of one of the Member States of the Community. The rental of protected works thus requires the consent of the rightholders, that is to say the authors, performers and producers of the phonograms. Under Article 4 of the Directive, where the rental right vested in authors has been assigned to the producers of phonograms, the new version of Paragraph 27 grants the former an unwaivable right to equitable remuneration. The person required to pay that remuneration is the person operating the rental business.

5 — Under Article 13(3) the Member States retain the right to lay down in domestic legislation that rightholders are deemed to have given their authorisation for the rental or lending of an object acquired before 1 July 1994. However, Member States may also determine that rightholders are entitled at least to obtain adequate remuneration for the rental or lending of that object, particularly if it is a digital recording.

The facts and the preliminary question

7. The German company Metronome Musik (hereinafter 'Metronome'), the producer of the compact disc 'Plant Punk' and therefore the holder of the rights related to copyright recognised by German law, sought an interim injunction from the Landgericht Köln against Music Point Hokamp GmbH (hereinafter 'Music Point'). Metronome complained that Music Point was, by way of trade, offering for rental copies of the above-mentioned compact disc in breach of the exclusive rental right enjoyed by it under Paragraph 17(2) of the German Copyright Law. By order of 4 December 1995, the court granted the injunction and prohibited Music Point from renting out the product in question thereafter. Music Point appealed against that order. It challenged the constitutional and Community basis of the legislation granting the producer of phonographic recordings the exclusive right to authorise or prohibit the rental of protected works.

8. The national court rejected Music Point's arguments as unfounded. Entertaining doubts as to the compatibility of the Directive with the general principle of Community law upholding free enterprise, it referred the following question to the Court for a preliminary ruling:

'Is the introduction of an exclusive rental right, contrary to the principle of the exhaustion of distribution rights, by Article 1(1) of Council Directive 92/100/EEC of 19 November 1992 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property compatible with Community law, in particular Community fundamental rights?'

Preliminary remarks

9. In view of the general terms of the question, I think it is appropriate first to define its scope so as to identify the aspects of the validity of the Directive with which these proceedings are concerned.

10. In the first place, it should be noted that the national court does not call in question the lending right, which is also conferred on the producers of phonograms by Articles 1 and 2 of the Directive; nor, moreover, does it appear that there could be any question in this case of conflict with the principle of free enterprise, since the lending right is by

definition exercised by establishments accessible to the public (for example, libraries) for purposes other than economic gain.

11. In the second place, even though the wording of the preliminary question appears to refer in general to all categories of holders of the rental right included in the list in Article 2 of the Directive, the court expressly refers in the grounds of its order only to the exclusive right vested in the producers of phonograms. It is clear that the exercise of the exclusive right accorded to authors may also result in prohibition of hirers' activities. However, in the proceedings before the national court, the question of a conflict with the principle of free enterprise is raised only in relation to the right accorded to producers. Consequently, the considerations which follow will focus solely on the validity of the rental right granted to the producers of phonograms.

12. It is also appropriate to emphasise that the question of validity will be examined in relation only to the principle of free enterprise and not to other general principles which might theoretically be of relevance in examining the decision to grant producers the exclusive right to authorise or prohibit rental of their phonograms. [6] This approach is in fact supported, notwithstanding the general terms of the question, by the text of the order for reference, which discloses with sufficient clarity the reasons for which the national court came to doubt the validity of the Directive.

13. A last clarification is called for concerning the actual nature of the rental right and its relationship with the principle of exhaustion of copyright. It will be noted that in the text of its question the national court describes the grant of a rental right to the categories mentioned by the Directive as being 'contrary' to the principle of the exhaustion of distribution rights. In other words, according to the Landgericht, the grant to authors and holders of related rights of the right to authorise or prohibit the rental of protected works constitutes an

6 — I refer to the right of every person to enjoy access to culture, recognised in international instruments concerning human rights to which the Member States contributed or became parties. I have in mind for example the Covenant on Economic, Social and Cultural Rights drawn up by the United Nations and opened for signature in New York on 10 December 1996, Article 15 of which provides: 'the States parties to the present Covenant recognise the right of everyone (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. I also have in mind Article 27 of the Universal Declaration of Human Rights, approved by the General Assembly of the United Nations on 10 December 1948, which confers on every individual 'the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'. The second paragraph of that article also expressly recognises copyright as a human right: 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.
On this point, see Cassin, 'L'intégration, parmi les droits fondamentaux de l'homme, des droits des créateurs des oeuvres de l'esprit', in *Études sur la Propriété Industrielle, Littéraire, Artistique. Mélanges Robert Plaisant*, Paris, 1960, p. 225 et seq. The classification of copyright as a human right in international instruments will not be taken into account here since the intellectual property right at issue is a related right which does not come within the scope of the legislation cited above.

exception to the principle of the exhaustion of distribution rights.

