those societies would be obliged to organize their own management and monitoring system in another country.

3. A national copyright-management society holding a dominant position in a substantial part of the common market imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

REPORT FOR THE HEARING
delivered in Joined Cases 110/88, 241/88 and 242/88 *

I — Facts and procedure

1. *The parties to the main proceedings*

The parties to the main proceedings are the Société des auteurs, compositeurs et éditeurs de musique ('Sacem'), the French copyright-management society, and François Lucazeau, Xavier Debelle and Christian Soumagnac, who operate discothèques at Epargnes and Poitiers. The proceedings relate to the payment of royalties to which Sacem considers itself entitled in respect of the use of protected musical works but which Messrs Lucazeau, Debelle and Soumagnac consider to be contrary to Community law.

Sacem's object is to collect and distribute copyright royalties whenever musical works forming part of its repertoire are used. Sacem's members assign to it exclusive rights over the exploitation of their works as soon as they are created. By virtue of the membership contracts and the statutes of Sacem, Sacem has the exclusive right to authorize or prohibit the use of its members' musical works and to receive the corresponding copyright royalties.

Sacem's repertoire comprises not only the works of its members but also those contained in the repertoires of those foreign copyright societies which have, by means of reciprocal representation contracts, appointed it to represent them in France. Each of the parties to such contracts undertakes to enforce within its own territory the rights of the other party's

* Language of the case: French.

members in the same way and to the same extent as it does so for its own members. That implies in particular that the scales, methods and means of collection and distribution of royalties are the same. In order to cover the operational costs incurred, each society has the right to deduct a percentage of the sums collected by it on behalf of the other society.

2. *French legislation on literary and artistic property*

Under Article 26 of the French Law of 11 March 1957 on literary and artistic property, an author's right of exploitation includes the right of performance and the right of reproduction. Performance is defined as 'communication of the work to the public, in particular by means of . . . dissemination by any method'. Reproduction is understood as 'the material fixing of the work by any method which permits indirect communication to the public, in particular by mechanical recording'.

Under the abovementioned law, the author of a musical work is entitled to authorize its reproduction for a specific purpose and to refuse consent for any other purpose. In practice, the author assigns his rights of reproduction to the manufacturer of gramophone records or other sound recordings with a view to their manufacture and marketing for private use, that is to say within the confines of the family. After receiving from the manufacturer a reproduction fee relating solely to the marketing of his work for purposes of private use, the author is also entitled to claim a royalty — known as a 'droit complémentaire de reproduction mécanique' (supplementary mechanical reproduction fee) — from any user who, after acquiring the phonogram, makes public use of it, for example in a radio station, in a discothèque or in a juke-box installed in a public place.

3. *The judgment of the Court in the Basset case*

The compatibility of the supplementary mechanical reproduction fee with Community law was considered in Case 402/85 (*Basset* v *Sacem*). In its judgment of 9 April 1987 [1987] ECR 1747 the Court ruled that Articles 30 and 36 of the EEC Treaty, properly construed, do not preclude the application of national legislation allowing a national copyright-management society to charge a royalty called a 'supplementary mechanical reproduction fee'. However, as regards Article 86 of the Treaty, the Court did not rule out the possibility that the amount of the royalty, or aggregate amount of royalties, fixed by the copyright-management society might be such as to render Article 86 of the Treaty applicable. In the *Basset* case the national court had found that Sacem was to be regarded as an undertaking occupying a dominant position in the common market. According to the Court, the conduct of that undertaking would be contrary to Article 86 if it engaged in abusive practices such as, in particular, the imposition of unfair conditions.

4. *The royalties charged by Sacem*

Relations between Sacem and individual discothèques are governed by a standard

contract known as a 'contrat général de représentation' (general performance contract). The contract gives the discothèque operator, for the stipulated period, the right to choose, from amongst Sacem's total repertoire, that is to say its own repertoire and the repertoires of its foreign counterparts represented by it in France, present or future works which he uses or will use. In return Sacem charges the discothèques a fixed copyright royalty in the form of a percentage of the total receipts achieved by the discothèque operator, including payments for drinks, entry charges, payments for services and VAT. The normal rate is 8.25%, which comprises the public performance right (6.60%) and the mechanical reproduction right (1.65%). However, although 8.25% is the normal rate, in practice a large number of discothèques enjoy reductions for various reasons, for example because they belong to a trade organization with which Sacem has concluded an agreement granting it certain facilities for the collection of the royalties, or because they furnish it with accounting statements which enable revenue to be checked.

5. *The background to the main proceedings*

In all three cases, the discothèque operators (Mr Lucazeau, Mr Debelle and Mr Soumagnac) played musical works in their establishments without having entered into a general performance contract with Sacem and without paying royalties.

