COPYRIGHT – EXHAUSTION

Free movement of goods
- **Also applies to sound recordings**
  It should first be emphasized that sound recordings, even if incorporating protected musical works, are products to which the system of free movement of goods provided for by the treaty applies.

- **No exception for copyright**
  It is true that copyright comprises moral rights of the kind indicated by the French government. However, it also comprises other rights, notably the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties. It is this economic aspect of copyright which is the subject of the question submitted by the national court and, in this regard, in the application of article 36 of the treaty there is no reason to make a distinction between copyright and other industrial and commercial property rights.

Exhaustion
- **Neither the copyright owner or his licensee, nor a copyright management society acting in the owner’s or licensee’s name, may rely on the exclusive exploitation right conferred by copyright to prevent or restrict the importation of sound recordings which have been lawfully marketed in another member state by the owner himself or with his consent.**

Exhaustion of copyright
*Disparities which continue to exist in the absence of any harmonization of national rules on the commercial exploitation of copyrights may not be used to impede the free movement of goods in the common market.*

Articles 30 and 36 of the treaty must be interpreted as precluding the application of national legislation under which a copyright management society empowered to exercise the copyrights of composers of musical works reproduced on gramophone records or other sound recordings in another member state is permitted to invoke those rights where those sound recordings are distributed on the national market after having been put into circulation in that other member state by or with the consent of the owners of those copyrights, in order to claim the payment of a fee equal to the royalties ordinarily paid for marketing on the national market less the lower royalties paid in the member state of manufacture.

Source: Eur-Lex
that the proprietor of an industrial or commercial enterprise to object to the distribution of sound recordings such legislation permits a copyright management society empowered to exercise the copyright which is the subject of the question submitted by the national court and, in this regard, in the application of article 36 of the treaty there is no reason to make a distinction between copyright and other industrial and commercial property rights.

It is true that copyright comprises moral rights of the kind indicated by the French government. However, it also comprises other rights, notably the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties. It is this economic aspect of copyright which is the subject of the question submitted by the national court and, in this regard, in the application of article 36 of the treaty there is no reason to make a distinction between copyright and other industrial and commercial property rights.

While the commercial exploitation of copyright is a source of remuneration for the owner it also constitutes a form of control on marketing exercisable by the owner, the copyright management societies acting in his name and the grantees of licences. From this point of view commercial exploitation of copyright raises the same issues as that of any other industrial or commercial property right.

The argument put to the court by the Belgian and Italian governments that in the absence of harmonization in this sector the principle of the territoriality of copyright laws always prevails over the principle of freedom of movement of goods within the common market cannot be accepted. Indeed, the essential purpose of the treaty, which is to unite national markets into a single market, could not be attained if, under the various legal systems of the member states, nationals of those member states were able to partition the market.
and bring about arbitrary discrimination or disguised restrictions on trade between member states.

15 It follows from the foregoing considerations that neither the copyright owner nor his licensee, nor a copyright management society acting in the owner's or licensee's name, may rely on the exclusive exploitation right conferred by copyright to prevent or restrict the importation of sound recordings which have been lawfully marketed in another member state by the owner himself or with his consent.

16 GEMA has argued that such an interpretation of articles 30 and 36 of the treaty is not sufficient to resolve the problem facing the national court since GEMA's application to the german courts is not for the prohibition or restriction of the marketing of the gramophone records and tape cassettes in question on german territory but for equality in the royalties paid for any distribution of those sound recordings on the german market. The owner of a copyright in a recorded musical work has a legitimate interest in receiving and retaining the benefit of his intellectual or artistic effort regardless of the degree to which his work is distributed and consequently it is maintained that he should not lose the right to claim royalties equal to those paid in the country in which the recorded work is marketed.

17 It should first be observed that the question put by the national court is concerned with the legal consequences of infringement of copyright. GEMA seeks damages for that infringement pursuant to the applicable national legislation and it is immaterial whether the quantum of damages which it seeks is calculated according to the difference between the rate of royalty payable on distribution in the national market and the rate of royalty paid in the country of manufacture or in any other manner. On any view its claims are in fact founded on the copyright owner's exclusive right of exploitation, which enables him to prohibit or restrict the free movement of the products incorporating the protected musical work.