However, I feel unable to share that view which, moreover, does not appear to find any support in the case-law of the Court of Justice. In *Warner Brothers*, the Court made it clear that the express consent of the holder of a copyright or right related to the commercialisation of a physical medium containing the protected work, although rendering lawful subsequent sales of the same medium even without the express consent of the rightholder, does not authorise any different form of economic exploitation of the work such as rental of the physical medium purchased. The Court then made it clear that, in view of the emergence of a specific rental market separate from the sales market, 'by authorising the collection of royalties only on sales to private individuals and to persons hiring out video-cassettes, it is impossible to guarantee to makers of films a remuneration which reflects the number of occasions on which the video-cassettes are actually hired out and which secures for them a satisfactory share of the rental market.' [7]

14. It is thus clear that the problem is badly defined. The release into circulation of the sound-recording medium cannot by definition de-restrict other forms of exploitation of the protected work which are of a different nature from sale or any other lawful form of distribution. Like the right of public performance, [8] including broadcasting, [9] the rental right remains a prerogative of the author and the producer notwithstanding sale of the *corpus mechanicum* containing the work.

There is thus no question here of any exception, still less of anything 'contrary', to the principle of the exhaustion of copyright. The sale of the sound-recording medium entails solely exhaustion of the right of distribution, which allows the author to decide whether, how and when to commercialise the original or copies of the protected work. Exercise of the distribution right cannot in itself therefore have any effect on other prerogatives granted to the author and to the holder of related rights, which make it possible to control any economic exploitation of the protected work. That applies with greater force to those infinitely repeatable activities that are capable of increasing the scale of exploitation of the work among the public: public performance, broadcasting and therefore also rental and lending of copies of the work. [10]

7 — Case 158/86 *Warner Brothers and Another* v *Christiansen* [1988] ECR 2605, paragraph 15.

8 — Case 395/87 *Ministère Public* v *Tournier* [1989] ECR 2521.

9 — Case 62/79 *Coditel* v *Cine Vog Films* [1980] ECR 881.

10 — See Sarti, *Diritti esclusivi e circolazione dei beni*, Milan, 1996, p. 312 et seq.; Bergé, *La Protection internationale et communautaire du droit d'auteur*, Paris, 1996, p. 128 et seq.

Substance

15. The terms of the problem having been thus defined, the first substantive point concerns the actual scope of the right conferred by Articles 1 and 2 of the Directive. The provisions in question, far from prohibiting rental of protected works, grant specified categories of holders the exclusive right to authorise or prohibit the rental of such works.

16. It is therefore clear that the legislative choice represented by the grant of an exclusive right is capable of impairing pursuit of the economic activity of renting phonographic products such as compact discs. By contrast with the position obtaining in a number of Member States before the introduction of Community rules for the harmonisation of legislation, that activity can be carried on only if the rightholders grant the requisite licences. It appears from the documents before the Court that the producers of phonograms, vested with the rental right in respect of their works, prefer for the time being, on the basis of economic assessments, not to allow third parties to hire out their products.

17. It is apparent from the case-law of the Court that the freedom to pursue a trade or profession, far from being an absolute prerogative, must be viewed within the Community legal order in relation to its social function. It follows that Community law may impose restrictions on the exercise of that right, provided that they in fact correspond to objectives of general interest pursued by the Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed. [11]

18. That said, it is now necessary to consider whether the reasons which prompted the Community legislature to grant the producer of phonograms an exclusive right to authorise or prohibit the rental of their phonographic products are such as to conform to the parameters just outlined.

— The reasons for harmonising national provisions concerning the rental right

19. In the preamble to the Directive the Council indicates the objectives it pursued in

11 — See *inter alia* Case 4/73 *Nold* [1974] ECR 491, paragraph 14; Case 265/87 *Schräder* [1989] ECR 2237, paragraph 15; Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 78; Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 55.

granting the rental right to the categories of persons indicated in Article 2. In the first place, mention is made of the way in which harmonisation of the legislation of the Member States regarding copyright and related rights contributed to the establishment and proper functioning of the internal market. In the first recital it is stated that 'differences exist in the legal protection provided by the laws and practices of the Member States for copyright works and subject matter of related rights protection as regards rental and lending [and] such differences are sources of barriers to trade and distortions of competition which impede the achievement and proper functioning of the internal market'. The third recital adds that 'such differences should therefore be eliminated in accordance with the objective of introducing an area without internal frontiers as set out in Article 8a of the Treaty so as to institute, pursuant to Article 3(f) of the Treaty, a system ensuring that competition in the common market is not distorted'.