In April 1987, the tribunal correctionel (Criminal Court), Saintes, found Mr Lucazeau guilty of the offence of *contrefaçon* (infringement of intellectual property rights). It also ordered him to pay the outstanding amounts to Sacem by way of compensation for the damage suffered, Sacem having joined the proceedings as a civil claimant. Mr Lucazeau appealed against that judgment before the cour d'appel, Poitiers, and the latter submitted two questions to the Court of Justice for a preliminary ruling.

Mr Debelle and Mr Soumagnac were also found guilty by the tribunal de grande instance (Regional Court), Poitiers, of the offence of *contrefaçon*. However, in the civil proceedings, in which Sacem sought payment of the amounts outstanding, the court stayed the proceedings because it considered that two questions should be referred to the Court of Justice for a preliminary ruling.

6. *The questions referred to the Court of Justice*

In Case 110/88, the cour d'appel, Poitiers, confirmed Mr Lucazeau's conviction but in the civil proceedings, by judgment of 3 March 1988, it stayed the proceedings and referred the following two questions to the Court of Justice for a preliminary ruling:

'1. Does the imposition by Sacem, an association of music writers and publishers which occupies a dominant position in a substantial part of the common market and is bound by reciprocal representation contracts with copyright societies in other countries of the EEC, of aggregate royalties on the basis of 8.25% of the gross turnover of a discothèque amount to the direct or indirect imposition on those entering into contracts with it of unfair trading

conditions within the meaning of Article 86 of the Treaty of Rome if that rate is manifestly higher than that applied by identical copyright societies in other Member States of the European Economic Community?

2. Is the establishment by means of a set of "reciprocal representation agreements" of a *de facto* monopoly in the countries of the European Economic Community, enabling a copyright-management society pursuing its activities in a Member State to fix under a standard form contract a comprehensive royalty which must be paid by users before exploiting foreign works, liable to constitute a concerted practice covered by the prohibition in Article 85 of the Treaty?'

In its judgment, the national court finds that Sacem occupies a dominant position in French territory. As regards the excessive nature of the rate of 8.25%, it should be noted, first that that rate includes a 'droit complémentaire de reproduction mécanique' (supplementary mechanical reproduction fee) which is not collected in the other Member States and, secondly, that Sacem's repertoire, in particular that used in discothèques, is largely of foreign origin. In those circumstances, the cour d'appel considered it necessary to clarify the requirements which Sacem may lawfully impose and for that purpose, before calculating the damage suffered, to submit two questions to the Court for a preliminary ruling.

In Cases 241/88 and 242/88, Mr Debelle and Mr Soumagnac drew attention to the request for a preliminary ruling made by the cour d'appel, Poitiers. They asked the court to stay the proceedings until the Court of Justice had delivered judgment or else to submit the same questions to the Court. By two judgments of 10 June 1988, the tribunal de grande instance referred to the Court two questions identical to those submitted in Case 110/88.

7. Procedure

The judgment making the reference in Case 110/88 was received at the Court Registry on 5 April 1988. The two judgments in Cases 241/88 and 242/88 were received on 23 August 1988.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Mr Lucazeau, the appellant in the main proceedings, and by Mr Soumagnac, a defendant in the main proceedings, both represented by Jean Claude Fourgoux, of the Paris Bar; by Sacem, the plaintiff in the main proceedings in Cases 241/88 and 242/88 and the respondent in the main proceedings in Case 110/88, represented by Olivier Carmet, of the Paris Bar; by the Government of the French Republic, represented by Edwige Belliard, Marc Giacomini and Régis de Gouttes, acting as Agents; by the Government of the Kingdom of Spain, represented by Rosario Silva de Lapuerta and Javier Conde de Saro, acting as Agents; by the Government of the Hellenic Republic, represented by Elli-Markella

Mamouna, Georgios Crippa and Spyros Zissimopoulos, acting as Agents; by the Government of the Italian Republic, represented by Ivo M. Braguglia, avvocato dello Stato; and by the Commission of the European Communities, represented by its Legal Advisers Giuliano Marenco and Ida Langermann, acting as Agents.

By order of 23 November 1988, the Court joined Cases 241/88 and 242/88 for the purposes of the oral and written procedure and of judgment.

By order of 18 January 1989, the Court joined Cases 110/88 and Joined Cases 241/88 and 242/88 for the purposes of the oral procedure and of judgment.

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. However, it asked the Commission to produce certain documents, and the Commission did so within the period set for that purpose.

II — Summary of the written observations submitted to the Court

1. *Abuse of a dominant position*

The observations concentrate on the concept of 'abuse' and in particular on the parameters which will enable the national court to determine whether the scales imposed by Sacem are of such a level that they are liable to constitute such an abuse.