18 It should be observed next that no provision of national legislation may permit an undertaking which is responsible for the management of copyrights and has a monopoly on the territory of a member state by virtue of that management to charge a levy on products imported from another member state where they were put into circulation by or with the consent of the copyright owner and thereby cause the common market to be partitioned. Such a practice would amount to allowing a private undertaking to impose a charge on the importation of sound recordings which are already in free circulation in the common market on account of their crossing a frontier; it would therefore have the effect of entrenching the isolation of national markets which the treaty seeks to abolish.

19 It follows from those considerations that this argument must be rejected as being incompatible with the operation of the common market and with the aims of the treaty.

20 GEMA and the belgian government have represented to the court that, in any event, a system of free movement of sound recordings may not be permitted as regards sound recordings manufactured in the united kingdom because the provisions of section 8 of the united kingdom copyright act 1956 have the effect of instituting a statutory licence in return for payment of a royalty at a reduced rate and the extension of such a statutory licence to other countries is contrary to the provisions of the berne convention for the protection of literary and artistic works.

21 Section 8 of the copyright act provides in effect that the copyright of a composer of a musical work is not infringed by the manufacture of a sound recording of that work if the work has already been reproduced in the united kingdom on a sound recording for the purpose of retail sale by the author himself or with his consent and if, in addition, the manufacturer notifies the copyright owner of his intention to make a recording of the work for the purpose of sale and pays him a royalty of 625% of the retail selling price of the sound recording.

22 It appears from the papers before the court that the practical result of that system is that the royalty for any manufacture of a sound recording is established at 625% of the retail selling price since no prospective licensee is willing to agree to a higher rate. As the rate of 625% is thus the rate which is in fact agreed for contractual licences, the United Kingdom legislation has the effect of putting a ceiling on the remuneration of the copyright holder.

23 Where, therefore, a copyright management society exercising an exclusive right of exploitation in the name of an owner claims the difference between the rate of 625% already paid and that charged on its domestic market, it is in fact seeking to neutralize the price differences arising from the conditions existing in the united kingdom and thereby eliminate the economic advantage accruing to the importers of the sound recordings from the establishment of the common market.

24 As the court held in another context in its judgment of 31 october 1974 in case 15/74 centrafarm bv and adriaan de peijper v sterling drug inc. (1974) ecr 1147, the existence of a disparity between national laws which is capable of distorting competition between member states cannot justify a member state's giving legal protection to practices of a private body which are incompatible with the rules concerning free movement of goods.

25 It should further be observed that in a common market distinguished by free movement of goods and freedom to provide services an author, acting directly or through his publisher, is free to choose the place, in any of the member states, in which to put his work into circulation. He may make that choice according to his best interests, which involve not only the level of remuneration provided in the member state in question but other factors such as, for example, the opportunities for distributing his work and the marketing facilities which are further enhanced by virtue of the free movement of goods within the community. In those circumstances, a copyright management society may not be permitted to claim, on the importation of sound recordings...
recordings into another member state, payment of additional fees based on the difference in the rates of remuneration existing in the various member states.

26 It follows from the foregoing considerations that the disparities which continue to exist in the absence of any harmonization of national rules on the commercial exploitation of copyrights may not be used to impede the free movement of goods in the common market.

27 The answer to the question put by the bundesgerichtshof should therefore be that articles 30 and 36 of the treaty must be interpreted as precluding the application of national legislation under which a copyright management society empowered to exercise the copyrights of composers of musical work reproduced on gramophone records or other sound recordings in another member state is permitted to invoke those rights where those sound recordings are distributed on the national market after having been put into circulation in that other member state by or with the consent of the owners of those copyrights, in order to claim payment of a fee equal to the royalties ordinarily paid for marketing on the national market less the lower royalties paid in the member state of manufacture.

Decision on costs
The costs incurred by the belgian government, the government of the italian republic, the government of the french republic 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 actions are concerned, in the nature of a step in the actions pending before the national court, the decision on costs is a matter for that court.

Operative part
On those grounds,

The court,

In answer to the question submitted to it by the bundesgerichtshof by two orders of 19 december 197, hereby rules:

Articles 30 and 36 of the treaty must be interpreted as precluding the application of national legislation under which a copyright management society empowered to exercise the copyrights of composers of musical works reproduced on gramophone records or other sound recordings in another member state is permitted to invoke those rights where those sound recordings are distributed on the national market after having been put into circulation in that other member state by or with the consent of the owners of those copyrights, in order to claim the payment of a fee equal to the royalties ordinarily paid for marketing on the national market less the lower royalties paid in the member state of manufacture.