The requirements of uniformity in the rules governing the rights provided for in the Directive are then set out in the eighth and ninth recitals. In the eighth it is stated that creative, artistic and entrepreneurial activities, and in particular those of producers of phonograms and films, are, to a large extent, activities of self-employed persons and that the pursuit of such activities must be made easier by providing harmonised legal protection within the Community. In the ninth recital, it is added that 'to the extent that these activities principally constitute services, their provision must equally be facilitated by the establishment in the Community of a harmonised legal framework'.

20. The reasons just outlined have my support. The *Warner Brothers* judgment cited above had already disclosed distortions in the functioning of the internal market deriving from discrepancies in national legislation on the rental of protected works. [12] The Court took the view that the national measures in question constituted measures having an effect equivalent to a quantitative restriction on trade but one which was, nevertheless, justified under Article 36 of the Treaty in that it was designed to protect intellectual property. The only way of eliminating barriers to the free movement of goods was the adoption of legislation to approximate national provisions. [13]

12 — Judgment cited in footnote 7, paragraph 10: 'the commercial distribution of video-cassettes takes the form not only of sales but also, and increasingly, that of hiring out to individuals who possess video-tape recorders. The right to prohibit such hiring out in a Member State is therefore liable to influence trade in video-cassettes in that State and hence, indirectly, to affect intra-Community trade in those products. Legislation of the kind which gave rise to the main proceedings must, therefore, in the light of established case-law, be regarded as a measure having an effect equivalent to a quantitative restriction on imports, which is prohibited by Article 30 of the Treaty'.

13 — The Court recognised, in Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 26, that 'It is ... precisely in order to avoid the risk of hindrances to trade and the distortion of competition that the Council has, since the disputes in the main proceedings arose, adopted Directive 92/100/EEC of 19 November 1992 on the rental right and lending right and on certain rights related to copyright in the field of intellectual property, on the basis of Article 57(2) and Articles 66 and 100a of the Treaty'.

21. It is not superfluous to point out that, before harmonisation, a lending right was granted by operation of law, albeit under differing procedures, in France, Spain, Portugal and the United Kingdom. In Italy, the dominant trend in the case-law made the right at issue part of the right 'to put into circulation' provided for in the old version of Article 72 of the special law on copyright. In Belgium, Greece and Luxembourg, the legislative position was not particularly clear and the pattern of the case-law was not clearly identifiable, but the lending right was in general associated with the 'right of destination' recognised by domestic law. In other States the rental right was close to achieving legislative recognition, on the German model of adequate remuneration considered earlier (that is the position in the Netherlands), or was granted only to authors (as in the case of Denmark). Only in Ireland was no lending right recognised in respect of protected works. [14]

In those circumstances, it must necessarily be recognised that harmonisation of the legislative provisions in the Member States concerning the lending right, and in particular the grant to producers of a lending right in respect of their phonograms, as a right separate from that of authors and performers, is certainly justified by the aim of promoting the proper functioning of the internal market, in particular the free movement of goods and services, and of avoiding distortions of competition. Moreover, as is made clear in the second recital in the preamble to the Directive, differences in legal protection could well become greater 'as Member States adopt new and different legislation or as national case-law interpretation of such legislation develops differently'.

22. In addition to the objective of ensuring the proper functioning of the internal market, it must also be borne in mind that 'the adequate protection of copyright works and subject matter of related rights protection by rental and lending rights' can be regarded as being 'of fundamental importance for the Community's economic and cultural development' (fifth recital). The link between the grant of the lending right to producers and the Community's economic and cultural development will be more clearly defined below, when the Council's decision to grant an *exclusive* right to producers to authorise or prohibit the rental of their works is discussed. It is nevertheless appropriate to have regard, in that connection, to Article 128 of the EC Treaty, inserted by Article G(37) of the Treaty on European Union, under which the Community is given the task of contributing to the development of cultural diversity. Among the areas of cultural importance, Article 128(2) includes artistic and literary creation. In particular, Article 128(4) provides that the Community is to take cultural

14 — This information comes from the report accompanying the proposal for a Commission Directive, Doc. COM(90) 586 of 24 January 1991, paragraph 11 et seq.

aspects into account in its action under other provisions of that Treaty.

The provision in question, it will be remembered, entered into force after the adoption of the Directive. However, I do not think that fact is decisive since the provision is without doubt an expression of a general principle.