The existence of Sacem's dominant position is not disputed. As regards the effect on trade between the Member States, only the Greek Government states that the royalties required by Sacem do not in all probability affect such trade.

According to Mr Lucazeau, Mr Debelle and Mr Soumagnac, it is apparent from the following factors that the rate of the royalties required by Sacem is arbitrary and unfair and that that society is thus abusing its dominant position:

The amount of the royalties charged in the other Member States is considerably lower than in France. In national proceedings and in the course of an investigation undertaken by the Commission of the European Communities, Sacem tried to confuse matters by submitting incorrect figures lower than the real ones and by claiming that the French royalty was well within the European average. However, discothèque operators are in possession of figures that show that the rate applied in France results in royalties several times higher than those charged in the other Member States;

The royalties charged bear no relation to the sums distributed to the authors. In the distribution of royalties, Sacem allocates large sums to the publishers; moreover, it retains large sums itself which are not distributed either to the authors or to the publishers. The sums due to the authors are thus very modest. Moreover, the distri-

bution does not in any way reflect the frequency of the use of the protected works in discothèques, since the checks carried out by Sacem by means of 'surveys' are wholly inadequate.

The scales applied to discothèques bear no relation to those negotiated with other, more powerful users of music, such as television and radio stations. Moreover, there is a considerable difference between the amounts actually paid by one discothèque and the next, and that difference cannot be accounted for by a benefit provided to Sacem by the privileged discothèques.

Mr Lucazeau, Mr Debelle and Mr Soumagnac observe that the scales are applied to a basis of assessment, namely the total receipts of the discothèque including VAT, which bears no relation to the musical works used by the establishment in question. Moreover, discothèque operators have to pay for the whole repertoire managed by Sacem even though 90% of the music they use comes from the English-speaking world. Sacem has consistently refused to give them special authorization for a sub-group, or several sub-groups, corresponding to the repertoire most used by discothèques.

Sacem observes, first of all, that the application of Article 86 of the Treaty is not without difficulty. Although the Court of Justice has laid down certain criteria for the identification of an unfair price, Mr Tournier finds it difficult to see how those criteria, namely the size of the profit margin and the cost price, together with the prices charged for competing products, can be applied to the case of musical works.

Sacem then discusses the discothèque operators' main complaint, the disparity between royalties in the Member States. It recognizes that there is a disparity, although the payment required by Sacem is comparable to that required in Belgium and Italy. If there is a disparity, it is attributable to objective considerations peculiar to each Member State, for example:

the general level of protection granted to authors in the State concerned: France traditionally affords a high level of protection to authors;

the legal approaches applied: only France and Belgium require an additional payment for the mechanical reproduction right;

the level of the prices charged by discothèque operators: if customers are prepared to pay more, it is clear that the royalty paid to Sacem may be higher than those paid in cheaper countries;

the manner in which royalties are habitually charged: a copyright society may, for example, place the emphasis on collecting royalties from only certain categories of users.

Sacem considers that to have regard to the disparity in the amounts of royalties would lead to unacceptable consequences. If it were considered that the highest payment

was abusive and that the lowest was lawful, the result would be 'downward harmonization' of which the victims would be the authors.

Sacem then expounds the criteria which it considers relevant to this case. In its opinion, account should be taken of the importance of the music for the operator in question, the significance of the payment due in respect of the music by comparison with the other charges incurred by the operator, the amount of the payment required by the copyright society from other users of its repertoire in relation to the importance for them of the use of the music, the amount of the payments received in the State concerned by creators of works other than the authors of musical works, and the traditions, in particular the legal traditions, obtaining in the State in question. Relying on those criteria, Sacem goes on to show that the royalty required from discothèques in France is perfectly proportional to the economic value of the benefit provided by Sacem.

In their observations, the Italian, Greek and French Governments put forward arguments identical to those of Sacem. They refer to the impossibility of determining the cost price and the profit margin in the case of a work of the imagination such as a musical work, a situation which renders the most useful criterion inoperative. Similarly, they emphasize that what is provided by Sacem to discothèque operators is of considerable value since music is the *raison d'être* of such establishments. The French Government infers that the level of the royalties must only be regarded as excessive if the expenditure in respect thereof shown in the operating accounts of discothèques exceeds what is usually regarded as a normal percentage, and it does not in this instance.

As regards the comparison between the scales applied in the various countries, the three governments consider that such a comparison cannot provide a valid criterion. The rates depend on the situation in the Member State in question, and in particular on the collection methods used, the prevailing customs and tastes, and the various traditions. In that connection, the French Government claims that there is no reason for asserting that the amount of the royalty in France, which reflects a long tradition of protection of intellectual property, has impeded the growth of discothèque business. It states that the imposition of a single royalty for the use of works of authors contained in Sacem's own repertoire and authors in foreign repertoires is justified by the complications and considerable extra cost of verification which would arise if the scales were diversified as a result of compartmentalization of the repertoire into various 'sub-groups'.

Finally, the Italian Government expresses certain doubts concerning the applicability to this case of Article 86 of the Treaty. In its view, copyright-management undertakings do not carry on a commercial activity.

The Commission recognizes, in principle, the difficulties referred to by Sacem and the governments concerning the possible parameters for establishing any abuse by Sacem of its dominant position. However, it does not consider that those difficulties render the criteria wholly inoperative. The

Commission agreements that the royalties charged by a copyright society cannot be judged unfair on the basis of a comparison between the cost price and the royalty. A comparison with the rates applied in the other Member States can, however, be wholly relevant. To make a valid comparison it is necessary to use standard national discothèques as a basis and to simulate their operating results, trying to keep as close as possible to reality. That approach eliminates those factors which seem, at first sight, to render a comparison difficult, such as, for example, disparities between legislation and differences between methods of collection. The Commission has carried out such a comparison in connection with an investigation made by it into the royalties charged to French discothèques by Sacem. If, following a comparison made on a uniform basis, a royalty proves to be several times higher in France than in the other Member States, that royalty may be considered to be unfair. Moreover, the Commission considers that in order to determine whether royalties are excessive, a comparison with the rates applied to other forms of exploitation of music may be relevant. However, in such a case account would have to be taken of the importance of music in the type of operation concerned; it would be important, for example, to assess what proportion of the operator's receipts was attributable to music.

The Commission therefore suggests the following answer to the first question:

'Article 86 of the Treaty must be interpreted as meaning that the charging by a copyright-management society occupying a dominant position in a substantial part of the common market of royalties several times higher than those charged by other societies in other Member States without any objectively justifiable reason may constitute an unfair trading condition.

2. *The reciprocal representation agreements*

Mr Lucazeau, Mr Debelle and Mr Soumagnac criticize Sacem and the other copyright societies for having partitioned the market, which makes it impossible for discothèque proprietors to approach a society whose rates are more reasonable for the worldwide repertoire or a part thereof. The network of reciprocal representation contracts leads to a *de facto* monopoly for Sacem over copyright management in French territory.

Sacem contends that it is the discothèque operators themselves who benefit from the system of reciprocal representation agreements. Their contracts with Sacem give them an opportunity of choosing from a very extensive repertoire the works they need in order to satisfy their customers at any time. If a foreign copyright-management society did not conclude a reciprocal representation agreement with Sacem, it would itself have to manage its repertoire in France, a task which would be practically impossible and extremely costly. Management on that basis would lead to discothèques paying royalties higher than those paid to Sacem. According to Sacem, operators in a Member State do have the possibility of direct access to foreign repertoires, but a direct link between the operators and the foreign societies gives rise

to such difficulties of verification and collection and such inconvenience for the operators themselves and for the foreign societies that the latter generally prefer indirect management by Sacem. In those circumstances the conduct of the management societies can in no way be considered to constitute agreements or concerted practices within the meaning of Article 85 of the Treaty.

The Greek, Italian and French Governments, together with the Spanish Government, whose observations relate only to this point, and also the Commission, support Sacem's arguments. In their opinion the reciprocal representation contracts contribute to rational and effective control of the use of musical works and to more rapid and less costly recovery of royalties. It is clear that foreign societies of authors do not issue authorizations direct to users because the arrangements for the issue thereof and for verification would make them unprofitable in practice. Territorial organization of the collection of copyright is in the interests of all the societies, and of all users. The Spanish Government adds that if the reciprocal representation contracts were to be covered by Article 85(1) of the Treaty, the Commission could declare them exempt under Article 85(3) in so far as they entail a number of advantages for the protection of copyright and an improvement in the distribution of the services in question for users.

The Commission adds that at its request, at the beginning of the 1970s, copyright societies eliminated the exclusivity clause traditionally included in reciprocal representation contracts. However, the situation has not changed. The management societies continue to entrust the protection of their members' rights in foreign territories only to the national management society. That practice is attributable, however, to the societies' concern to ensure efficient management and not to a concerted practice. Accordingly, the Commission proposes that the following answer should be given to the second question:

Article 85 of the Treaty must be interpreted as not prohibiting as such agreements between two copyright-management societies for the reciprocal protection of their respective repertoires on each other's territory, but as prohibiting an exclusivity clause or a concerted practice precluding a society, as principal, from granting licences in respect of its repertoire in the territory of the other either directly or through another society. Such a concerted practice cannot, however, be inferred from a mere refusal on the part of foreign societies to grant direct licences for their repertoires in French territory.

T. Koopmans
Judge-Rapporteur