— The grant of an exclusive rental right to the producer of phonograms

23. The comments made thus far fully support the Council's decision to proceed with harmonisation of national legislation on the lending right. It remains, however, to consider the compatibility with the right of free enterprise of the Council's choice in granting the producers of phonograms the *exclusive* right to authorise or prohibit rental of their works.

On close examination, there are genuine grounds for complaint against the provisions of the Directive. The undertakings which, by way of trade, rented out compact discs in Germany before the entry into force of the domestic law implementing the Directive were in any event required by the domestic legislation to pay producers adequate remuneration for the economic exploitation of their phonograms. It would therefore have been sufficient, in the view of Music Point, to strike a balance between the opposing interests in such a way as to keep access to the rental market available to commercial operators, without prejudice to the obligation to recognise the right of the producers of phonograms to fair remuneration.

24. In assessing the proportionality of the solution adopted in the Directive, it is therefore necessary to show that the Community objectives of general interest, as outlined above, could not have been attained by measures which would have been less onerous for rental businesses. The national court itself notes in its order for reference, whilst recognising that the introduction of an exclusive rental right is justified and necessary to ensure the creation and functioning of the internal market, that the question 'must be asked whether, in view of [the] extreme effects [of that solution] on the freedom to pursue the business of renting CDs, the economic interests of phonogram producers and the operation of the single market

could not equally have been assured by an obligatory right to remuneration.'

Let me say immediately that that question must be answered in the negative.

25. In the first place, as made clear by the Council in the sixth and seventh recitals in the preamble to the Directive, copyright and related rights protection must adapt to new economic developments such as new forms of exploitation of protected works. That adaptation must take the form of the introduction of provisions to protect the holders of intellectual property rights so as to allow them to receive 'an adequate income as a basis for further creative and artistic work'. The justification for the protection offered by the legislation on copyright and related rights to the producers of phonograms has always been based on the protection of the particularly high-risk and substantial investments which constitute an absolutely essential precondition for authors to go on creating new works. Consequently, 'the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned' (last sentence of the seventh recital). The return on the investor's investment also constitutes, indirectly, the remuneration for the author's intellectual endeavours.

26. As far as the rental right is concerned, the grant of an exclusive right to producers certainly appears to be the most effective form of protection. Thus, in the case of CDs, if the producer were not allowed to decide whether and when to grant third parties a licence to rent them, the door would be left open to the phenomenon, already witnessed in the past in the absence of clear rules, of sale at the rental price. In other words, the borrower of the physical medium containing the recording could, at little cost, obtain a copy of the product and very easily reproduce its content. Indeed, what commonly happens in the case of CDs, as opposed to video-cassettes, is that they are rented not so much for listening as for the purpose of obtaining a personal copy of the protected work.

Furthermore, that operation can, potentially, be repeated an infinite number of times. The sale of a single copy to a person in the rental business allows it to be rented out on a considerable number of occasions, in view of the fact that, unlike their vinyl counterparts, CDs do not easily wear out. Moreover, the introduction of digital technology for unrecorded tapes as well (DAT) now makes it possible to reproduce the content of the CD with the same high quality as the original, and this makes rental even more attractive. Those developments would clearly lead to a considerable shrinkage in sales of phonographic products which could not be offset by rental income. There would then be a risk that it would be impossible to assure

adequate remuneration for those who make investments to produce phonographic products, and this would of course have repercussions for the creation of new works. In addition, producers would concentrate exclusively on investments in commercial, and thus more profitable, works, to the detriment of cultural pluralism within the Community.

27. The information given in the order for reference and again in the observations of Music Point, according to which the market in sales of CDs did not register any decline in Germany when renting was still permitted, [15] does not seem significant. First, it relates to the market situation at a time when technological developments had not yet made renting a *de facto* alternative to sales; second — and this is a more important point — the accuracy of the assessments made by the Community institutions as a basis for the content of harmonising legislation cannot be verified solely in the light of statistics relating to one or more Member States.

28. The grant of the exclusive right cannot be isolated from a proper assessment of the potential effects of technological developments. The rules laid down in the Directive, including the transitional provisions which allow renting of recordings acquired before a specified date, offer a solution whereby excessive impairment of investments can be prevented. That solution is thus entirely proportionate to the aims pursued by the harmonisation of legislation, since it was necessary in order to ensure adequate protection for the rights of phonogram producers.

On this point I would also observe that, when the Directive entered into force, some Member States had already introduced in their domestic legislation an exclusive rental right for phonogram producers, a fact which the Council could not ignore when adopting Community harmonising legislation. Any other course would probably have helped maintain barriers to the functioning of the internal market rather than removing them.

29. In short, the Council was right to decide to introduce legislation affording special protection for the lending right of authors, performers and producers, which was exposed to encroachment as a result of technological progress. In the case of producers, the extreme ease with which recordings of works can be reproduced is liable to cause serious damage to the profitability of their investments. The sacrifice imposed on those who

15 — The data are, however, contested by Metronome.

in the past legitimately engaged in the business of renting out recordings appears, in that respect too, to be proportionate to the aim pursued. It must be borne in mind that the right to pursue a trade or profession must always be viewed in conjunction with the requirements of protection of intellectual property and with developments in the rental market due to new technologies.

30. Furthermore, the requirements imposed clearly enjoy an international consensus. Whilst it is true that the Berne Convention for the Protection of Literary and Artistic Works, the latest revision of which dates back to 1971, and the 1961 Rome Convention on related rights, for reasons which are understandable in view of developments in sound-reproduction technology, contain no provisions concerning the lending right, recent convention practice has been directed wholly towards the strengthening of protection. That is particularly true with regard to phonogram producers.

In that regard, particular importance attaches to the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) annexed to the Agreement establishing the World Trade Organisation, [16] to which both the Community and the Member States are parties. Article 11 of TRIPS provides that 'In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorise or to prohibit the commercial rental to the public of originals or copies of their copyright works'. Article 14 then provides that the provisions of Article 11 are to 'apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders'. Now, at least as far as CDs are concerned, it seems to me that the comments made earlier show that a system based on fair financial return is by definition liable substantially to undermine the exclusive reproduction right of phonogram producers.

31. A provision of similar content is also to be found in the Performances and Phono-

16 — The WTO Agreement and its schedules, signed in Marrakesh on 15 April 1994, were approved on behalf of the Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 213).

gram Treaty, opened for signature in Geneva on 20 December 1996 on conclusion of the diplomatic conference organised by WIPO (World Intellectual Property Organisation), which was devoted to the updating of international conventions in force concerning copyright and related rights. By contrast with Article 14 of TRIPS, Article 17 of the Geneva Convention lays down a maximum term beyond which the members may not maintain a system of adequate remuneration (three years as from entry into force of the Treaty).

32. No examination of the validity of the provisions of the Directive concerning the rental right can disregard those extremely important details. They are evidence of an extremely wide consensus in favour of strengthening protection for phonogram producers in accordance with the approach taken by the Council when it adopted the Directive. [17] In that connection, it is significant that in the preamble to the Directive reference was made to the need for the legislation of the Member States to be approximated 'in such a way as not to conflict with the international conventions'.

That means that in interpreting the general principle of freedom of economic enterprise and the corresponding fundamental right, the international obligations entered into by the Community and the Member States cannot be disregarded. Economic enterprise is not entirely unrestricted if its exercise undermines the protection of intellectual property rights whose recognition enjoys an extremely wide consensus in the international community.

33. It should be noted, finally, that the Directive does not a priori prevent producers from granting the requisite licences for rental in response to offers which they see as profitable. A problem not easily solved would arise, however, if it were shown that the sole purpose of the prohibition of granting rental licences was to eliminate those engaged in the rental business from the market — so that, subsequently, the same market could be occupied by undertakings controlled by producers. No problem of that kind is involved here: we are concerned here only with the validity of the provisions of the Directive which *grant* an exclusive right to authorise or prohibit the rental of phonographic products. However, in the event of the *procedures for exercising* the exclusive right in question being called in question, I do not think it could be affirmed with certainty, in the light of recent case-law of the Court of Justice, that the requirements of general interest which motivated the grant of the right are such that it may even be exercised in clear breach of Article 86 of the Treaty. [18]

17 — It should also be noted that the WIPO proceedings regarding protection of the rental right were taken into consideration by the Commission in drawing up the proposal for a directive — see paragraph 40 and note 12 of the introductory report cited in footnote 14.

18 — The judgment in Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743 offers more than one reason for controlling the way in which the exclusive right granted to the producers of phonograms is exercised. I would add, however, that the conclusion reached by the Court in that judgment deserves some clarification: it would be unacceptable to interpret it as a general justification for control, by means of the competition provisions, of decisions by *authors* regarding the exercise of their essential prerogatives such as the right of reproduction and performance. The status of fundamental right attributed to copyright by the international instruments referred to earlier stands in the way of such a conclusion. The same cannot be said of rights related to copyright, to which the international provisions do not accord equivalent protection.

Conclusion

34. In the light of the foregoing considerations, I propose that the Court give the following answer to the question submitted by the Landgericht Köln:

Consideration of the question referred to the Court has not disclosed any factor of such a kind as to affect the validity of Article 1(1) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.